

“And Yet It Moves”— The First Amendment and Certainty

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Abstract

Surprisingly few, if any, works on the First Amendment have explored the relation between free speech and certainty. The same holds true for decisional law. While this relationship is inherent in much free speech theory and doctrine, its treatment has nonetheless been rather opaque. In what follows, the author teases out—philosophically, textually, and operationally—the significance of that relationship and what it means for our First Amendment jurisprudence. In the process, he examines how the First Amendment operates to counter claims of certainty and likewise how it is employed to demand a degree of certainty from those who wish to cabin free speech rights. Drawing its satirical title from words purportedly spoken by Galileo when he was persecuted by ecclesiastical inquisitors for defending the heliocentric theory of Copernicus, the Essay argues that many free speech theories (from Milton to Meiklejohn and beyond) have the net effect of constricting our First Amendment freedoms based on uncertain claims to normative benefits and equally uncertain claims of societal harm. In this general sense, many free speech theorists might be viewed as the descendants (albeit kinder ones) of Galileo’s ecclesiastical detractors insofar as they invoke their own certainty of morals (or normative theories) or alleged harms to trump actual facts in order to censor speech. This problem is compounded when First Amendment lawyers must disingenuously pigeonhole their client’s speech into the doctrinal boxes compatible with normative theories. In the duplicitous course of things, bawdy comedy becomes political action, erotic sexual expression becomes self-realization, offensive speech becomes cultural criticism, and imagistic commercial expression becomes consumer information. Strange as it is, in such circumstances falsity is necessarily called into

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the service of placing a normative face on aberrant expression. By way of a bold counter to all such theories, and duly mindful of the role of real harm in the working scheme of things, the author advances a view of the First Amendment premised less on certainty (and its conceptual cousin, normativity) than on risk—real and substantial risks, properly comprehended. Thus understood, the very idea of risk deserves to be an accepted and preferred part of the calculus of decision-making, be it judicial, legislative or executive. Hence, at the philosophical level, a risk-free First Amendment is a contradiction while at the operational level it is a formula for suppression. Undaunted by the specter of criticism of his own experimental views on the matter, the author invites the kind of First Amendment risk-taking once roundly championed by Justice Louis Brandeis—a brand of freedom though uncertain of its success is nevertheless hopeful of its attainment.

They command the earth to stand still, less
their possessions be endangered, and their
peasants begin to think new thoughts.

– Bertolt Brecht¹

Certainty is the servant of the censor.

That proposition, of course, cannot be canonical without being ironical. Still, it is close enough to whatever is the mark by which we evaluate ideas. Think of it: On April 12, 1633, when Galileo Galilei was brought before his ecclesiastical inquisitors for defending the heliocentric theory of Copernicus, the grand defenders of the Holy Apostolic Truth were certain of his religious heresy and his scientific error. The secular science he proffered in his *Dialogue on the Great World Systems* (1632)² did not square with Ecclesiastical Truth. Hence, he was tried. Later, after he was convicted and facing the specter of prison,³ the Italian astronomer and philosopher reluctantly recanted and mouthed the words of a humiliating abjuration to the General Inquisitors against Heretical Depravity.⁴ Legend has it that somewhere along the way Galileo muttered a dissident phrase, “*Eppur si*

1. FREDERIC EWEN, BERTOLT BRECHT: HIS LIFE, HIS ART, HIS TIMES 335 (1992) (quoting files from BRECHT ARCHIVES & WERNER MITTENZWEI, BERTOLT BRECHT: VON DER MASSNAHME ZU LEBEN DES GALILEO).

2. Since Galileo wrote his work in Italian, rather than in the customary scholarly Latin, it was far more accessible to lay readers of the time and thus more dangerous to the Church. See BENÉT’S READER’S ENCYCLOPEDIA 381 (4th ed. 1996).

3. See THE TRIAL OF GALILEO 1612-1633, 189–93 (Thomas F. Mayer ed., 2012).

4. *Id.* at 194.

muove!” (“And yet it moves”).⁵ Meanwhile, the decree of the Congregation of the Index⁶ prevailed whereupon purist certainty returned to the bloody land.

Galileo did not follow the example of Socrates, who was forced to swallow the noxious certainty of his Athenian detractors. Facts aside, they, too, were convinced of the true identity of their gods and the Secret and Sacred Truths they espoused.⁷ So it has been for centuries, no matter the nation, creed, or ideology. What well-functioning tyrannies and malfunctioning democracies have in common is some abiding commitment to certainty of one form or another. At some pinpoint in conceptual time, the former implodes into the latter, though it may take years to detect and even longer to concede. But by then it is too late, for certainty has taken its tragic toll. Oh, the evils that have been and continue to be committed—lives taken, torture inflicted, liberty deprived, and reputations smeared—in Certainty’s name.

To say that one is certain is to say that something is beyond doubt; it is to say, for example, that the question under consideration is settled—it does not *move* anymore. “Moral certainty” adds an ethical or spiritual dollop of finality to the matter; it stills the need for discussion even more. In their unadulterated forms, monism, purism, absolutism, originalism, textualism, communism, liberalism, conservatism, atheism, and almost every other kind of *-ism* is akin to moral certainty—they are its secular cousins. Where such isms rule over the minds of men and the wills of women,⁸ there is little room, if any, for movement in the opposite direction. Censorship by the government’s formal decree or a group’s informal directive is the inevitable result. Of course, the censor—even in the most tyrannical of regimes—always invokes some justification, “higher good,” or norm to rationalize or legitimize enforced silence. But whatever the justification, the followers of the Congregation of the Index demand their way.

5. See ANDREA FROVA & MARIAPIERA MARENZANA, *THUS SPOKE GALILEO: THE GREAT SCIENTIST’S IDEAS AND THEIR RELEVANCE TO THE PRESENT DAY* 464 (1998). See also HANS C. OHANIAN, *EINSTEIN’S MISTAKES: THE HUMAN FAILINGS OF GENIUS* 37 (2008).

6. This was a decree issued in 1616 by the Sacred Congregation of the Index condemning the Copernican theory of heliocentricity. See JEROME J. LANGFORD, *GALILEO, SCIENCE, AND THE CHURCH* 86–104 (3d ed. 2003).

7. See JOSIAH OBER, *SOCRATES AND DEMOCRATIC ATHENS*, in *THE CAMBRIDGE COMPANION TO SOCRATES* 141–48 (Donald L. Morrison ed., 2011).

8. Simone Weil offered a remarkably insightful discussion of this general point in a powerful 1937 essay. See SIMONE WEIL, *SELECTED ESSAYS, 1934–43* at 154, 156–65 (Richard Rhees trans., 1962). See GABRIELLA FIORI, *SIMONE WEIL: AN INTELLECTUAL BIOGRAPHY* 149–54 (Joseph R. Berrigan trans., 1989) (discussing the context in which this famous essay was penned).

Aspirationally, the secular “gospel” of the First Amendment, by contrast, stays the censorial hand in ending discourse. As here understood, the Madisonian principle operates to move the vagaries of dialogue further along. In this sense, it is no faithful respecter of Truth with a capital T. Likewise, it is a foe to the dogmas of certitude preached by the Paters of Ism. Rather, the free speech frame of mind to which I refer invites Socratic gadfly types back into the city of dialogue from whence they were driven out. In other words, it allows the gods of the city to be challenged and the circularity of the heliocentricity of the sun to be defended. It leaves omniscience to the gods and everything short of that to mortals with enough will and determination to push Sisyphean stones.

Seen in this light, the First Amendment both humbles and irritates us. It begs the nagging question, and then again, almost *ad infinitum*. In various ways—political and apolitical, civil and uncivil, scientific and unscientific, religious and secular—this way of acting disparages Darwin (and his critics), derides Derrida (and his opponents), and dismisses even the teachings of the great Dalai Lama (and his detractors). Why? There are many answers, but let me tender one, if only for preliminary consideration and examination.

Start here: Truth might well be viewed more as a verb than a noun, more as a *process* than an end, and more incomplete than complete. Granted, gravity makes its demands and cancer conquers many a cell. But in the long run how we as humans come to understand such things is more an evolving cerebral matter than a static scientific truth. Viewed in categorical terms, Darwin’s theory of evolution may now in some measure seem uncertain because it was incomplete; it stopped the truth process before the discovery of the double-helix structure of DNA.⁹ We pay a price for certainty. Moreover, certainty has a way of becoming uncertain over time—the texture of truth never feels quite the same as one generation after another touches it.

Process (I do not say *progress*) is not a one-way ratchet. It does not always wrench towards truth, or improve life for the better, or explain things satisfactorily, or make the world more just, or more democratic, or more egalitarian, or coincide with our norms. Process, *qua* process, is indifferent to such values. It is no more normative than a hammer. To extend the metaphor, if in the name of the First Amendment we allow people to use such tools, we do so more in the blind hope that the resulting product will be more constructive than destructive. But who can be sure of how such matters

9. See RICHARD WILLIAM NELSON, *DARWIN, THEN AND NOW: THE MOST AMAZING STORY IN THE HISTORY OF SCIENCE* 274 (2009) (“The discovery of [the double helix] was monumental. Now that the actual structure of genetic information had been discovered, the mysterious events of evolution were open for further molecular investigation.”) See generally, JAMES SCHWARTZ, *IN PURSUIT OF THE GENE: FROM DARWIN TO DNA* (2010).

will play out? By that calculus, this belief in the First Amendment asks us to trade certainty for contingency, and this with the uncertain expectation that something good *may* come of all of this. Those who oppose this contingent mindset often demand that the rest of us yield to their Truths, that we abandon our uncertainties in the name of their convictions, and that we carve out ever more and more exceptions to the First Amendment, if only to make way for the norms which they are certain are central to any just society (or, should I say, to *their view* of such a society).

All too often Truth tumbles with hubris, with that smug audacity so confident of itself that it stands alone in the corner of the courtyard, deliberately distanced from the place where real ideas are exchanged. Its nemesis is a humility born of doubt about one's own grasp of things, both epistemological and moral. "We have made enough mistakes along the way," Albert Camus once warned, "to be able to benefit from the lessons that failure always has to teach."¹⁰ How true. The benefits of failure, it should be noticed, come *after* the fact, after the proverbial damage has been done. Take, for example, the *Pentagon Papers* case,¹¹ in which the government maintained that national security would be compromised and jeopardized if the leaks Daniel Elsberg orchestrated and the *Washington Post* and *New York Times* sought to publish were made public.¹² As it turned out, the government's claim was exaggerated and unfounded.¹³ Thus, had the Court ruled other than it did, it would have sided with the "Government's Truth" leaving the country to learn "from the lessons that failure has to teach."

By contrast, the First Amendment as portrayed herein¹⁴ moves in the opposite direction. It prefers humility to hubris,¹⁵ dialogue to censorship, correction to certainty, some uncomfortable chaos to lockstep conformity, and the free flow of information to brash claims of secrecy, at least when there is no real, substantial, and imminent harm to be suffered. By that measure, such a First Amendment mindset is a modest one, a mind open to the actual possibility that it might be wrong in its claims of Truth, in its

10. ALBERT CAMUS, *ALGERIAN CHRONICLES* 70 (Arthur Goldhammer trans., Alice Kaplan ed., 2013).

11. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

12. See FLOYD ABRAMS, *FRIEND OF THE COURT: ON THE FRONT LINES WITH THE FIRST AMENDMENT* 138–39, 382–83, 392 (2013).

13. *Id.* at 135–54.

14. When I speak of "the First Amendment" in this way, I do not mean to invoke a *Deus ex Machina* argument premised on an abstraction that is personified. Rather, I mean to refer to a general mindset consistent with the arguments advanced in this Essay.

15. Of course, the First Amendment likewise has its bolder, passionate side, which is one of its main features. Even there, however, a certain degree of skepticism is warranted. See *infra* notes 85–88 and accompanying text.

assessment of the societal worth of a given form of expression, in its democratic calculation, in its moral evaluation, in its aesthetic judgment, or simply wrong in its starting premises. Such a view of things, of course, is not a cure all. It is rather a process that, in the democratic scheme of things, errs on the side of more expression not less, if only because it *aspires* to teach us all a few lessons this side of failure.



As it turned out, Galileo, the old heretic, may have had it right, the canonical crowd be damned. From that vantage point, the new heretics are the ones who preach the old dogma of the Congregation of the Index. Of course, in modern times (at least here in Western world), they are more inclined to leave some heretics to their contrarian ways and do not subject them to the rack, wheel, or the garrote. Why? Because their unbelief does not really challenge societal certainty in any ways that actually offend us, or that destabilize the world we have come to accept. Their uncertainty is relatively harmless. Case in point: No one lost much sleep when Pluto was removed from the celestial maps since it really did not upset the axis around which our daily lives and belief systems rotate.

So far as the principle of free expression is concerned, the matter of certainty also cuts in other directions. That is, sometimes expression is abridged because those who would have the government do so are not entirely certain of the stability of their own creed or ideology. Nonetheless, they want their creed (however diplomatically branded or craftily couched) to prevail. Since their certainty is fragile it is in need of protection, which is the point at which the idea of censorship sets in. Insecurity, too, beckons the censorial hand. If you are unsure about the future of American values but you are certain they must triumph, then censor the expression of those who contest them—e.g., anarchists, Communists, antiwar protestors, environmentalists, feminists, Muslim sympathizers, advertisers, pornographers, for-profit corporations, and all sorts of other ideological and cultural rogues. By that norm, they need to be kept at bay (for example, in those ironically tagged campus “free speech zones”). Those uncertain of the viability of their beloved moral code will banish all expression that challenges it, as the history of Anthony Comstock (1844-1915) and the obscenity laws named after him so vividly demonstrate. Comstock’s heirs will not allow the other world to turn with theirs; theirs is sole sexual truth of the moral universe. In that universe, many a life and many a liberty sacrificed to save ears from hearing uncouth words or eyes from seeing the unholy sight of amorous bodies bonding intimately.

There is a related kind of government uncertainty that arises in the context of digital information and those governmental and private actors who

regulate it.¹⁶ There, the specter of uncertainty so troubles the State's quest for national security that it feels justified in engaging in questionable censorial practices, either direct or indirect, to provide it with a greater degree of purported certitude in matters such as ferreting out terrorists or identifying leakers of sensitive government information. On the one hand, the government claims to be absolutely certain of the worthiness and necessity of its cause, both as to its objectives and methods. On the other hand, it is uncertain about the precise magnitude of the threat posed by those it fears. With this certitude of purpose, the government seeks to alleviate or significantly reduce the purported threats to our collective security. To do this, it either coerces or coopts private entities, such as Internet service providers and search engine suppliers, to censor or monitor speech that it believes poses a threat to national security.¹⁷ While the context and method of the government's censorial enterprise may be new, the forces that motivate it are not—perfect certainty as to the value of its goal and uncertainty as to the so-called danger posed by those who it believes seek to undermine that goal. This is the caldron in which suppression is brewed.¹⁸

The flip side of certainty is risk. Understandably, we tend to be risk averse; we incline towards the safe side of the street. What better statement of this proposition than Justice Robert Jackson's eloquent dissent in *Terminiello v. City of Chicago*, wherein he warned: "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."¹⁹ By a 5-4 measure, the Court ignored Jackson's counsel and sided with Arthur Terminiello, a Catholic priest who had a knack for being racially inflammatory, this while an unruly crowd protested outside the auditorium in which he spoke. Though Jackson's admonition was not heeded, his words have echoed down the halls of time and more recently have found a welcome ear in Judge Richard Posner.²⁰ That said, it is helpful to bear in mind the

16. See Derek Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 867–68, 872 (2012) (describing new kinds of censorship in digital age). See generally, RONALD K.L. COLLINS & DAVID M. SKOVER, *ROBOTICA: FREE SPEECH AND ARTIFICIAL INTELLIGENCE* (forthcoming 2018) (discussing censorship in a robotized speech context).

17. See Jack Balkin, *Old School/New School Speech Regulation*, 127 HARV. L. REV. 2296, 2298–99, 2308 (2014) (describing such methods of coercion and co-option).

18. Of course, not all kinds of impermissible regulation of expression by the government constitute censorship per se. See, e.g., *id.* at 2330 (referring to "pervasive digital surveillance"). Generally speaking, in this Essay I mean to be equally critical of such forms of government regulation as I am of government censorship.

19. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

20. See RICHARD POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006).

view of the case for the other side, namely, that one need not laud suicide to endorse the proposition that the First Amendment, if it is to be meaningful, must allow for some degree of *real* risk. After all, to contest “certainty” is to embrace risk.

In bold terms, the oratorical cry of the First Amendment might be put thusly: *The safe life is not worth living*. Time and again, from before the free speech jurisprudence of Justice Oliver Wendell Holmes in his dissent in *Abrams v. United States*²¹ to and after that of Justice Stephen Breyer in his dissent in *Holder v. Humanitarian Law Project*,²² the idea of risk enters into the constitutional equation, as it must. In that respect, Holmes’s hammer hit the nail right on its jurisprudential head: “[The Constitution] is an experiment, as all life is an experiment.”²³ And experiments, including the free speech experiment in a democracy, can fail. To permit experimentation is to risk failure and all that comes with it, including everything from racial or religious bigotry to socialist or capitalist tyranny. Mindful of that, Justice Brandeis’ stirring words cannot be repeated too often: “Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. [They were] courageous, self-reliant men, with [a] confidence in the power of free and fearless reasoning applied through the processes of popular government”²⁴

Assuredly, to evoke passages such as the ones above is to play to the romantic side in us. All right, fair enough. I say that because I do not think that the First Amendment should be cabined in the quarters of risk-free or play-it-safe rationality or normativity.²⁵ If anything, we are more in need of taking free-speech-chances than in refusing them in the name of some purported certainty, security, or morality. After all, how sure is America of its liberty if it prosecutes newspaper printers such as Benjamin Bache?²⁶ Or

21. *Abrams v. United States*, 250 U.S. 616, 628–30 (1919) (Holmes, J., dissenting). Dean John Wigmore took strong issue with Holmes’s dissent and argued that such thinking could put the nation at undue and even perilous risk. See THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER 285–89 (Ronald K.L. Collins ed., 2010) [hereinafter THE FUNDAMENTAL HOLMES].

22. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40–62 (2010) (Breyer, J., dissenting).

23. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

24. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

25. In this regard, I concede to having been somewhat influenced by my law school classmate and lifelong friend, Steve Shiffrin. See STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1993).

26. See JEFFREY A. SMITH, FRANKLIN AND BACHE: ENVISIONING THE ENLIGHTENED REPUBLIC 83–163 (1990) (describing Bache’s criticism of Presidents Washington and Adams, Federalist lawmakers, and resulting prosecution of the Philadelphia printer).

if it jails comedians like Lenny Bruce?²⁷ Or how self-confident is America in its morality if it silences the poetry of Allen Ginsberg's "Howl"?²⁸ Or how committed are we to free speech values when our Supreme Court countenances government retribution against prosecutors who publicly criticize the legitimacy of a search warrant?²⁹ Or how sure are we liberals of our own liberality when we run abortion protestors out of public parks because their visual messages strike some of us as too horrific?³⁰ The basic point is: When the government plays it too safe, it soon enough plays the card of the censor.

In the more modern past, this mindset has taken refuge in many quarters of the liberal community, especially in the liberal legal academy. It began in earnest at least twenty years ago when *The Nation* published an issue titled "Speech and Power"³¹ in which liberals, such as Owen Fiss, C. Edwin Baker, and Cass Sunstein, took aim at the protective side of our First Amendment jurisprudence as it applied to commercial speech, corporate speech, and campaign financing. In other publishing venues, liberals such as Catharine MacKinnon targeted pornography.³² Today, much of the liberal ire is once again directed at hate speech.³³ And why all this liberal animus against protecting speech rights? The answer is, there is a *perception* that such

27. See RONALD K.L. COLLINS & DAVID M. SKOVER, *THE TRIALS OF LENNY BRUCE: THE FALL AND RISE OF AN AMERICAN ICON* 267–313 (2002).

28. See RONALD K.L. COLLINS & DAVID M. SKOVER, *MANIA: THE STORY OF THE OUTRAGED AND OUTRAGEOUS LIVES THAT LAUNCHED A CULTURAL REVOLUTION* 251–319, 347–48 (2013). Owing to current FCC indecency standards, "Howl" cannot be read during most waking hours on broadcast radio or television. See Patricia Cohen, "Howl" in an Era That Fears Indecency, *N.Y. TIMES*, Oct. 4, 2007, at E3 (describing unsuccessful effort to air "Howl" on broadcast radio).

29. See *Garcetti v. Ceballos*, 547 U.S. 410 (2006). In *Lane v. Franks*, 134 S. Ct. 2369 (2014), the Court did temper *Garcetti* a bit, at least in cases involving the potential of perjured testimony in a criminal case.

30. See Adam Liptak, *In Abortion Protests, Which to Protect, Children or Speech?* *N.Y. TIMES*, May 13, 2013, at A13, and Emily Bazelon, *The Supreme Court's First Amendment Cowardice*, *SLATE* (Aug. 14, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/08/gruesome_abortion_photos_and_the_supreme_court_the_justices_refuse_to_st_and.html.

31. *Speech and Power*, 265 *THE NATION* 11 (July 21, 1997).

32. See CATHARINE A. MACKINNON, *ONLY WORDS* (1993).

33. See, e.g., MARI MATSUDA & CHARLES LAWRENCE III, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993), and K-Sue Park, *The A.C.L.U. Needs to Rethink Free Speech*, *N.Y. TIMES*, Aug. 17, 2017, at A23 (arguing the ACLU should "rethink how it understands free speech. By insisting on a narrow reading of the First Amendment, the organization provides free legal support to hate-based causes. More troubling, the legal gains on which the ACLU rests its colorblind logic have never secured real freedom or even safety for all."). See also Ronald K.L. Collins, *Hate Speech Is Vile—And Protected*, *SEATTLE TIMES*, Jan. 19, 2017 (discussing hate speech on college campuses).

protections place other liberal values (e.g., equality) in jeopardy. In other words, when the risk factor entered the liberal tent, many of those who once defended it turned into the ones who sought to cabin it.

The philosopher Heraclitus once quipped: “Nothing endures but change.”³⁴ From a societal and cultural point of view, what makes Heraclitus’s axiom so problematic is that it wars with established norms about life and the afterlife and everything in between. Insofar as First Amendment freedoms allow individuals to rail against the status quo and to rally for change, they too stand to be judged critically and even harshly. The status quo is typically the status of society; in some foundational sense it is necessarily averse to change. That is why Socrates (the individual) and philosophy (the pursuit) were seen as enemies of the state. Viewed through that prism, the First Amendment represents the institutionalization of the Socratic way, though with far broader boundaries and far rougher edges. If that is so, it is little wonder that when this nation was legally constituted its supreme law did not contain a First Amendment. Pause, and think about it: If you are trying to forge a Union, you cannot really afford to have the Patrick Henry and George Mason bunch upset the constitutional applecart with endless criticisms and calls for change. True, Article V of the Constitution of 1787 did allow for fundamental changes, but it made the process burdensome and supermajoritarian. The First Amendment, by constitutional contrast, was a “quick fix.” It permitted individuals to speak, print, petition, and even assemble for radical change, be it for religious liberty or political freedom or neither. In other words, it allowed them to stir the political pot. But when a nation is new, when it is still constituting itself, it will be disinclined to be so open-minded as to risk its own perpetuation. At that stage in its development, fear of change seems inevitable. Politically speaking, it is amazing that the First Amendment ever became law, at least at such a tender point in our history. What is not surprising, however, is the backlash that followed—the Alien and Sedition Acts of 1798, which were all too predictable. Most assuredly, the members of the Fifth Congress knew they were abridging speech. They knew they were abridging the rights of the anti-federalists; and they knew that all of this was contrary to a constitutional amendment that had become the supreme law of the land only seven years earlier. So why did they do it? Fear. They feared change; they feared exactly the kind of change that the First Amendment, if left unabridged, allowed the anti-federalists to call for.

It should not be startling that in the history between 1791 and now, the First Amendment has been abridged countless times. Why? Because in a

34. *Quoted in* 1 W. K. C. GUTHRIE, A HISTORY OF GREEK PHILOSOPHY 435, 449–54 (1967).

very real sense it (by its very nature) poses a real danger to society. And what is that danger? CHANGE, or the prospect of it. Lest we forget: “Every idea is an incitement.”³⁵ And when people are incited to act, they sometimes change their ways. Settled societies, however, dislike change. They do not embrace what is different; they do not smile kindly on the outsider; and they certainly do not like to encourage Galileo types to rearrange their moral universe. Strange as it must seem, the First Amendment calls on societies to be *risk tolerant*, which (if we are to be fair) is asking a lot. If we but stop momentarily to dwell on it, our constitutional law as embodied in the First Amendment is squarely at odds with many of the basic precepts of the great political philosophers. That law, faithfully applied, protects not only the modern-day Socrates (who was far more radical than typically understood) but also those whom Socrates condemned (such as the sophists). Virtually all of exceptions to the First Amendment as crafted by the courts³⁶ can be seen as attempts to rein in the radical world of the guaranty, a world where no settled idea or norm or belief is safe.

If there is a lesson here (as with the one gleaned from the trial of Galileo), it is to be leery of those leery of change *qua* change. Remember: The very idea of the First Amendment invites us to be open to change, or at least tolerant of it. Think of it as that adversarial intellectual in the parlor or that badgering radical in the street who, with either refined dialect or coarse vernacular, contests much or all of what we hold morally, politically, and culturally dear. If our system of free expression is working well, it will permit them to call for an end to some of the very things we are *certain* are vital to our continued existence as a civil and God-fearing society. Writ large, the First Amendment calls on us to live with uncertainty, or some measure of it.

While we need not be obstructionist Nihilists (note the capitalization), uncertainty, nonetheless, is a vital part of existence. It contributes both to our evolutionary and philosophical bounty. By that Camusian logic, the First Amendment, at least as herein portrayed, ventures to put that uncertainty to good use. In that process, it neither endorses the canonical imperatives of the many nor the cynical imperatives of the nihilist few. Justice Anthony Kennedy captured something of that idea well in the following observation:

When a student first encounters our free speech jurisprudence, he or she might think it is influenced by the philosophy that one idea is as

35. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

36. See Ronald K.L. Collins, *The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALBANY L. REV. 409, 417–22 (2013) (listing forty-three exceptions to the First Amendment).

good as any other, and that in art and literature objective standards of style, taste, decorum, beauty, and esthetics are deemed by the Constitution to be inappropriate, indeed unattainable. Quite the opposite is true. The Constitution no more enforces a relativistic philosophy or moral nihilism than it does any other point of view.³⁷

Admittedly, there can be a fine line between a healthy Socratic-like skepticism and an unhealthy nihilist-like cynicism. Even so, that possibility ought not to blind us to the ever-present need to test the imperatives of the adherents of both camps who argue with Aristotelian or Hegelian certainty about the certainty of their claims. This is not a cause for Faustian angst so much as it is admonition to be skeptical of uncompromising skeptics.

In light of this, the astute reader may well ask: But is not truth the benchmark of several key tenets of our free speech law, as, for example, in the law of fraud and defamation? After all, when a man is lied to about the working condition of the transmission of a used car he purchased, it is no defense that the state of truth is so much in flux as to justify the swindler's lie. Likewise, when someone defames a good woman's good reputation by way of knowing falsehoods, the one perpetuating the lie cannot take legal refuge in the nuances of deconstructionist arguments about truth. Or what about the intentional lie told to a police officer in order to impede the administration of justice? Are such lies immune from prosecution because of the philosopher's reflective pause about the relationship between truth and certainty? The answer to all of these queries is, of course, in the question itself. Undoubtedly, we need some amount of perceived truth in order to live much of our daily lives.

Still, if we step back and think of what is at really issue, it is not entirely clear that the demand for truth is what always drives the engine of free speech law. That is, we demand truth (or our current perception of it) insofar as knowing falsehoods produce actual and significant harms to others. Just consider the heralded opinion in *New York Times Co. v. Sullivan*³⁸ or the more recent ruling in *Alvarez v. United States*³⁹—in both cases truth lost out to the liberty guaranteed by the First Amendment. And why? The answer inheres in a libertarian principle. And *harm* is that principle. If falsehoods—e.g., exaggerations, puffery, white lies, or satirical swipes—produce no real

37. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000).

38. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (allowing for certain kinds of defamation of public officials).

39. *Alvarez v. United States*, 132 S. Ct. 2537 (2012) (protecting certain kinds of false statements concerning Stolen Valor medals). *See also* *United States v. Alvarez*, 638 F.3d. 666, 666–77 (9th Cir. 2011) (Kozinski, C.J., concurring in denial of rehearing *en banc*).

harm, or if they produce the kind of harm that is socially acceptable on balance, then their falsity is of little or no actual concern to us.



Let me raise a few questions here: If some of those in the free speech community suffer from a kind of First Amendment hypertrophy, might it be that their First Amendment theories are so swollen with their own pet value-laden norms that they fail to take sufficient account of the obvious? Could it be that any perceived threat (no matter how real) to their prized norms (no matter how inflated) is enough for some to deny a free expression claim? That is, are some theories, some so norm-obsessed and value-inflated, that there is little breathing space for First Amendment freedom? In such instances, could it be that the presence or likelihood of real harm, even if obliquely addressed, is discounted?⁴⁰ Hence, if the harm factor, properly understood and applied, is what primarily fuels various free speech theories, then maybe more time and attention need to be focused on considering the typologies of harm.⁴¹

Of course, harm is quite often linked to some norm. Consider, for example, the proposition that pornography is harmful to women. The norms to be safeguarded are equality and safety (as in a world safe from the rape “caused” by pornography, etc.).⁴² Such norms are offered up in categorical terms and thus in need of certain special kinds of protection. The free speech problem, of course, is that once these norms and their conceptual offspring are let loose, they first circle and then fence in the domain of free speech—they thus *abridge* that freedom of speech or of the press. If the First Amendment is indeed the first freedom in our legal and philosophical scheme of rights, it may be owing to the fact that the idea behind it was to constitutionalize the risk factor and thus make it an indispensable part of all free expression analysis. That is, wherever we may draw the harm line, some element of risk must remain. And that measure of risk, if I may be so daring, must be meaningful and must expose us to some actual and present dangers. Again, life is an experiment and experiments fail. This idea of meaningful risk—of taking real chances—is central if only because without it free expression could be abridged at the drop of a normative dime. Holmes’s

40. Notably, when such harm is absent, even malicious motives cannot defeat a First Amendment claim. See, e.g., *Snyder v. Phelps*, 562 U.S. 443 (2011) (upholding the right to demonstrate near military funeral).

41. See, e.g., Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81 (2011); Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 ETHICS 635 (1993).

42. See *infra* notes 54–60 and accompanying text.

“experiment,”⁴³ Brandeis’s “risks,”⁴⁴ and Brennan’s echo of it all⁴⁵ lead readily towards the path of contingency and away from the house of Certainty.

Let us not speak falsely: If the First Amendment is to mean anything, it must mean that some actual and not insignificant degree of harm or offense or risk must be endured. Otherwise, what is the point of such a constitutional guaranty if it protects only the speech or expression or ideas or principles or values of which a majority approves? After all, it may be that offensive speech may cause civic disorder, that certain ideas will blossom into harmful practices, that expression is so close to abhorrent conduct that police action seems necessary, that particular types of expression are so vile and base as to degrade the norms of a civilized society, that expression amplified by technological advances if left largely unchecked will present heretofore insurmountable problems, that government secrets if made public might jeopardize our national security, and that hate speech will undermine our egalitarian ideals. If the reflexive response to such understandable fears is censorship, then the real purpose of the First Amendment will become more ceremonial and less operational, and more made for a glorious graduation speech than for a needed judicial decision in defense of some moral leper or some political ranter run amok.

I wonder if there can be any worthwhile interpretation of the First Amendment unless we first concede that risk (and that means the acceptance of some degree of *genuine* harm) is a vital part of the conceptual equation. There is more here than mere balancing, because insofar as the First Amendment is concerned, the thumb of risk should already be on the scales tilting in favor of free speech protection. Thus understood, a societal claim of sixty percent detriment might well *lose* to a First Amendment claim of forty percent benefit. One of the problems with ad hoc balancing is that it all too regularly ignores the presumption in favor of free speech or the tilt in its favor and proceeds to balance as if the scales were even at the outset. Thus, the weight of the free speech interest is balanced against that of the societal value,⁴⁶ with some deference to the state’s determinations of its

43. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

44. See *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

45. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

46. See, e.g., *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 399 (1950); *Barenblatt v. United States*, 360 U.S. 109, 126 (1959); *Dennis v. United States*, 341 U.S. 494, 524 (1951) (Frankfurter, J., concurring). More recently, jurists such as Justice Stephen Breyer and scholars such as Robert Post have gone even further and have attempted to recalibrate the strict scrutiny and compelling interest equations in ways less protective of individual free speech liberty. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2006); ROBERT POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014).

assertion of societal values and with little or no exacting examination of the purported harms said to be caused by the speech in question.⁴⁷

In all of this, it is important to note that it is far easier for the State to allege normative or societal harms buttressed by attenuated proof of such ambiguous harms than it is for the State to clearly demonstrate actual harms caused to persons or their property. For that reason alone, ad hoc balancing frequently adds little or nothing to safeguarding First Amendment freedoms. In fact, ad hoc balancing typically trades the mandate of the First Amendment for a kind of common law balancing and thus returns our constitutional order to its pre-1791 status. If the First Amendment is to have any staying power, it cannot stand on an equal footing with any and all so-called societal or normative values. Rather, it must, at the outset, be presumed to reflect a weightier social interest that can only be overcome by proof of actual harm to persons, property or to the administration of justice.

So, when we think about the spectrum of harms, how might we proceed, at least broadly speaking? By way of a sketch of an answer, we might ask:

- Is the purported harm more speculative or actual?
- How reliable is the evidence tendered?⁴⁸
- Who is really harmed and how?
- What is the imminence and gravity of the purported harm?
- If the harm is indeed actual, grave, and intentional or reckless,⁴⁹ what is its likely scope?
- To what extent is the called-for censorship specifically tailored to remedying the alleged harm and how likely is it that it can do so?
- Can the harm specified and demonstrated be remedied by non-censorial methods?
- What is the likely duration of the actual and grave harm, and will censorship continue beyond the point?

47. See Rodney A. Smolla, *SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT* § 207[3][b] (“Freedom of speech does not start on a level playing field because courts will tend to defer to legislative judgments that have already struck a balance against free speech.”) (footnote omitted).

48. This question raises the ever-thorny matter of how to evaluate evidence where there is a conflict of interest, as in industry-financed research. In this particular regard, I am inclined to agree with much of Professor Lessig’s thinking and his admonition to be skeptical of (or at least cautious about) such evidence. See LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 29 (2011).

49. See Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255 (2014).

A few examples may help to explain my thinking here:

- (1) Assume that someone was to say publicly that “the vast majority of female students at Walt Whitman High School take illegal drugs and engage in illicit sex in public places.” Any alleged harm here is not likely to be actual because it is speculative in that the group is too ill defined; the “of and concerning” requirement⁵⁰ of the First Amendment has been fashioned to address precisely such matters.
- (2) As to the who is harmed question: Assume that a court enjoins the display of “gruesome” antiabortion material (a.k.a. political, moral, and religious advocacy) in a traditional public forum, in order to protect the sensibilities of children.⁵¹ Harm to children may be possible, but their protection comes at the expense of content-based restrictions that censor rights of adults to express such sentiments and the corresponding rights of other adults to receive and evaluate them.⁵²
- (3) Consider next the gravity of the purported harm in *Abrams v. United States*.⁵³ While it may be that, in the abstract, the threat posed in 1918-19 by the dissident provocateurs could damage the war effort, in moderated retrospect it appears that the threat was more the product of war hysteria than of anything real.

50. See *Sullivan*, 376 U.S. at 267, 288 (1964).

51. See *Scott v. Saint John’s Church in Wilderness*, 194 P.3d 475 (Colo. Ct. App., 2013), *cert. denied*, 134 S. Ct. 33 (2013) (author of this Essay signed onto an amicus brief prepared by Bruce Johnson in support of the Petitioner).

52. There is also the value of such free speech to children themselves. See *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (explaining that children below voting age “must be allowed the freedom to form their political views on the basis of uncensored speech before they turn eighteen, so that their minds are not a blank when they first exercise the franchise”).

53. Professor Chafee referred to the Bolshevik-inspired speech in that case as “harmless folly.” See ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* 140 (1948). Holmes himself thought the judiciary sometimes “rather hysterical” in its response to dissident expression. See, e.g., Letter from Holmes to Alice Stopford Green (Mar. 26, 1919), in *THE FUNDAMENTAL HOLMES*, *supra* note 21, at 224; Letter from Holmes to Harold Laski (Mar. 16, 1919), in *THE FUNDAMENTAL HOLMES*, *supra* note 21 at 224; Letter from Holmes to Felix Frankfurter (Apr. 25, 1920), in *THE FUNDAMENTAL HOLMES*, *supra* note 21, at 290 (regarding Holmes’s criticism of Wigmore’s all too “emotion[al]” commentary on the *Abrams* dissent).

- (4) Insofar as the scope of the harm is concerned, it may be that “protective bubbles” shield women entering Planned Parenthood centers from the taunts of self-righteous antiabortionists⁵⁴ or that designated “free speech zones” protect the president and other high-ranking government officials from danger. But how real is the danger of actual harm and how far is too far to safeguard against that? More importantly, are such censorial practices designed more to quell offensive expression than to protect people?

All of the above examples also point to the need of laws that are carefully tailored to protect First Amendment interests even if some degree of harm were to occur. The overbreadth doctrine does considerable spadework in this conceptual field. By much the same reasoning, censorial measures that win the judicial day in wartime ought not to prevail in later years by way of holdover laws (statutory or decisional) when the imminent need for such abridgements has vanished. Having said all of this, let me dig a little deeper, and turn over a few normative rocks to see what hides beneath them.



At its heart, the debate between Galileo and his ecclesiastical detractors was not over science understood as facts, but rather over science understood as values (loosely defined). In the process, the *is* of the world (its scientific facts) was confused with the *ought* of life (its normative values). And in that universe, where the sun hovers at the center of all things, norms trump science just as beliefs prevail over facts. In the mix, certainty either took a back seat to faith or was redefined to comport with it. Again, consider the phrase “moral certainty.” In its own peculiar way, this not too innocent phrase reveals how questions of *is* and *ought* can be fused together in the unsuspecting and uncritical mind. That said, one might ask: So how does this play out in the First Amendment scheme of things? Let me offer three examples in which questions of fact (scientific matters) yield to questions of value (normative matters) with the consequence of compelling individuals to adhere to the belief systems of the State no matter how demonstrably false those systems are.

54. See *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) (striking down Massachusetts law regarding buffer zones around abortion clinics on First Amendment grounds). See Brief for Eugene Volokh et al. as Amici Curiae Supporting Petitioners, *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) (No. 12-1168) (providing detail on one side of the issue).

With alarming frequency, more and more states compel doctors performing abortions to provide women with state-sanctioned information (actually religious propaganda) about the purported dangers of abortion. To illustrate: South Dakota law⁵⁵ requires abortion providers to tell their patients that the incidents of mental health problems in women are greater for those who have had abortions. Though this is *highly* misleading at best,⁵⁶ the facts of the science of the matter have succumbed to the norms of “pro-life” advocates. In some significant respects, this marks the return of the rule of the Congregation of the Index.

By way of another example, recall the arguments of the radical feminists who once argued that pornography incites men to commit rapes and other acts of violence against women.⁵⁷ Hence, to tolerate pornography was to endorse discrimination against women⁵⁸ contrary to the equality commands of the Constitution.⁵⁹ However rhetorically powerful such arguments might have once been, at their base they lacked the kind of scientific proof necessary to vindicate the normative claims made.⁶⁰ Here,

55. S.D. CODIFIED LAWS § 34-23A-10.1(1)(e)(ii) (2017) (“suicide advisory”), upheld in *Planned Parenthood v. Rounds*, 530 F.3d 724 (8th Cir. 2012).

56. See Susan A. Cohen, *Still True: Abortion Does not Increase Women’s Risk of Mental Health Problems*, GUTTMACHER POL’Y REV., Spring 2013 at 13 (in the interest of full disclosure, the author of the article cited in this footnote is my spouse).

57. See CATHARINE A. MACKINNON, ONLY WORDS 15–18, 20, 62, 96–97 (1993). The case of “revenge porn” is importantly different insofar as it,

‘transforms individuals’ most intimate moments into pornographic spectacles exposed to the general public. A vengeful ex-partner or malicious hacker can upload an explicit image of a victim to a website where thousands of people can view it and hundreds of other websites can share it. In a matter of days, that image can dominate the first several pages of ‘hits’ on the victim’s name in a search engine, as well as being emailed or otherwise exhibited to the victim’s family, employers, co-workers, and peers. Non-consensual pornography can destroy victims’ intimate relationships as well as their educational and employment opportunities.

Kaimipono D. Wenger, *Legal Developments in Revenge Porn: An Interview with Mary Anne Franks*, CONCURRING OPINIONS (Oct. 10, 2013), <https://concurringopinions.com/archives/2013/10/legal-developments-in-revenge-porn-an-interview-with-mary-anne-franks.html>. If indeed there were such demonstrable harms, a properly and narrowly drawn statute, replete with the requisite *mens rea* requirements along with provision for certain exceptions, should be able to withstand constitutional challenge.

58. See ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN’S EQUALITY 24–36, 58–66 (1988).

59. See *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986) (rejecting such claims of sexual discrimination).

60. See NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN’S RIGHTS 247–64 (2000) (refuting the claim that antipornography laws would reduce violence or discrimination against women).

too, the *is* of the matter was conflated with its *ought* with the liberty guaranteed by the First Amendment hanging in the balance.

Consider as well the example that gave rise to the controversy in *Brown v. Entertainment Merchants Ass'n*,⁶¹ the violent video game case in which it was argued that viewing such games actually induces or influences, either directly or otherwise, young players to commit acts of violence. Once again, what drove the State's claim was the norm of the matter more so than the fact of the matter, though the two were loosely lumped together. Thus, the State of California argued that "the First Amendment does not demand proof of a direct causal link between exposure to violent video games and harm to minors."⁶² In that regard, and in an amicus brief filed in the case, Robert Corn-Revere made the following telling observation:

In the well-rehearsed script of the typical moral panic, . . . science has been used less as a tool for understanding than as currency to be exchanged for political leverage. As a result, the policy debates in this area a *mélange* of social science mixed with politics and advocacy, and rarely is there a clear dividing line between the researchers and the advocates. *See, e.g.,* David Trend, *The Myth of Media Violence* 45-49 (2007). The debate over media violence has followed the standard script, dominated by "reactionary rhetoric, flawed research, and distorted accounts of legitimate scientific studies."⁶³

These examples reveal that the old ways of the Congregation of the Index manifest themselves anew whenever science and faith, or facts and values, are conflated. When functioning properly, the expression clauses of the First Amendment keep the State's faith and norms at bay in order to safeguard the rights of the individual whose own sun does not rise and set in the officially approved way. Moreover, in matters touching upon free expression and its correlates, the First Amendment prevents the government from masquerading as a fact finder when in truth it is a norm enforcer.⁶⁴

61. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011).

62. Brief for Petitioner at 45–48, *Schwarzenegger v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011) (the petitioner's case name was subsequently changed to *Brown*).

63. Brief for Comic Book Legal Defense Fund as Amici Curiae Supporting Respondents at 16–17, *Schwarzenegger v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011) (No. 08-1448) (quoting DAVID TREND, *THE MYTH OF MEDIA VIOLENCE* 48 (2007)). Consistent with what is said in the text above, Mr. Corn-Revere titled this section of his brief "From Sin to 'Science' and Back Again." *Id.* at 16. *See also* *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

64. Much the same point was made by Justice Anthony Kennedy: "The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 818 (2000).

Before proceeding further down any more philosophical paths, it might be useful to clear a little more legal brush in order to see how the operation of our current free speech doctrine fits, if at all, into all of this. Though I will return to the philosophical side of things, I think it salutary to flag a few related ideas about the wording of the First Amendment and the decisional law developed under it. Permit me to explain why.



While not investing too heavily in the mechanistic determinism of originalist and textualist jurisprudence, let us continue by considering (if only by way of a reflective aside) the wording of the First Amendment. This perhaps will allow us to better appreciate how it might be said to speak to the larger idea behind Galileo's purported quip. There is one word that is particularly relevant here; it is the word "*abridging*." It is an old-fashioned word. It derives from the Middle English (*deprive*) and before that from the Old French (*abbreviate*), and before that from the Latin (*cut short*). For example, when a book or story is abbreviated by cutting short its narrative, the abridgement deprives the reader of the complete message. The term "abridge" was the word used by our founders, but not those who drafted the Declaration of Independence or the Constitution of 1787 or even the early state declarations of rights. It made its American debut in the First Amendment: "Congress shall make no law . . . *abridging* the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."⁶⁵

So why *that* word? Why not other words such as "respecting" (as in the Establishment Clause), or "prohibiting" (as in the Free Exercise Clause), or "restrained" (as in the 1776 Virginia Declaration of Rights), or "deprived" (as used in Madison's June 8, 1789, proposal to the House), or "infringed" (as used in a July 28, 1789, House Committee Report)? Well, it is hard to say with certainty since the surviving historical records reveal little. Supreme Court decisions say little, and scholarship on the matter is meager. And while the word is commonplace in constitutional parlance, it is nonetheless a word about which we are never quite sure of its meaning. Rather, we skip by any thought of it, much as a man chasing butterflies ignores the plant life—like Queen Anne's Lace, violets, marigolds, and maybe even milkweed—vital to the existence of butterflies.

Etymologically speaking, abridging is when someone else, particularly the government, cuts off what we say or write. To abridge is to abbreviate, to command approved brevity. Or as Samuel Johnson's 1755 dictionary

65. See THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 83–128 (Neil H. Cogan ed., 1997) (quoting U.S. Const. amend. I) (emphasis added).

defined it: “To contract, to diminish, to cut short.”⁶⁶ Such a demand means that a censor—one who scrutinizes a work for objectionable content—can shorten any message by deleting as much as he or she wishes. Constitutionally speaking, all of this is abhorrent because we should be able to speak our minds *uninterrupted*. The dialogue must continue; the book must be read; and the show must go on and on. Thus, no “prior restraints” on freedom of speech or of the press.

By this logic, to permit the government to abridge expression is to allow for the perpetuation of half-truths, or a one-sided views of things, or a one-size-fits-all code of principles. One only gets the side of the truth or argument or view of whatever the government wants us to hear or read or see, but no more. In the name of censorial brevity, the “whole truth” is not permitted and neither is the “full story” or the “uncut” movie or the unabridged novel. Censors—be they in Burma or Cuba or Alabama—fear the specter of the abundance of *unabridged* communicative liberty. They like to call things to an end; they prefer their truths settled; and they are certain when there is enough information in the marketplace and whom can best dispense it there.

Without being categorical, this old-fashioned Madisonian textual idea was one that equated *abridging* with government attempts to “cut short” the many messages of “We the People.” Half-truths, condensed government records, redacted government documents, abridged literary works, word-sanitized radio programming, image-sanitized TV programing, and campaign restrictions might thus be seen (at least sometimes) as antithetical to a vibrant First Amendment. Such practices trade government ordered brevity for the fullness of freedom. They halt what should be ongoing, namely an ongoing exchange of communication, even of the offensive kind.

In a very real (and conceptual) sense, the First Amendment rebooted the mission of the Constitution of 1787. The original conceptual model was that government could only censor expression if it was expressly *authorized by law* to do so, meaning authorized by some provision of the Constitution and then by some duly enacted law. But that was far too slender a reed for the Anti-Federalists who sensed, and correctly so, that such an approach was too elastic and would not secure the kind of protection they thought worthy of a constitutional democracy. When they prevailed, and when thereafter decisional law invoked the Fourteenth Amendment to expand free speech liberty,⁶⁷ the First Amendment became the supreme law. In doing so, the

66. See SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 61 (1755).

67. See *Near v. Minnesota*, 283 U.S. 697, 707 (1931); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

constitutional scheme of things became twofold insofar as free expression was concerned: (1) government could only do what it was authorized to do, *and* (2) even when authorized it must not abridge those freedoms protected under the First Amendment. By that measure, all citizens could assert more freedom. They could now point to a constitutional provision that recognized their right to speak out against their government. That it took a long duration of time for that principle to be honored as a matter of judicial review does not deny the significance of this monumental moment in our constitutional history.

If one thinks about it, over the long run the First Amendment typically ratchets forward; it protects ever more and more expression and thus limits government power more and more. And when it does so, it contests what was once deemed to be certain and beyond question. It tests truths, contests beliefs, and questions values that past generations deemed important enough to override the ravages of hostile or offensive expression.

There is more at stake here than the words of our supreme law and what those words connote in our minds when we pause to think of them and what they might signify. There is also the law itself and how it plays out in operation vis-à-vis concerns over certainty. That is, how does the doctrinal law of the First Amendment respond to claims of certainty or claims based on alleged propositions grounded in certainty or near certainty?



Ever since certain jurists and First Amendment scholars got a theoretical whiff of Judge Learned Hand's incitement test⁶⁸ and Justice Oliver Wendell Holmes's clear-and-present danger test,⁶⁹ there has been a march to follow such conceptual scents. What we might observe about this movement (about which I will say more in a moment) is that it might be seen as a jurisprudential move to contest the certainty of those who claim that particular types of speech should *not* be constitutionally protected. That is, sometimes it is not enough for government censors to merely allege harm, but instead, they must go to great lengths to demonstrate its existence or likelihood. Hence, by the time the law got to *Brandenburg v. Ohio*⁷⁰ some half a century later, the censors' feet were being held to the doctrinal fire. By that time, the same certainty that once claimed surefire danger in the speech of the likes of Charles Schenck, Eugene Debs, Jacob Abrams, and Anita Whitney, came to be judged in much more skeptical terms. In the process, some of the certainty of the past gave way to the skepticism of the

68. *See* *Masses Pub. Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917).

69. *See* *Schenck v. United States*, 249 U.S. 47, 52 (1919).

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

present. The censor's claims of certainty had to do battle with the reviewing courts' demands for scrutiny. Just consider the vernacular of the various free speech tests that came on the scene between 1919 and 1969:

- *Schenck v. United States* (Holmes for the Court): "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."⁷¹
- *Abrams v. United States* (Holmes dissenting): "[T]he United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent."⁷²
- *Gitlow v. New York* (Holmes dissenting): "[W]hatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."⁷³
- *Whitney v. California* (Brandeis concurring): "That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled."⁷⁴
- *Brandenburg v. Ohio* (per curiam): "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing

71. *Schenck*, 249 U.S. at 52.

72. *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting).

73. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

74. *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

imminent lawless action and is likely to incite or produce such action.”⁷⁵

In this list of doctrinal tests we see the Justices expressing skepticism about claims of *purported* dangers, a shift from the prior presumption of reasonable certainty. To the extent that more certainty of such harms is demanded, there is a corresponding degree of real risk. Granted, there are hard cases such as *Holder v. Humanitarian Law Project*⁷⁶ where there has been functional pushback. Even so, the insistence for more certainty of harm finds expression in the modern line of commercial speech cases such as *Lorillard Tobacco Co. v. Reilly*,⁷⁷ where censorial claims of harm have been more closely scrutinized. To much the same effect, rules such as the overbreadth doctrine⁷⁸ and the narrowly tailored doctrine⁷⁹ rein in the realm of censorship by demanding more exacting line drawing and likewise urging avoidance of censorship if possible. And then there is the Roberts Court’s seemingly uncompromising approach to protecting speech unless it is categorically subject to a traditional free speech exception.⁸⁰ In all of these ways, and still others, certainty is very much a concern of modern free speech jurisprudence, though unlike the past, today certainty is often the very card that defeats the censor’s own hand.

There is more to be considered insofar as our focus remains on certainty and how it interacts with censorship. For example, in the era of the Roberts Court, the certainty and risk dynamic move along nontraditional free speech tracks. Just consider the fact that Milton and Meiklejohn no longer rule the jurisprudential roost of the First Amendment. Likewise, the normative importance of truth is a currency that is decreased all too regularly. Rather, the First Amendment is called into the mechanical service⁸¹ of those who trade in animal “crush videos”⁸² and violent video games,⁸³ along with those who lie about military medals⁸⁴ and others who feel called upon by Great

75. *Brandenburg*, 395 U.S. at 447.

76. *Holder*, 561 U.S. 1 (2010).

77. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

78. *See Reno v. ACLU*, 521 U.S. 844, 880 (1997).

79. *See Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

80. *See Collins*, *supra* note 36.

81. *See Collins*, *supra* note 36, at 414–24 (discussing and critiquing use of the “traditional exceptions” to the First Amendment approach to judicial decision-making).

82. *See United States v. Stevens*, 130 S. Ct. 1577 (2010).

83. *See Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011).

84. *See Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

God to protest near military funerals.⁸⁵ And then there is the issue of the First Amendment being tapped in the service of corporations eager to spend untold amounts of money to endorse the candidates they support and oppose those they condemn.⁸⁶

The takeaway: Those overriding norms that at one time seemed so central to any notion of free speech no longer have the same cache that they once may have enjoyed. To the extent that they are even invoked, they are done so in a decorative manner as by way of rhetorical embellishment or what have you. Insofar as the articulation of the law is concerned, much free speech normative thinking (classic and contemporary) is operationally inert, however in vogue it may be in the legal academy. In short, there is much less certainty about which norms should or should not be the conceptual touchstone for deciding First Amendment cases. And that means that raw risk calculations ratchet up proportionally, thus leaving us more risk prone.

With all of the above said, let us next consider, albeit in a cursory way, the relationship between certainty, risk, and adversity.⁸⁷ The word adverse derives from the Latin *adversus*, meaning against or opposite. Assuredly, Galileo the heretic was an adversary of the governing body and its governing norms; his views concerning the heliocentric theory of Copernicus were adverse to those of the Church. In that sense, then, his message was adversarial, meaning in clear opposition to the tenets of the Holy Apostolic Truth. And were the Church Fathers to tolerate Galileo's scientific gospel, they risked putting their own truths in jeopardy . . . or so they feared. Judged by such considerations, the adversarial voice—the voice of the other—is one that tests, on the one hand, the censorial limits placed on free speech by those certain of their belief systems or, on the other hand, challenges the belief systems of those uncertain of the viability of their beliefs—the ones thus in need of government intervention in order to perpetuate them by censorial measures. Where certainty rules, such adversity is vital, if only to test time-and-again the premises that inform it and the logic that implements it.

Adversity cuts both ways; that is, it should also turn inwards to a willingness to test the certainty of one's own views. Quite often the rebellious are so self-righteous that they fail to see the shortcomings of their own rants. While the First Amendment should nonetheless protect them

85. See *United States v. Alvarez*, 132 S. Ct. 2537, 2542 (2012).

86. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2011).

87. See MARTIN H. REDISH, *THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSION AND THE FOUNDATIONS OF AMERICAN DEMOCRACY* 1–27, 176–81 (2013) (describing and defending role of adversarial expression in a democratic society).

(recall *New York Times Co. v. Sullivan*⁸⁸), this does not mean that their messages are beyond critique and criticism. The give-and-take envisioned by the ideal of the First Amendment stands to do just that, provided one keeps an open mind. Or to cast it as the discerning and ever-skeptical Justice Holmes did: “To have doubted one’s own first principles is the mark of a civilized man.”⁸⁹ Better still, in a 1925 letter to Lewis Einstein, Holmes took it a step further: “Scepticism is a saving grace if it takes in enough of oneself.”⁹⁰ Ironically, sometimes the adversarial figure is so critical of certain things that she is unable to appreciate the value of self-criticism. “The greatest dangers to liberty,” Justice Brandeis cautioned, “lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”⁹¹ While a healthy First Amendment culture surely needs adversarial types (offensive⁹² and aggregating as they can be), it also needs others willing to contest the kind of adversarial certainty that honors no view other than its own.



Just to be clear: Not all First Amendment jurisprudential configurations fit neatly into the box of the certainty-risk notion I have been discussing. Things like properly crafted laws concerning actual fraud, real trade secrets, true threats, genuine copyright violations, actual child pornography, and the like continue to demand a different calculation.⁹³ We are less willing to take

88. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (recognizing an almost absolute First Amendment right to defame public officials).

89. Oliver Wendell Holmes, Jr., *Ideas and Doubts*, 10 ILL. L. REV. 1, 2 (1915).

90. Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein (June 1, 1925), in *THE HOLMES-EINSTEIN LETTERS* 241–42 (James B. Peabody ed., 1964).

91. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (footnote omitted).

92. That we protect such speech has been deemed to be a proud tenet of our free speech jurisprudence. See, e.g., *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (“But no matter how the point is phrased, [the government’s] unmistakable thrust is this: The Government has an interest in preventing speech expressing ideas that offend. And, as we have explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’ *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).”).

93. Even so, when invoking such labels, it is well to remember the following important admonition:

In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet ‘libel’ than we have to other ‘mere labels’ of state law. . . . Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this court, libel can claim no talismanic immunity

any risks in these areas (though even here there is some leeway at the definitional level). This is but another way of saying that our ever-emerging law concerning the various forms of modern free speech is not easily contained under a single conceptual umbrella. If at one time we tended to move in that direction (e.g., Thomas Emerson's "Toward a General Theory of the First Amendment"⁹⁴), then that time seems to have passed insofar as we now seem to be moving *away* from such all-purpose theories. Quite apart from the historical development of free speech law and how it has evolved in modern times, there is also a deeper point to be pondered. It, too, concerns certainty and how it is that we buy into it . . . step by conceptual step. Isaiah Berlin once remarked that "[i]deas are the commodity in which intellectuals deal."⁹⁵ Indeed. And how many in that crowd—be they in philosophy, history, or law—love to invest in some grand unitary idea by which all in life or law can be explained by way of a single architectonic claim? In this regard, let us reflect upon yet another sentiment tendered by Mr. Berlin: "I've got no . . . terrible interest," he once declared offhandedly, "in people with a single vision; on the contrary, I think them very grand, important geniuses, but dangerous."⁹⁶ Nice! Judged by that standard, free speech giants of the order of John Milton or Alexander Meiklejohn—along with their modern-day adherents (who veer here and there, but remain true to some fetishized creed of an Enlightenment or Democratic Governance ideal)—may well be geniuses. Something of the same might be said of seasoned Originalists or savvy Textualists. Yet even granting that, Mr. Berlin warns us that they are *dangerous*. Why? Without venturing to speak for the late social theorist, let me offer a few ideas, at least as they might operate in the First Amendment arena.

If one is a "single vision" scholar of the Aristotelian school, then he looks for the *telos* of things—that is, the purpose of something or the end towards which it aims. Of course, such pursuits are premised on the foundational idea that all things have *both* such singular purposes *and* that we can discern them. By the same token, if one is a "single vision" scholar of the Enlightenment school, then he looks for the ways—scientific and

from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

New York Times Co. v. Sullivan, 376 U.S. 254, 269 (citation & footnotes omitted).

94. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

95. ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY* 27 (Henry Hardy ed., 2d ed., 2013).

96. *Id.* at 102.

social—that the world can be explained in some comprehensive and intelligible way. Yet again, if one is a “single vision” scholar of the Democratic Governance school, then he or she looks for all the ways by which government, in all its diverse aspects, can be reconciled with that overriding idea. In the philosophical process, everything from the laws of gravity to the laws of free speech is categorized or characterized or compartmentalized to comport with some Grand Unitary Vision (“GUV”). And what does not fit into that scheme of things is either marginalized or ostracized. To translate this into First Amendment terms, speech that is at odds with the GUV is deemed unworthy of constitutional protection and thus carrion for insatiable censors.⁹⁷ In such a world, there is haughty confidence rather than humble uncertainty.

Certainty sometimes manifests itself in the most striking ways when we close our minds. In this regard, we may be entirely certain of the Truth of our own cause or of the Evil of another’s cause so as to demand that our side of the story be the Whole Truth. It all comes out the same in the censorial wash. Something of the same holds true for how we think about the First Amendment and how we theorize about it. Whether it be Milton or Meiklejohn, the Enlightenment principle or the checking function, or self-realization or democratization, such theories serve to cabin speech, curb expression, or cut short some idea or ideology or way of communicating something from one person to another. This is so even when such theories of truth might advance the cause of free speech in the short run but restrict it in the long run. Simply consider the case of the famed free speech theorist Alexander Meiklejohn (1872-1974).⁹⁸ Unquestionably, his bold views helped to usher in a new and liberating mindset in our First Amendment jurisprudence, which was quite important in the years leading up to, during, and shortly after the McCarthy era. Then again, Zechariah Chafee (who had rallied to Meiklejohn’s defense when Amherst’s trustees fired him for unpopular ideas⁹⁹) criticized the great scholar’s free speech norms when he took skeptical aim at them in a *Harvard Law Review* article—Meiklejohn’s public versus private speech dichotomy, Zechariah maintained, was both ill-

97. For a contemporary example of such GUV free speech thinking, see ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014); or by way of an originalist GUV, see Akhil Amar, *The First Amendment’s Firstness*, 47 U.C. DAVIS L. REV. 1015 (2014).

98. See RONALD K.L. COLLINS & SAM CHALTAI, *WE MUST NOT BE AFRAID TO BE FREE: STORIES OF FREE EXPRESSION IN AMERICA* 39–58 (2011).

99. See *Meiklejohn Quits Amherst: Trustees Urge Retirement*, WASH. POST, June 20, 1923, at 2.

conceived and capable of being applied to censor science, art, drama, and poetry.¹⁰⁰

It is both ironic and accurate that theories of free speech liberty can pave the way for censorship. If time is on truth's side, it is mainly because truth is not static; it is often molded to the different times and circumstances in which it finds itself. It evolves much like a giant oak, too slow to be seen by an untrained eye, but too big to be ignored by any eye. Though we dare not say it openly or too loudly, to concede this is to permit a sardonic spoonful of honey to be added to our overconfident understanding of the eternal mix of things. But such is life.

GUV thinkers tend to be certain of their theories and equally certain of the need for society to align itself with such theories. Thus, if you are a strict GUV follower of the Enlightenment school, expression that is primarily artistic (say, Jackson Pollock) or entertaining (say, George Carlin) will likely be beyond the pale of First Amendment protection *unless* some analytical liberties are taken in applying that GUV principle. So, too, if you are a GUV thinker of the Democratic Governance school, expression that is primarily commercial (say, a Geico commercial) or offered up by for-profit corporate entities (say, the Nike Co.) may well find itself outside the way of First Amendment protection. Then again, if your GUV is steeped in some notion of free speech being inextricably and exclusively linked to the advancement of the political process, then some racy artistic expression (say, that of Robert Mapplethorpe) or much sexual expression (say, *50 Shades of Grey*) will be subject to censorial whims. What all these examples have in common in this: Where there is a GUV theory, there will often be certainty in the first instance and censorship in the second. In other words, the theory behind censorship is theory, or at least Grand Theory.

There is yet more: One of the practical consequences of GUV theorizing is that it forces First Amendment lawyers representing dissident or unorthodox clients to fabricate constitutional fictions. The job of such lawyers is to try to place the square peg of their clients' speech into round normative holes. Or to vary the metaphor, lawyers must disingenuously pigeonhole their client's speech into the normative boxes compatible with the GUV principle. In the course of things, comedy becomes political action, erotic sexual expression becomes self-realization, offensive speech becomes cultural criticism, and imagistic commercial expression becomes consumer information. Such expression may or may not fairly fall into such categories, but lawyers should not be forced to perpetuate hypocrisy in order to appease

100. See Zechariah Chafee, *Free Speech: And Its Relation to Self-Government*, 62 HARV. L. REV. 891 (1949).

the GUV crowd and thus prevail in court. Strange as it is, in such circumstances falsity is necessarily called into the service of placing a normative face on aberrant expression.

If any of this strikes a cord of soundness, then the point to be gleaned here is that GUV free speech theories first invite censorship and then set out to legitimize it. The piquancy of such theories is that they seem to turn chaos into order, danger into safety, harshness into humanity, power into democracy, while at the same time assuring us that such theories can manage risk to allowable levels. In such risk-free and safe worlds, pornographers are kept at bay, the captains of commerce are muzzled, so-called antidemocratic corporate entities are driven out of the electoral arena, and those who offend us are relegated to the realm of fenced in “free speech zones.” Though liberty may not dance with hands waiving free, here is the purported quid pro quo: our land is SAFE thanks to the GUV that rules over us in ways generally reminiscent of the Guardians in Plato’s *Republic*.¹⁰¹

As noted earlier, and given the underlying premises of many so-called theories of free speech, their practical effect is to *diminish* the realm of First Amendment freedom. This is true either as to how free speech is defined¹⁰² or how it is balanced against normative considerations. Consequently, such theories are more appropriately viewed as *anti*-free speech theories. Why? Because if speech does not comport with the normative criteria proffered, then the expression in question loses any claim to constitutional protection. Put another way, many speech theorists demand that speech prove its normative worth *before* it is protected. Here is how it works: They construct some utopian republic (utopian to them, though perhaps dystopian to us) that is invented to further illusory ideals and then work backwards from there and demands that if speech is to be protected it must comport with those ideals. That speech as speech should be protected, they view as absurd since so many kinds of expression (ranging from securities fraud to revenge porn to perjury) are seemingly beyond the pale. Hence, for them, speech must *earn* its way to First Amendment protection. It must be tied to the tale of some utopian kite. Only then can it be legitimated; only then can it assume the mantle of worthy expression.

But this, I submit, is to flip the First Amendment on its head. The constitutional premise of the 1791 guaranty should work conversely: Speech is presumptively protected. It should, that is, be entitled to the protection that accompanies that presumption absent some subsequent clear

101. See Ronald K.L. Collins & David Skover, *The Guardians of Knowledge in the Modern State: Post’s Republic and the First Amendment*, 87 WASH. L. REV. 369 (2012).

102. For example, at one time some did not consider defamation, expressive conduct, sexual expression, or commercial expression, as speech entitled to First Amendment protection.

demonstration of an actual, imminent, and significant harm. For the most part, it need demonstrate no more; it need not bow to the dictates of Utopian Masters.

In some very fundamental respects, the logic of the First Amendment cuts against the grain of the GUV crowd. It does so in several ways: First, it reverses the traditional pre-1791 presumption¹⁰³ so that it favors free speech at the outset (“Congress shall *make* no law”); second, it endorses the idea that some degree of real risk must be endured and some measure of actual offense tolerated; third, it does not create rigid and hierarchical categories of speech (just consider the modern development of the law of defamation and commercial speech); and fourth, it need not be beholden to so-called democratic theories of majoritarian rule or the common good. Admittedly, such a view of the First Amendment is an unabashed one, rooted more in liberty than security and thus dependent on a liberal degree of toleration.

We the People need not take our conceptual cues from free speech theorists who are more appropriately viewed as the modern-day descendants of the Congregation of the Index. In these times when the liberal academy and the illiberal think tank carry much influence, what the First Amendment may need most is less theory and more liberty. While I do not argue for that categorically, I am nonetheless willing to defend that idea as long as reasonably possible, taking due account for a generous ration of risk.

Before leaving this subject, let me add a few more words, beginning with these questions: Why theory? What purpose, if any, does it serve? Might we have a First Amendment *sans* theory? In a rudimentary sense, First Amendment theory might be said to serve two purposes: First, to help rein in, “explain,” or criticize the in-and-outs of decisional law. And second, theory shades the law in a blanket of norms, sometimes labeled “universal” or “inalienable” or “fundamental” or “long-standing.”

As to the first purpose, part and parcel of legal analysis is the ability to understand how the law is conceptualized and reconceptualized by those who direct or interpret its course. Each generation of scholars has its builders and levelers, its conceptualists and contextualists, its formalists and anti-formalists, its Langdells and Llewellyns, and so on.¹⁰⁴ And in the First Amendment world, the law has been bound by the likes of William

103. See WALTER F. BERNS, FREEDOM, VIRTUE, AND THE FIRST AMENDMENT 228 (1965) (“The argument for freedom is a distinctly modern one . . . [That is,] freedom was not the central political principle that it was to become after the influence of Hobbes, Locke, and Rousseau Instead of freedom, older writers considered virtue the organizing principle . . .”). Thus understood, the First Amendment and the Bill of Rights as a whole, marked a radical departure from past precedent.

104. See GRANT GILMORE, THE DEATH OF CONTRACT ix (Ronald K.L. Collins ed., 2d ed. 1995).

Blackstone and unbound by the likes of Leonard Levy.¹⁰⁵ By design or accident, the process of classification (like that of precedent) trades, at some significant point, in a falsity. Lawyers do it, judges replicate it, and scholars complicate it by way of their own conceptual templates. Absent some normative *telos*, so the argument goes, the process is more mechanical than philosophical, and in that sense might even be seen as game like, though an important game to be sure. The main gloss that might be added here is that concerning the demands of equality, of the law's obligation to treat similarly situated people similarly. That said, do we really need High Theory to check the excesses of runaway judicial decision-making? If precedent is built on some meaningful and constrained understanding of actual (as opposed to fetishized theoretical) harm, then that should suffice for analytical purposes.

As to the second purpose, which can work in tandem with its predecessor, theory hopes to explain or justify what we do or fail to do in the course of human events, including those events concerning our system of free expression. With Aristotelian allure, it points to a "higher good" (e.g., the acquisition of truth, self-realization, or personal autonomy) by which the law of free expression should be measured and judged. Unitary theories are created in the process of shrewdly linking facts to precedents and then linking those precedents to some so-called "desired" norm. If there is a "fit" (subjective as that determination is), then speech is protected, but if not, theory abridges expression without any constitutional qualm. Seen in this light, theory might be said to have a *moderating influence* on the law of free speech; it cleanses the conceptual house while restraining human behavior that might otherwise be deemed objectionable. Hence, theory is *Pater*-like; it is the Father of the State telling us what we can say or not say (e.g., we cannot publicly express visual sexuality, we cannot advertise condoms, or we cannot speak ill of our government employers). In such a *Pater* world the First Amendment is a bastard; it owes no allegiance to the ideal of censorial paternalism. It does *not* deny norms or morals or truths; rather, it demands no more than that *private individuals* decide such moderating principles instead of having the State dictate them. This is the basic idea behind the religion clauses and should likewise have some bearing on the way we think about the expression clauses.

Free speech in a world without highbrow, overblown, and self-serving normative theories linked to governmental regulation of expression need not pave the way to a Borgia's Rome. Again, those norms have their place in the private sphere and in the governmental one too, provided only that speech

105. See LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 309–10 (1985) (historically repudiating Blackstone).

is not impermissibly abridged. Behind every High Theory of free speech dwells the God of Piety, who in one way or another demands that many kinds of speech be abridged in her honor. But the time has long passed for those of us in the free speech community to continue to worship at such altars. In our postmodern times, the role of the state in free speech matters is a humble one, not a self-righteous one; it is to protect speech more than silence it. The state is not a *Pater* or Goddess so much as a restrained policeman on duty to safeguard the Commonwealth against real harms waged by real people against other people.

Now, it will surely be said that all of this talk of harm is no more than a norm masquerading as something it is not. And, so that argument would go, to understand that norm one would need a theory of harm. Fair enough. Still, I have ventured to address this issue in my earlier discussion of the spectrum of harms.¹⁰⁶ Conceptually speaking, what is crucial in this regard is the need to harness any notion of harm lest it swallow up the very freedom the First Amendment was designed to preserve. In that regard, what the GUV crowd is most adept at, is fusing its values into alleged harms that demand governmental intervention.



I want to step back for a moment and tease out a few, if you will, larger but related philosophical and psychological points. Let me begin this way: To be social, to be a part of civil society, a person must at some point sublimate his or her expressive instincts. Otherwise we would find ourselves in the throes of a Hobbesian melee. For the most part, that is part of the price we pay for civilization. By that measure, expressive instinct is hobbled in the name of political necessity. Still, if carried too far, such a move destroys individuality by homogenizing it in the name of safety and civility. If instinctual individuality is not to be destroyed, if it is not to be totally or significantly sublimated, there must be some release valve, some social mechanism that permits a dollop or more of the very thing that might (in the long run) destroy it.

The First Amendment is that release valve.

Among other things, the early speech-versus-conduct dichotomy in First Amendment jurisprudence spoke, in a way, to the general point I am

106. See *supra* text accompanying note 47. In a future work (tentatively titled *In Harm's Way*), I plan to say more, much more, about harm, how we speak and think of it, and its relation to the First Amendment. For today, however, brevity demands that I put such thoughts on hold, if only to provide my detractors with a measure of goading doubt.

trying to make. On the one hand, certain kinds of conduct are too close to the Hobbesian side of the destructive equation to be tolerated. Hence, they are not constitutionally protected. It may well be symbolic expression to heave a rock through the window of political foe, but such expression cannot be sanctioned if the Republic is to endure. The takeaway point here is that this kind of instinctual behavior wars with the survival and social premises of any polity. On the other hand, certain kinds of speech are distant enough from the specter of Hobbesian bedlam and mayhem as to be tolerated. Hence, they are constitutionally protected. By that logic we may say the vilest of things about our political opponents and, by and large, avoid the punitive hand of the law. Here the takeaway point is that of the release valve, the idea that some degree of instinctual expression is to be allowed, if only as a concession to individual freedom.

In both a philosophical and psychological sense, the First Amendment works to mediate the war between the self and society. Absent such kinds of mediation, society would virtually crush almost all varieties of instinctual expression it found to be adverse to any or all of its interests, however broadly or vaguely defined. Of course, the instinctual self is never satisfied and thus demands more expression and thus ever less sublimation. In some respect, this may help to explain why we have witnessed the vast expansion of free speech freedoms in modernity. Symbolic expression—i.e., flag burning, cross burning, armband wearing, nude dancing—exemplifies how even certain kinds of expressive *conduct* came to be constitutionally protected, or at least partially so. Though over the dissent of the likes of Justice Hugo Black,¹⁰⁷ the march for yet more protection for expressive behavior continues.

Insofar as modern American culture is concerned, in the past several decades we have witnessed less individual sublimation and more societal toleration. In the process, many believe we are today experiencing the coarsening of our culture, insofar as the First Amendment has been rallied, to protect everything from deviant forms of sexual expression¹⁰⁸ to violent forms of entertainment¹⁰⁹ to hateful forms of expression.¹¹⁰ All triumphs for almost instinctual expression, to be sure. But also, all defeats for societal civility.

There is more: One reason why the Certainty Principle (or if you prefer, the Truth Principle) is antithetical to First Amendment freedom is because

107. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 516–22 (1969) (Black, J., dissenting).

108. See, e.g., *United States v. Stevens*, 559 U.S. 460 (2010).

109. See, e.g., *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011).

110. See, e.g., *Snyder v. Phelps*, 562 U.S. 443 (2011).

so much of the human psyche consists of a rich cross section of contradictions—of beliefs pointing in different directions and of thought being divergent from behavior. Such contradictions—in philosophic stances, economic principles, religious beliefs, scientific premises, and various interpretative canons—can be so significant as to be existential in character. Because of that, we need a body of constitutive law that allows for a measure of divergent thought and behavior at the micro and macro levels. While precedent is said to be binding in law (though actually it is not quite so), it has little place in the expressive affairs of men and women. Their lives and their societal interactions often demand some real and messy degree of illogical divergence from the normative edicts of the enlightened or well-washed few. In other words, there has to be some breathing space for instinctual expression, messy at that, it will always prove to be.

It is a very famous line in First Amendment jurisprudence, one that warrants yet further examination: “[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be *uninhibited*, robust, and wide-open, and that it may well include *vehement*, *caustic*, and sometimes unpleasantly *sharp attacks* on government and public officials.”¹¹¹ Here, we can see in budding form the case for instinctual expression—i.e., expression that is unrepressed in character, vicious in tone, scathing in temper, and unrepressed in voicing anger. This release of the uninhibited self onto the body politic is indicative of the character of risks we as a society now take in the name of free speech liberty. Most assuredly, it is not the kind of risk that the Congregation of the Index would have ever tolerated. But, for better or worse, we have moved on from those days, from that mindset, and from that notion of the relation between the individual and her society. We have, in other words, embarked on a grand *experiment* in both political philosophy and in psychological wellbeing.



Mindful of what I have just said and more, the tension between the Galileos and the Congregation of the Index of the worlds is inevitable. What distinguishes the American experiment in freedom is that we have a constitutional commitment to the old heretic and a corresponding skepticism of ecclesiastical inquisitors and their modern-day counterparts. I do not say that our commitment is either certain or absolute; but I do think it should be aspirational to the greatest extent humanly possible.¹¹²

111. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (emphasis added).

112. *E.g.*, RONALD K.L. COLLINS, *NUANCED ABSOLUTISM: FLOYD ABRAMS AND THE FIRST AMENDMENT* 39–40, 70–72, 120–132 (2013).

Notice that I do not stress any particular reason why I argue as I do; that is, I do not offer the kind of norm that would be the crown jewel of some High Theory of free speech. I may be wrong. Even so, there is something splendid in being outside of that High Theory Crowd if such a stance points to an appreciation of the First Amendment that is more renegade than retrograde, more tolerant than intolerant, more creative than cabined, and surely more risk prone than risk averse. Cast in romantic terms, America sorely needs more George Anastaplos¹¹³ and Daniel Ellsbergs¹¹⁴ and certainly more government whistleblowers.¹¹⁵ By and large, we have come a long way in safeguarding the freedoms of such troublemakers. Then again, the road is a long one and we as a nation still have many miles to go.

It is hard, to be sure, to altogether dismiss normative claims from the conceptual table. And one could not do so for both pragmatic and (of course) normative reasons, at least not without fear of being branded a depraved nihilist. In this respect, my point is a modest one: If the First Amendment is to have any operative meaning and strength, it must begin with some meaningful consideration of real harms. Thereafter, if norms are what we must have, then the steel of normative assertions must be *strictly* tested . . . time and again. Otherwise wild-eyed claims to Truth and a host of other Values will trump First Amendment freedoms time and again. This was as true in the McCarthy era with its obsession with Communists as it is today in the national security era with its preoccupation with government leakers. Mere assertions tend towards the *ought* side of the conceptual equation, while demonstrative proof tends towards the *is* side.

Necessity makes its demands. Thus, some accommodation will always be needed. Such a constitutional accommodation is exemplified in the time, place, and manner exception to the First Amendment. Accordingly, one could not fairly claim a First Amendment right to erect a 100-foot commercial neon sign in a residential area or have a raucous rock concert near a neighborhood if the blare of Led Zeppelin-like electric guitars continued on into the wee hours. This is reasonable enough, even by my harm standards. But accommodation turns to misapplication when the exception is tapped to silence unpopular expression. Case in point: In *Feiner*

113. See *In re Anastaplo*, 366 U.S. 82, 97–116 (1961) (Black, J., dissenting); COLLINS & CHALTAİN, *supra* note 98, at 4–16.

114. See *New York Times Co. v. United States*, 403 U.S. 713 (1971); COLLINS & CHALTAİN, *supra* note 98, at 59–87.

115. In this regard, the 5-4 ruling in *Garcetti v. Ceballos*, evidences a cramped view of the First Amendment—a view that all too cavalierly places the maintenance of employee timidity in the workplace over the public disclosure of government wrongdoing. 547 U.S. 410 (2006). Happily, and as noted earlier, the *Garcetti* rule was tamed a bit in favor of a modicum more of free speech freedom in the case of *Lane v. Franks*, 134 S. Ct. 1533 (2014).

v. New York,¹¹⁶ Justice Hugo Black was certainly warranted in taking exception to the liberty Chief Justice Fred Vinson took in sustaining Irving Feiner's conviction for disorderly conduct. To quote Justice Black:

The record before us convinces me that petitioner, a young college student, has been sentenced to the penitentiary for the unpopular views he expressed on matters of public interest while lawfully making a street-corner speech in Syracuse, New York. Today's decision, however, indicates that we must blind ourselves to this fact because the trial judge fully accepted the testimony of the prosecution witnesses on all important points. Many times in the past this Court has said that despite findings below, we will examine the evidence for ourselves to ascertain whether federally protected rights have been denied; otherwise review here would fail of its purpose in safeguarding constitutional guarantees. Even a partial abandonment of this rule marks a dark day for civil liberties in our Nation.¹¹⁷

The maxim that time, place, and manner restrictions must be content neutral¹¹⁸ and narrowly tailored represents a judicial attempt to rein in abuses, though cases such as *Feiner* reveal that if the exception is too freely applied abuses will surely occur. The Court's opinion in *Frisby v. Schultz*¹¹⁹ is indicative of the need to monitor the invocation of even this rather pragmatic exception.¹²⁰ Here, again, the important point is to *verify* claims¹²¹—pragmatic or normative—when invoked for some purported need

116. *Feiner v. New York*, 340 U.S. 315 (1951).

117. *Id.* at 321–322 (Black, J., dissenting).

118. See Kate Yannitte, *Content-Neutral Time, Place, Manner Restrictions on Free Speech—A Municipality's Park Ordinance That Requires a Permit to Assemble More than Fifty People Is Facially Constitutional*, 12 SETON HALL CONST. L.J. 825, 830 (2002).

119. *Frisby v. Schultz*, 487 U.S. 474 (1988) (striking down on First Amendment grounds total ban on displaying flags or banners on public sidewalk surrounding the Supreme Court).

120. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’”) (citations omitted).

121. In this regard, the Court has been far too lenient in denying First Amendment claims in cases where local authorities cavalierly invoke the “secondary effects doctrine.” See, e.g., *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (upholding ban on total nudity in “dancing establishment”). See David L. Hudson, Jr., *Secondary-Effects Doctrine*, FIRST AMEND. CTR. (Sept. 13, 2002), <http://www.firstamendmentcenter.org/secondary-effects-doctrine> (“The secondary-effects doctrine has proven to be fertile ground for abuse because it enables government officials to conceal their thinly disguised dislike for adult entertainment behind claims of harmful effects.”). The way the doctrine has been applied is a good example of morals regulations masquerading as scientific fact.

to abridge freedom of speech, press, petition, assembly, or the free exercise of one's faith. The more courts set out to verify, and to do so factually and honestly, the more likely they are to see that the harm lawmakers feared was the harm that we imagined.



For some fastidious types, much of what is set out herein will be seen as unduly broad, coarse, and lacking in the kinds of analytical molding and varnish that law professors delight in championing (if only in impenetrable theory). In their eyes, such views may smack of the rank absolutism once espoused by Justice Hugo Black.¹²² Likewise, my guess is that the brand of presumptive liberty I have urged will be understood as imprudently oblivious to the demands of context and the need for balancing (albeit endless contextual balancing). Contextualists are not likely to endorse stringent First Amendment protection of the brand vouchsafed in *New York Times Co. v. Sullivan*,¹²³ *Brandenburg v. Ohio*,¹²⁴ *Citizens United v. Federal Election Comm'n*,¹²⁵ *United States v. Stevens*,¹²⁶ and the like. For them, such protection should not be seen as the normal or default position of freedom. Although this position may represent the rhetorical high ground, for them it also proves to be the analytical low ground. Seen in that skeptical light, the First Amendment must be read narrowly. Thus, they claim: "In reality, *the First Amendment itself is an exception to the prevailing principle that speech may be regulated in the normal course of government business.*"¹²⁷ This claim reverses the presumption I have urged and replaces it, at least operationally speaking, with a kind of due process, case-by-case form of

122. See HUGO L. BLACK, A CONSTITUTIONAL FAITH 45 (1969); TINSLEY E. YARBROUGH, MR. JUSTICE BLACK AND HIS CRITICS 126–50 (1988); *Justice Black and the First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549 (1962). It is all too easy to dismiss Black's absolutism, which did have its analytical problems, as grossly simplistic. Of course, such an assessment presumes his true jurisprudential intentions. In that regard, it is well to remember that he was a "master tactician . . . who used his forensic and temperamental skills to great advantage." Dennis J. Hutchinson, *Hugo Black Among Friends*, 93 MICH. L. REV. 1885, 1893 (1995) (reviewing *Hugo Black: A Biography* by Roger K. Newman). Whatever one may say of Black's absolutism, it did make Justice Brennan's near absolutism relatively palpable. Viewed in that light, they may well have had a "harmony of goals." See William J. Brennan, Jr., *Remarks on the Occasion of the Justice Hugo L. Black Centennial*, in JUSTICE BLACK AND MODERN AMERICA 171, 181 (Tony Freyer, ed., 1990) (quoting Justice Frankfurter).

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

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

125. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

126. *United States v. Stevens*, 559 U.S. 460 (2010).

127. Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism in IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS* 103, 110 (E. Joshua Rosenkranz ed., 1999) (emphasis added).

decision-making. One need not validate Justice Black's absolutist creed in order to discern that such an unbridled contextual approach to the First Amendment would very much constrict the very degree of freedom to which we as a people have become accustomed, if only grudgingly at times.

Though it is seldom, if ever, mentioned, certainty (or the insistence on it) is what fuels much of the contextualist animus towards more so-called libertarian interpretations of the First Amendment. Because we can never be *sure* about the consequences of liberty, its domain must be restricted. Otherwise, we subject ourselves to unforeseen risks. On that score, I repeat: A high degree of risk is vital to freedom. Freedom is decreased proportionate to the degree to which risk (often imagined) is diminished. Here the focus is on the nexus between the demand for certainty and the avoidance of risk. Since certainty can seldom, if ever, be determined, there will always be consequential risks.

I contend that contrariety makes for a better First Amendment fit than certainty. The ability to be torn, to hold opposing ideas at the same time, is, I think, a necessary condition for forthright thinking. To reconsider, reformulate, reinvent, and rearticulate one's thought¹²⁸ allows it to evolve beyond the rigid constraints of certainty. True, contextualism can sometimes help in that process. But it is all too often contextualism in the service of an often futile form of certainty. Contextualists simply will not abide uncertainty and the purported risks that accompany it. Hence, they champion the fluidity of context in order to rein in free speech freedom. There are just too many variables, they argue, to allow for much of anything approximating a bright line rule or presumption in favor of liberty. Then again, even contextualists would concede that there may be a degree of fortified protection for particular kinds of expression (e.g., pure political speech) in particular contexts (e.g., town hall meetings) provided, of course, due allowance is made for time, place, and manner restrictions. While this Norman Rockwell image is, to be sure, part of the heroic domain of the First Amendment,¹²⁹ standing alone it is too idealistic to do the real *work* of the Madisonian guaranty. In the rough-and-tumble free speech world, such idealism, as I have suggested above, works to *diminish* the domain of the First Amendment.

128. See Phillip Sipiora, *Editor's Preface*, in NORMAN MAILER, *MIND OF AN OUTLAW: SELECTED ESSAYS* xvii (Phillip Sipiora ed., 2013) (stressing the value of continually adjusting one's beliefs); Ronald K.L. Collins, *Mailer's Resistance—A Little Lesson in Free Speech*, 8 THE MAILER REV. 92 (2014).

129. Some adherents of the Rockwell heroic standard take a dim view of less respectable figures as candidates for heroic free speech designation. See, e.g., Frederick Schauer, *Lives in the Law: The Heroes of the First Amendment*, 101 MICH. L. REV. 2118 (2003) (dismissing the idea of Lenny Bruce, the ribald comedian, as a First Amendment hero).

What, then, to do with the need for great precision and for due attention to context? Here again, I think a presumption in favor of speech is key. That presumption can be overcome by some showing of actual or imminent harm of a significant nature. Beyond that, it is not the province of courts to constrict free expression rights based on Platonic-like norms of behavior that dictate our understanding of the First Amendment. Even so, some contextualists might argue that cases such as *Reno v. ACLU*¹³⁰ sweep too far in safeguarding sexual expression or in giving the impression that such speech might be protected when in fact it is not. They might likewise insist on qualifying Justice Steven's declaration that the "interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."¹³¹ Good rhetoric, but bad law, they might claim. Moreover, they might point to the excesses that have arisen post-*Reno* insofar as patently obscene materials, in contravention of *Miller v. California*'s¹³² standards, are the daily fare on the Internet.

Is there a problem here? I think not. For the First Amendment is more than what judges say; it is also what people do¹³³—that day-in and day-out exercise of unabridged freedom not beholden to elevated notions of the proper kinds of speech worthy of protection. Such expression needs no HIGH VALUE justification to exist; its existence is its justification, at least presumptively so. As the Internet obscenity illustration exemplifies, the *culture of the First Amendment* may well exceed the *law of the First Amendment*. And if it does (owing to what lawmakers and prosecutors decline to do), then that is part of the domain of America's modern liberty. Remember: There are societal costs to such freedom¹³⁴—the vulgarians and their bunch have their tasteless ways. Admittedly, America is not as pristine as it once was. Here again, that is the culture of the First Amendment—vibrant though sometimes coarse, robust though sometimes upsetting, and full-bodied though sometimes extreme.



Will the law of the First Amendment ever venture as far down the paths as I have suggested? Not entirely—most people are too beholden to the play-it-safe and play-it-by-my-norms mentality.¹³⁵ Nonetheless, there are

130. *Reno v. ACLU*, 521 U.S. 844 (1997).

131. *Id.* at 885.

132. *Miller v. California*, 413 U.S. 15 (1973).

133. See RONALD K.L. COLLINS & DAVID SKOVER, *THE DEATH OF DISCOURSE* 199–215 (1992) (discussing cultural approach to the First Amendment).

134. See *supra* text accompanying notes 97–99.

135. Again—and it cannot be repeated too often—the First Amendment represents a radical break from that mindset.

promising signs; we tend ever more in the direction of free speech freedom.¹³⁶ In the scheme of societal things, that movement may be reversible in a slight way or more.¹³⁷ After all, the future is a wild card. Still, as a nation we have progressed so far down the path of free speech liberty that I doubt that our momentous movement is stoppable. As far as I know, never before in the history of humankind has such a wide swath of communicative freedom existed, either constitutionally or culturally.

Meanwhile, holdover followers of the Congregation of the Index busily rounded up gay pride protestors several years ago in Putin's Russia, this as they strove to again jail members of the punk rock group Pussy Riot for dissing the Great Vladimir.¹³⁸ On the morality side of the political equation, in "modern" Saudi Arabia "The Committee for the Promotion of Virtue and the Prevention of Vice" (the official enforcer of Sharia) still keeps a watchful eye on how women express themselves in public.¹³⁹ True, it shocks us, as well it should. And the reason it does is because such censorship is, literally speaking, foreign to us as free Americans. Yes, we allow excesses; yes, we permit a degree of abuse; yes, we permit a big dollop of sexual license in movies; yes, we approve of citizens taking liberties with the reputations of public servants; yes, we suffer hate speech; and yes, we take our chances when we tolerate as much as we do in the name of free speech freedom. All right, let us admit it. But it is just that American outlook that situates us on

136. Some seem to consider this disturbingly problematic. See Frederick Schauer, *First Amendment Opportunism*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 175, 194–196 (Lee Bollinger & Geoffrey Stone eds., 2002) (stressing the purported necessity of the "essence" of the First Amendment or its "antecedent" normative core in order to prevent its "misapplication"). *But cf. id.* at 195–196 (noting that "in the final analysis none of the justifications for a distinct free-speech principle is sound," thus allowing for the possibility of "arguments for a broader liberty").

137. Consider, for example, the diminution of student free speech rights. See DAVID L. HUDSON, JR., *LET THE STUDENTS SPEAK!: A HISTORY OF THE FIGHT FOR FREE EXPRESSION* (Christopher Finan ed., 2011); GREG LUKIANOFF, *UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE* (2013).

138. See Zack Ford, *Russian Police Arrest 60 Pride Protesters As Putin Signs Anti-Gay Censorship Bill Into Law*, THINK PROGRESS (July 1, 2013) <http://thinkprogress.org/lgbt/2013/07/01/2238181/russian-police-arrest-60-pride-protesters-as-putin-signs-anti-gay-censorship-bill-into-law/>; Agence France Presse, *Nadezhda Tolokonnikova, Pussy Riot Member, 'Transferred To Siberia'*, HUFF. POST (Nov. 5, 2013) http://www.huffingtonpost.com/2013/11/05/nadezhda-tolokonnikova-siberia_n_4217448.html. See also David Herszenhorn, *Released Punk Rockers Keep Up Criticism of Putin*, N.Y. TIMES (Dec. 24, 2013) http://www.slate.com/blogs/the_slatest/2013/12/23/pussy_riot_release_punk_protesters_slam_amnesty_as_hoax_lie.html ("We didn't ask for any pardon," Ms. Alyokhina said. "I would have sat here until the end of my sentence because I don't need mercy from Putin.").

139. See Katherine Zoepf, *Shopgirls: The Art of Selling Lingerie*, NEW YORKER, Dec. 23 & 30, 2013 at 58, 60.

a world stage *radically* different from Russia, Saudi Arabia, France, Germany, and even England and Canada.

Though there is dissension (particularly in the legal academy), our system of freedom of expression stands. Happily, demands to call a constitutional convention or amend the First Amendment have gone nowhere.¹⁴⁰ But time can change minds. For example, one of my dear friends and a renowned free speech scholar wrote a book titled *What's Wrong with the First Amendment*.¹⁴¹ Steve Shiffrin is his name, and I owe a great deal of my formative education on the First Amendment to him. That said, we do part company (for now, at least) at various intersections of free speech jurisprudence. In his book, Professor Shiffrin contests much of today's speech protective wisdom when it comes to matters such as privacy,¹⁴² race hate speech, commercial expression, campaign financing, and pretrial proceedings, among others. If I dismissed this out of hand, I could only do so by betraying all I cherish about the First Amendment. Shiffrin's thoughts, however provocative, deserve a full and fair hearing in the courtroom of our minds.¹⁴³ In that venue there can be no heretics, even when it comes to the First Amendment. For all I know, Professor Shiffrin's book may win over minds; it may turn the tide away from much of today's libertarian-like thinking about the First Amendment. It may, in short, upset the very things I hold dear in my current understanding of what free speech *in America* is or should be about. Well, we take our chances—who knows, my old friend may even persuade me . . . or, then again, he may further embolden my current views. That, at any rate, is a chance one must take if one truly believes in free speech. The lesson: Nothing is certain here. Take heed!

140. See RONALD K.L. COLLINS & DAVID SKOVER, *WHEN MONEY SPEAKS: THE MCCUTCHEON CASE, CAMPAIGN FINANCE LAW & THE FIRST AMENDMENT 189–92* (2014) (discussing the call by Lawrence Lessig for a constitutional convention); Moveon.org (re constitutional amendment).

141. Cambridge University Press published the book in 2016. See Ronald K.L. Collins, *FAN 93 (First Amendment News) 'What's Wrong with the First Amendment?'*—Steve Shiffrin Book Coming This Summer, CONCURRING OPINIONS (Jan. 23, 2016), <http://concurringopinions.com/archives/2016/01/fan-93-first-amendment-news-whats-wrong-with-the-first-amendment-steve-shiffrin-book-coming-this-summer.html>.

142. Of course, nothing that I say herein is intended to deny real harms caused by certain types of invasion of privacy followed by public dissemination. See, e.g., Carrie Goldberg, *It's Clear: Creating Amateur Porn Without a Participant's Knowledge is Illegal in NY*, CONCURRING OPINIONS (July 16, 2014), <http://www.concurringopinions.com/archives/2014/07/carrie-goldberg-its-clear-creating-amateur-porn-without-a-participants-knowledge-is-illegal-in-ny.html#more-89> 052. See also DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* (2014).

143. See, e.g., Ronald K.L. Collins, *FAN 40 (First Amendment News) Steve Shiffrin & Bob Corn-Revere debate 'What's Wrong with the First Amendment?'* CONCURRING OPINIONS (Nov. 12, 2014), <https://concurringopinions.com/archives/2014/11/fan-40-first-amendment-news-steve-shiffrin-bob-corn-revere-debate-whats-wrong-with-the-first-amendment.html>.

To be a free people is to take risks. We cannot have genuine liberty if we clutch to safety like children terrified of the dark. Free speech scholars may frighten us with the sky-is-falling scenarios while contextualist balancers echo that theme in opposition to reaffirmations of free speech freedom. In that world censors tempt us with promises of security. But in the end, it is too often a false promise. For little worth safeguarding is truly gained if liberty is the altar on which such sacrifices are made. Brandeis had it right: The First Amendment was made for a courageous people.¹⁴⁴ And to be courageous means taking risks, which in turn sometimes means forsaking the security of collective certainty. Or as Galileo so well phrased it: “In questions of science, the authority of a thousand is not worth the humble reasoning of a single individual.”¹⁴⁵ Despite its romantic tenor, such an insight might serve us well not only in matters of science, but also in matters of life and law.

144. *See supra* text accompanying note 20.

145. GERARD PIEL, *THE AGE OF SCIENCE: WHAT SCIENTISTS LEARNED IN THE TWENTIETH CENTURY* 21 (2001) (quoting Galileo).
