

Certainty and the Censor's Dilemma

by ROBERT CORN-REVERE*

Pity the plight of poor Anthony Comstock. The man H. L. Mencken described as “the Copernicus of a quite new art and science,” who literally invented the profession of antiobscenity crusader in the waning days of the nineteenth century, ultimately got, as legendary comic Rodney Dangerfield would say, “no respect, no respect at all.” As head of the New York Society for the Suppression of Vice, and special agent for the U.S. Post Office under a law that popularly bore his name, Comstock was, in Mencken’s words, the one “who first capitalized moral endeavor like baseball or the soap business, and made himself the first of its kept professors.”¹ For more than four decades, Comstock terrorized writers, publishers, and artists—driving some to suicide—yet he also was the butt of public ridicule. George Bernard Shaw popularized the term “Comstockery” to mock the unique blend of militant sanctimony and fascination with the lurid that marks American prudishness.² Comstock frequently was lampooned in illustrated comics, and in his final days, even his supporters distanced themselves from his excessive zeal. In this respect, Comstock personified the censor’s dilemma in a free society—the capacity to wield great power combined with the inability to shake off the taint of illegitimacy.

Comstock’s influence lives on, both in the extension of his law to the modern technology of the Internet and in the army of “Lilliputian Comstocks” pursuing the same profession, but who, like Elvis impersonators, can never quite come close to the real thing. His outsized shadow looms over the likes of Brent Bozell, founding President of the Parents’ Television Council, an organization that was created to keep the world safe from fleeting expletives and wardrobe malfunctions on television.

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1. H. L. MENCKEN, *A BOOK OF PREFACES* 255 (1917).

2. HEYWOOD BROUN & MARGARET LEECH, *ANTHONY COMSTOCK: ROUNDSMAN OF THE LORD* 229–230 (1927).

Comstock's lasting impact also overshadows personages such as Newton Minow, President Kennedy's Federal Communications Commission ("FCC") chairman, who endeavored to tell Americans that the television medium they so love is nothing but a "vast wasteland."³ This is because no political philosophy has a monopoly on sanctimony, or on the belief that revealed truth—as defined by its adherents—may be enforced as a matter of public policy.

Liberals and conservatives are united in the common conviction that they know which forms of expression are unacceptable and that their choices should be enforced by law; they only differ in their preferences. In this respect, the eye of the beholder governs the mind of the censor. But, in part because the arbiters of propriety wish to suppress what the public embraces, they are the ultimate counterculture warriors, and for that reason, doomed, in the end, to failure and disrepute.

A Fundamental(ist) Disconnect

A more fundamental reason for the censor's harsh fate is that his very existence contradicts the arc of history among societies that value freedom. From the time Anthony Comstock shuffled off into the void in 1915 to the present day, constitutional protections for the freedom of imagination and expression have become well-established to a degree Comstock could never have anticipated and which would have horrified him. The year Comstock died, the Supreme Court held that the First Amendment's protections do not extend to the then-new medium of cinema. The Court reasoned "the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit," and, more to the point, "capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition."⁴

The decision provided both a legal result and a rhetorical style worthy of the great morals crusader himself, but it would not stand the test of time. As both the sophistication and artistry of film evolved, the public enthusiastically embraced it, as did—eventually—the courts. When Comstock died, the Supreme Court had not yet issued a single decision upholding any First Amendment claim. But over the next fifty years, the Court would decide that the film medium was constitutionally protected in

3. Newton N. Minow, Television and the Public Interest, *Speech Before the National Association of Broadcasters*, American Rhetoric Top 100 Speeches (Apr. 15, 2017), <http://www.americanrhetoric.com/speeches/newtonminow.htm>; see also Robert Corn-Revere, *Avast Ye Wasteland: Reflections on America's Most Famous Exercise in "Public Interest" Piracy*, 55 FED. COMM. L.J. 481 (2003).

4. *Mut. Film Corp. v. Ohio Indus. Comm'n*, 236 U.S. 230, 244 (1915).

the same way as newspapers and books;⁵ that the government's ability to impose prior restraints—to censor expression in advance of publication—was strictly limited;⁶ that sex and obscenity are not synonymous, and that discussions of intimate subjects could be banned only if they were “prurient” and utterly lacked redeeming social value.⁷ At the same time, both public and judicial estimations of what is socially valuable shifted radically. Since then, the legal component of the so-called “culture war” has continued to be waged along the border, and it is an ever-expanding frontier.

It is tempting to think of Comstock's Victorian Era reign of censorship as a limited episode in our history—like the Red Scare and McCarthyism—that erupted for a time only to be left behind as law and social understandings evolved. But the reality is not so simple, as no such phenomenon is a one-time thing to the extent we fail to learn the lessons of history. Even at the height of his influence, Comstock was ridiculed almost as much as he was feared, and his passing did not signal the end of the profession of moral crusader. Far from it—the names and faces may change, as do the specific problems that represent the latest threat to civil society, but there has never been a shortage of volunteers who are eager to save us from our own bad taste and poor manners.

If there is a defining moment for what we have come to know as the “culture war” at the start of twenty-first century, it is the Janet Jackson, Justin Timberlake “wardrobe malfunction” that ended the halftime show of Super Bowl XXVIII in 2004. Although the broadcast network immediately apologized for what turned out to be a poorly planned and flawed execution of a last-minute stunt secretly contrived by Jackson and her choreographer, policy entrepreneurs like Brent Bozell, who then led the Parents Television Council—and the FCC—immediately pounced on the 9/16-second flash of bejeweled breast flesh as a sign of the End of Days and a call to arms. The FCC instantly launched a major investigation, Congress convened a series of hearings, and Michael Powell, the FCC's Chairman at the time, initiated a number of steps designed, as he put it, to “sharpen our enforcement blade.”⁸ The Commission ultimately fined CBS over half a million dollars for the unplanned and unauthorized moment which the agency nevertheless decreed “was designed to pander to, titillate and shock the viewing audience.” After

5. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

6. *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

7. *Roth v. United States*, 354 U.S. 476 (1957).

8. *Protecting Children from Violent and Indecent Programming, Hearing Before the S. Comm. on Commerce, Science and Transportation*, 108th Cong. (2004), (testimony of Michael K. Powell, Chairman, Federal Communications Commission).

eight years of litigation, however, that penalty was thrown out as “arbitrary and capricious.”⁹

But the FCC’s problem was not just with the courts. The public had quite a different reaction to the “wardrobe malfunction” as well. Most people didn’t see the blink-and-you-miss-it moment that ended the Super Bowl halftime show, and those who did weren’t immediately clear about just what they had seen. Even inside the network control room at Reliant Stadium, the venue of Super Bowl XXVIII, amidst the managed chaos that accompanies any live broadcast, directors of the show turned to one another after witnessing the show’s climax and asked, “What was *that*?” But the curiosity of the audience had been piqued. The “wardrobe malfunction,” as it was later called by a hapless Justin Timberlake, was the most TiVoed moment in television history up to that point and the most searched event online according to Google.¹⁰ But it wasn’t as if the public was rising up in outrage so it could flood the FCC with complaints. That task would be left to Bozell’s Parent’s Television Council and other pro-censorship groups whose bread and butter is whipping up spam email campaigns to regulators and legislators. No, the viewing audience mostly was just curious about this strange and unprecedented event. In fact, a nationwide poll sponsored by the Associated Press revealed that eighty percent of respondents believed that the federal investigation was a waste of taxpayer dollars.¹¹

Therein lies the censor’s dilemma.

No Respect at All . . .

Censors may wield great power and enjoy political favor—for a time—and can ravage individual lives and reputations. But they also are the subject of popular derision and generally end up on the wrong side of history—in the United States, at least. This is why those who actively seek to suppress speech try vehemently to deny that their actions amount to “censorship,” and why they often feel beleaguered even as they marshal the power of the state to serve their purposes. Defensiveness pervades their occupation. Those who engage in the business of censorship have an inferiority complex for a

9. CBS Corp. v. Fed. Comm. Comm’n, 663 F.3d 122, 152 (3rd Cir. 2011), *cert. denied*, 132 S. Ct. 2677 (2012).

10. Ben Charney, *Jackson’s Super Bowl Flash Grabs TiVo Users*, CNET (Feb. 2, 2004), <https://www.cnet.com/news/jacksons-super-bowl-flash-grabs-tivo-users/>; *see also Janet’s Breast Makes Net History*, BBC NEWS (Feb. 5, 2004), <http://news.bbc.co.uk/2/hi/technology/3461459.stm>.

11. Will Lester, *Poll: Janet Jackson Act Not a Federal Case*, ASSOC. PRESS (Feb. 21, 2004), https://web.archive.org/web/20040312001041/http://customwire.ap.org/dynamic/stories/A/AP_POLL_JANET_JACKSON?SITE=NJASB&SECTION=HOME&TEMPLATE=DEFAULT.

reason—at some level, they understand their enterprise is fundamentally un-American.

But “censorship” is a word people use to mean many different things. Parents censor their children when they tell them not to make too much noise in the house or when they tell them they mustn’t say out loud that Aunt Maude is fat, or that Grandpa smells funny. Parenting is not unconstitutional censorship, of course: Nor is the use of private ratings systems such as the Motion Picture Association of America’s ratings for movies or the Electronic Software Association’s ratings for electronic games. People often confuse such private editorial commentary with government censorship. And there are those who claim to be censored by what they call “political correctness,” when their intolerant or racist rants are met with disdain and social ostracism. When Los Angeles Clippers owner Donald Sterling was banned from the National Basketball Association for life after he was recorded making mindlessly bigoted remarks to a young woman friend in 2014, it may have been an act of censorship, but it was not *illegal* censorship.¹² The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” It does not say “the NBA shall make no rules.”

Such notions took on greater urgency when Donald Trump launched his presidential campaign with attacks on undocumented immigrants as rapists and murderers and defending his inflammatory rhetoric by saying he had no time for “political correctness.” It is not illegal for a political candidate to talk this way—in the United States at least (Europe is another matter)—and in normal times, the ballot box would act as a check on such loutish behavior. But, as it turned out, we are not living in normal times. So what does President Trump’s unhinged rhetorical style say about his attitude toward free expression? Not much. Although Trump bristles at any suggestion that his own speech should be limited in any way, he has said we should “open up” the libel laws (whatever that means), that flag burners should be stripped of their citizenship, that established news organizations are the enemy of the American people, and should be investigated by congressional committees and the FCC. The sole constant is that Trump believes he can spout whatever pops into his head but that any views he dislikes should be restricted. Taken together, the statements of President Trump and his enablers say nothing about the nature of censorship because they are so conflicted and confused.

Of course, illegal censorship can take many forms, including government efforts to suppress political dissidents, impede demonstrations,

12. *Donald Sterling Banned for Life by the NBA for “Deeply Disturbing” Comments*, CBS NEWS (Apr. 29, 2014), <https://www.cbsnews.com/news/donald-sterling-banned-for-life-by-the-nba-for-deeply-disturbing-comments>.

monitor radical groups, or enforce libel judgments. When the Nixon Administration tried to enjoin publication of the Pentagon Papers, the secret history of the Vietnam War, it was a prime example of the type of censorship the First Amendment was designed to prevent. Likewise, the Obama Administration's efforts to limit the press, including its aggressive use of leak investigations and prosecutions to stifle reporters and their sources represented serious threats to free expression. These are vital issues in the ongoing struggle for human freedom.

But beyond the strictly political or journalistic realm, the censor seeks to exert control over the culture based on the idea that he or she, speaking for the community, has a right to draw the boundary lines for speech. One cannot really argue taste—or, as the Latin maxim would have it, *de gustibus non est disputandum*, but at some times or places in America (and, in much of the rest of the world, at any time) people go to jail—or are killed—over such disputes. There often is substantial overlap between the cultural and the political, and all of the so-called “Culture War” issues are intensely political.

A Global Dimension

The interrelationship of social and political issues was vividly illustrated at the close of 2014 when a cyber attack on the computers of Sony Pictures Entertainment was linked to the impending release of *The Interview*, a goofball comedy about a plot to assassinate North Korean leader Kim Jong-un. The Obama administration announced that it uncovered evidence the North Korean government was behind the hack, and also was responsible for threats of violence that disrupted the film's opening.¹³

But the controversy surrounding *The Interview* was quickly overshadowed in January 2015 by the terrible news from Paris that Islamic gunmen associated with Al-Qaeda massacred twelve people at the offices of the weekly satirical newspaper *Charlie Hebdo*.¹⁴ The publication had committed the unpardonable offense of lampooning religion and of publishing rude cartoons depicting Mohammad. The killings rekindled and heightened the global debate about freedom of expression sparked by publication in 2005 cartoons about Islam by the Danish newspaper *Jyllands-Posten*, and, before that the global fatwa issued against author Salmon

13. Brooks Barnes & Michael Cieply, *Sony Drops 'The Interview' Following Terrorist Threats*, N.Y. TIMES (Dec. 17, 2014), <https://www.nytimes.com/2014/12/18/business/sony-the-interview-threats.html>.

14. Dan Bilefsky & Maia de la Baume, *Terrorists Strike Paris Newspaper, Leaving 12 Dead*, N.Y. TIMES (Jan. 7, 2015), <https://www.nytimes.com/2015/01/08/world/europe/charlie-hebdo-paris-shooting.html>.

Rushdie for his novel *The Satanic Verses*.¹⁵ Such episodes are stark reminders that there is no clear dividing line between cultural and political censorship, and they foreshadowed the challenges we will face in preserving freedom in an interconnected world.

One would think it should be easy to obtain a consensus condemning assassination as a legitimate response to a political or cultural debate, and in the immediate aftermath of the Paris killings, it appeared for a time that people could agree on such a modest proposition. In the week immediately after the *Charlie Hebdo* shootings, a rally for national unity was held in Paris, drawing more than two million people and some forty world leaders. Across France, an estimated 3.7 million people participated in similar demonstrations. Seemingly united by the slogan *je suis Charlie* (“I am Charlie”), the throngs marched in support of freedom of expression.¹⁶

But it did not take long for the appearance of consensus to break down. Despite the show of seeming solidarity, the official reaction in France was schizophrenic. The Justice Ministry sent a letter to prosecutors and judges urging more aggressive tactics against racist or anti-Semitic speech. The order, however, did not mention Islam.¹⁷ In the first week after the *Charlie Hebdo* attack, fifty-four people were arrested for hate speech.¹⁸ One of those charged was comedian Dieudonné M'bala M'bala who was convicted of condoning terrorism for tweeting, “I feel like Charlie Coulibaly,” combining a reference to *Charlie Hebdo* and the name of the gunman who attacked a kosher supermarket.¹⁹ The government's response to controversial speech in France following the attacks underscores the stark differences between European law and the First Amendment to the United States Constitution,

15. See generally FLEMMING ROSE, *THE TYRANNY OF SILENCE* (2016); Rick Gladstone, *A Timeline of Threats and Acts of Violence Over Blasphemy and Insults to Islam*, N.Y. TIMES (Jan. 7, 2015), <https://www.nytimes.com/2015/01/08/world/middleeast/perceived-anti-islam-insults-in-the-media-have-often-led-to-retributions-and-threats.html>.

16. Anthony Faiola & Griff Witte, *Tributes, Marches Held in France After Terror Attacks*, WASH. POST (Jan. 11, 2015), https://www.washingtonpost.com/world/europe/tributes-marches-held-in-france-after-terror-attacks/2015/01/10/fcfe738e-98f6-11e4-8005-1924ede3e54a_gallery.html.

17. Lori Hinnant, *In Crackdown on Hate Speech, France Arrests 54 for Defending Terror*, ASSOC. PRESS (Jan. 14, 2015), <https://www.bostonglobe.com/news/world/2015/01/14/crackdown-hate-speech-france-arrests-for-defending-terror/exzmOcyRHLEPPWKJIVcHYK/story.html>.

18. See also Alexander Trowbridge, *French Arrests Draw Charges of Free Speech Hypocrisy*, CBS NEWS (Jan. 15, 2015), <http://www.cbsnews.com/news/french-arrests-draw-charges-of-free-speech-hypocrisy/>.

19. *French Comedian Dieudonné Faces Inquiry Over 'Charlie Coulibaly' Remark*, GUARDIAN (Jan. 12, 2015), <http://www.theguardian.com/world/2015/jan/12/french-comedian-dieudonne-charlie-coulibaly-prosecutor>; Aurelien Breeden, *Dieudonné M'bala M'bala, French Comedian, Convicted of Condoning Terrorism*, N.Y. TIMES (Mar. 19, 2015), <http://www.nytimes.com/2015/03/19/world/europe/dieudonne-mbala-mbala-french-comedian-convicted-of-condoning-terrorism.html>.

which has been interpreted to protect even the most vile verbal attacks based on race or religion.

In the Islamic world, many people simply rejected the premise of free speech as an important value. Muslims in the Philippines took to the streets to proclaim that the event should serve as a “[m]oral lesson for the world to respect any kind of religion, especially the religion of Islam.” Freedom of expression, they said, “[d]oes not extend to insulting the noble and the greatest prophet of Allah.”²⁰ Protesters in Pakistan displayed posters that read, “This is not freedom of expression, it is open aggression against Islam,” and similar rallies took place in Turkey, Chechnya, and elsewhere.²¹ Such reactions were not confined to the streets. In a *USA Today* op-ed, British cleric Anjem Choudary wrote, “Muslims do not believe in the concept of freedom of expression, as their speech and actions are determined by divine revelation and not based on people’s desires This is because the Messenger Muhammad said, ‘Whoever insults a Prophet kill him.’”²² Similarly, Junaid Thorne, an Australian Muslim, wrote, “If you want to enjoy ‘freedom of speech’ with no limits, expect others to exercise ‘freedom of action.’”²³

Even in the United States, the mocking tone of *Charlie Hebdo* was just too much for some. The president of the U.S. Catholic League, Bill Donohue, wrote that *Charlie Hebdo* had “a long and disgusting record”²⁴ of mocking religion and had its editor “not been so narcissistic, he may still be alive.”²⁵ In a somewhat milder vein—or, at least, not blaming the victims

20. *Muslims in Philippines March Against Charlie Hebdo*, DAILY MAIL, (Jan. 14, 2015), <http://www.dailymail.co.uk/wires/afp/article-2909953/Muslims-Philippines-march-against-Charlie-Hebdo.html>.

21. Jack Linshi, *5,000 Rally Against Charlie Hebdo in Pakistan*, TIME (Jan. 18, 2015), <http://time.com/3672871/charlie-hebdo-pakistan/>; *Chechens Protest Against Charlie Hebdo Cartoons*, GUARDIAN, (Jan. 19, 2015), <https://www.theguardian.com/world/2015/jan/19/chechens-protest-charlie-hebdo-cartoons-grozny>.

22. Anjem Choudary, *Why Did France Allow the Tabloid to Provoke Muslims?*, USA TODAY (Jan. 8, 2015), <http://usatoday.com/story/opinion/2015/01/07/islam-allah-muslims-shariah-anjem-choudary-editorials-debates/21417461/>.

23. *Paris Terror at Charlie Hebdo Newspaper: Aussies Justify Attack*, HERALD SUN (Jan. 8, 2015), <http://www.heraldsun.com.au/news/paris-terror-at-charlie-hebdo-newspaper-aussies-justify-attack/news-story/ea40455bd2e028b9cda440d00a39471c>.

24. Eric W. Dolan, *Catholic League Chief: Charlie Hebdo Editor Got Himself Murdered by Being a Narcissist*, RAW STORY US (Jan. 7, 2015), <http://www.rawstory.com/rs/2015/01/catholic-league-chief-charlie-hebdo-editor-got-himself-murdered-by-being-a-narcissist/>.

25. Ishaan Tharoor, *After Charlie Hebdo Attack, U.S. Catholic Group Says Cartoonists ‘Provoked’ Slaughter*, WASH. POST (Jan. 7, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/01/07/after-charlie-hebdo-attack-u-s-catholic-group-says-cartoonists-provoked-slaughter>.

quite as much—Pope Francis told reporters, “[o]ne cannot provoke, one cannot insult other people’s faith.”²⁶

And even some supposedly familiar with traditional protections for free expression in the United States took a similar tack. One of the more prominent voices was that of cartoonist Garry Trudeau, the creator of *Doonsbury*, who called what *Charlie Hebdo* did with its Mohammad cartoons “an abuse of satire.” In remarks made as he accepted the George Polk Career Award for journalism in April 2015, Trudeau criticized *Charlie Hebdo* and *Jyllands-Posten* for publishing cartoons of Mohammad and slammed “free speech absolutists” for defending them. He compared the cartoons to crude and vulgar graffiti that “punches down” and attacks “the little guy,” thereby wandering “into the realm of hate speech.”²⁷ Later that month, one hundred forty-five writers signed a letter protesting the PEN American Center’s decision to present its annual Freedom of Expression Courage award to *Charlie Hebdo*, and six writers backed out as literary hosts for the award dinner.²⁸ DeWayne Wickham, Dean of Morgan State University School of Global Journalism, wrote of the *Charlie Hebdo* killings, “The once little-known French satirical news weekly crossed the line that separates free speech from toxic talk.”²⁹

The Common Thread—Certainty

Ultimately, censorship results from the conviction that some forms of expression are so unacceptable or dangerous that unwanted speech may be restricted or prohibited by law (or, as in the examples of *The Interview* and the *Charlie Hebdo* massacre, by extralegal means including assassination). Censors claim the moral sanction to speak for the collective, either by enforcing “community standards” against evil expression or by mandating speech they believe serves the “public interest.” They are willing to legislate their preferences and to brand as outlaws those who would transgress their standards or, if they claim a mandate to speak for some god, to kill the infidels. As Supreme Court Justice Anthony Kennedy put it, “[s]elf-

26. Elizabeth Dias, *Pope Francis Speaks Out on Charlie Hebdo: ‘One Cannot Make Fun of Faith*, TIME (Jan. 15, 2015), <http://time.com/3668875/pope-francis-charlie-hebdo/>.

27. Garry Trudeau, *The Abuse of Satire*, ATLANTIC (Apr. 11, 2015), <http://www.theatlantic.com/international/archive/2015/04/the-abuse-of-satire/390312/>.

28. *Rejecting the Assassin’s Veto*, PEN AMERICA (Apr. 26, 2015), <http://www.pen.org/blog/rejecting-assassins-veto>; Jennifer Schuessler, *Six PEN Members Decline Gala After Award for Charlie Hebdo*, N.Y. TIMES (Apr. 26, 2015), <http://www.nytimes.com/2015/04/27/nyregion/six-pen-members-decline-gala-after-award-for-charlie-hebdo.html>.

29. DeWayne Wickam, *‘Charlie Hebdo’ Crosses the Line*, USA TODAY (Jan. 8, 2015), <http://www.usatoday.com/story/opinion/2015/01/19/charlie-hebdo-cross-line-free-speech-covers-islam-limits-wickham/21960957/>.

assurance has always been the hallmark of a censor.”³⁰ In this respect, he echoed Mencken’s description of vice crusaders that “[t]heir very cocksureness is their chief source of strength.”³¹

The arbiters of culture are sustained and emboldened by their moral fervor, but at least in this country they can never shake a certain defensiveness since they live in a community where the Supreme Court affirmed as far back as 1943 that one “fixed star in our constitutional constellation” is that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”³² One might quickly add, as the Court did within a few years, that this principle applies equally to matters of taste and that “a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system.”³³ Thus, in a free society the censor never has the moral high ground no matter how sanctimonious he may be.

Just Can’t Get Enough

The internal conflict is not just a question of law. There appears to be a psychological dimension to the censor’s dilemma as well. What can one say about the type of person who devotes his or her life to denouncing certain types of speech and advocating its prohibition while choosing a profession in which he immerses himself in it? Purity crusaders claim to hate the material they want to suppress and argue it will ruin all who are exposed, but invariably can’t get enough of it. They search it out, collect it, study it, categorize it, archive it, talk about it, and display it to others, all for the ostensible purpose of making such expression cease to exist. Comstock created what he called a Chamber of Horrors—his personal collection of lewd publications and “obscene” objects—that he would show Members of Congress to persuade them of the need for his 1873 federal obscenity law.³⁴ Over 120 years later, Senator James Exon crafted his “Blue Book” to illustrate early examples of internet porn which he showed to colleagues to persuade them of the need to restrict online “indecentcy.” Senator Exon’s colleagues responded by adopting the indecency prohibitions of the Communications Decency Act by an overwhelming margin in 1996.

30. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 645 (1995) (Kennedy, J., dissenting).

31. MENCKEN, *supra* note 1, at 245.

32. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

33. *Hannegan v. Esquire*, 327 U.S. 146, 158 (1946).

34. JAMES C. N. PAUL & MURRAY L. SCHWARTZ, *FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL* (1961); MARJORIE HEINS, *NOT IN FRONT OF THE CHILDREN* 31–32 (2001).

Activists of all political stripes surround themselves with the type of speech they believe must be suppressed for the good of others, yet somehow are immune to the material's dangerously toxic effects. Could it be that such people are drawn to their work because of the opportunity it affords to spend countless hours communing with the forbidden? As Sydney Smith, a noted British writer and cleric of the nineteenth century once observed, "[m]en whose trade is rat-catching love to catch rats; the bug destroyer seizes upon the bug with delight; and the suppressor is gratified by finding his vice."³⁵ It is not beyond belief that censorship is an ultimate act of self-gratification and that our rights are sacrificed on an altar of the censor's guilty pleasure.

Morris L. Ernst, a cofounder of the American Civil Liberties Union, noted this phenomenon in his 1928 study of obscenity and the censor entitled *To the Pure*: "Recall those men who belong to vice societies but enjoy showing, of course in a scientific manner, postal cards of homosexual acts." Ernst concluded that examples of such public hypocrisy "are too multitudinous to permit a detailed inventory."³⁶ Decades later he observed that Anthony Comstock was an "obvious psychopath" whose diaries provided "precious morsels for any psychiatrist" because his writings made it obvious "he suffered from extreme feelings of guilt because of a habit of masturbation."³⁷ This may help explain why Comstock devoted a lifetime to collecting, cataloguing, and destroying all that he found to be shameful.

Because the urge to censor derives from personal preferences or policy positions, no political party or philosophy is immune from the impulse to suppress contrary views. One oft-expressed stereotype is that conservatives favor censorship while liberals oppose it, but one needn't search long to find numerous counter examples. Liberals and conservatives alike, regardless of how one might define those philosophies, appear to agree that the machinery of government can rightfully be used to restrict speech, provided the targeted expression is sufficiently vile (from their point of view) or insufficiently valuable (using their scale as a measure). The problem is, the competing factions never can seem to agree on which speech qualifies.

35. See BROWN & LEECH, *supra* note 2, at 273.

36. MORRIS L. ERNST & WILLIAM SEAGLE, *TO THE PURE: A STUDY OF OBSCENITY AND THE CENSOR* 14 (1928).

37. MORRIS L. ERNST & ALAN U. SCHWARTZ, *CENSORSHIP: THE SEARCH FOR THE OBSCENE* 29–30 (1964).

A Vast Bipartisan Conspiracy?

A common assumption is that conservatives want to censor sex, while liberals want to censor depictions of violence and “hate” speech, while both want to restrict speech about abortion—so long as it is the other side that gets muzzled. Veteran journalist and free speech advocate Nat Hentoff summed up the mindset quite nicely in his book *Free Speech For Me—But Not For Thee*, noting that “the lust to suppress can come from any direction.” Hentoff credited to a fellow journalist the insight that censorship “is the strongest drive in human nature; sex is a weak second.”³⁸

Social conservatives seek to limit access to information about abortion (just as earlier generations sought to suppress discussions of contraceptives), while progressives try to restrict “sidewalk counseling” and other efforts on the walkways outside clinics to dissuade women from terminating their pregnancies. Both sides justify their actions in the name of public health and decry their adversary’s tactics as censorial. Liberals generally favor placing limits on political campaign expenditures and contributions, while conservatives tend to oppose them as a violation of free speech. But the roles switch when restrictions are imposed on providing “material support” (a.k.a. “contributions”) to organizations branded by the government as supporting terrorism (or, in earlier days, Communism). Liberals recoil at the courts’ increasing recognition of constitutional protection for commercial speech (unless it involves the commercial promotion of contraceptives), while conservatives (and some progressives) claim authority to ban or restrict sexually oriented entertainment because it is “commercialized.”

These are generalizations, of course. Not all liberals think alike on these issues, just as conservatives may take different positions. The problem may lie in the left-right labels themselves, notwithstanding the polarization of our current political culture that resembles a giant game of “shirts versus skins.” The two sides divide into self-selected factions and reflexively oppose whatever the other team is proposing as the solution to society’s ills. But the one point on which most of the combatants in these political controversies agree is that they don’t want to be tarred as “censors.” Censorship is what the other side is doing.

38. NAT HENTOFF, *FREE SPEECH FOR ME—BUT NOT FOR THEE* (1992).

A Question of Definitions

Just as “[h]ypocrisy is the homage vice pays to virtue,” as Seventeenth Century French writer Francois de La Rochefoucauld put it, so is euphemistic evasion.³⁹ George Orwell, in his 1946 essay, “Politics and the English Language,” wrote that political euphemism “is designed to make lies sound truthful and murder respectable, and to give the appearance of solidity to pure wind.” He observed that “[d]efenseless villages are bombarded from the air, the inhabitants driven out into the countryside, the cattle machine-gunned, the huts set on fire with incendiary bullets: this is called *pacification*.” Updating Orwell’s example, genocide came to be known in the 1990s as “ethnic cleansing.” “In our time,” Orwell concluded, “political speech and writing are largely [employed in] defense of the indefensible.”⁴⁰

The corruption of language for political ends is a central premise of Orwell’s fictional masterpiece, *1984*. In that novel he described the nation of Oceania in which the apparatus of government was divided between the Ministry of Truth, which concerned itself with news, entertainment, education, and the fine arts; the Ministry of Peace, which concerned itself with war; the Ministry of Love, which maintained law and order by torturing dissidents; and the Ministry of Plenty, which was responsible for economic affairs and rationing. Newspeak, the official language of Oceania, was designed to meet the ideological needs of the State. The purpose of newspeak, Orwell wrote, was “to make all other modes of thought impossible,” which was accomplished by eliminating superfluous words from the dictionary and stripping all remaining words of “unorthodox meanings.” These principles were the basis for the official slogans of the Party over which Big Brother presided:

War is Peace
Freedom is Slavery
Ignorance is Strength

Orwell’s vision would seem outlandish if nonfictional examples of such use of language were not so common. “America’s Mayor” and later Trump surrogate, Rudolph Giuliani was seemingly channeling Big Brother when he said in a 1994 speech that “[f]reedom is about authority. Freedom is about

39. FRANÇOIS DE LA ROCHEFOUCAULD, SENTENCES AND MORAL MAXIMS, No. 218 (London, J. W. Willis Bund, M.A. LL.B and J. Hain Friswell Simpson, Son, & Martson, 1871) (1678).

40. GEORGE ORWELL, POLITICS AND THE ENGLISH LANGUAGE, *reprinted in* THE ORWELL READER 355, 366 (Mariner Books, 1961) (1956).

the willingness of every single human being to cede to lawful authority a great deal of discretion about what you do.”⁴¹

Giuliani at least was clear in saying he was all about control. Others obfuscate more (or at least are a little more artful about it). In 2017 officials at American University refused to approve a sorority fundraiser they believed may be insensitively “appropriating culture.” They were wrong about that, but couldn’t bring themselves to cop to the censor label. Instead, Colin Gerker, the school’s assistant director of fraternity and sorority life wrote to Sigma Alpha Mu to say “I want to continue empowering a culture of controversy prevention among [Greek] groups,” advising the sorority to “stay away from gender, culture, or sexuality for thematic titles.” Evidently feeling empowered by this exchange, Sigma Alpha Mu cancelled the planned event.⁴²

Sometimes, officials just want to make sure they set the record straight. In a 1996 letter to the *Washington Post*, the ambassador from Belarus complained about a report that a dissident had been arrested for “participating in a demonstration.” This was simply untrue, the ambassador insisted, explaining that the protester “had a perfect right to demonstrate.” The official explained that the demonstrator had not been stopped from protesting, but instead had been arrested and detained “for knowingly organizing a disruptive march through the city that was not authorized by city authorities.” Moreover, the ambassador was “pleased to inform the *Post*’s readers” that the dissident “had since been released.”⁴³

Closer to home, officials routinely use language creatively to expand their power. As a presidential candidate, Donald Trump asserted that no one has greater respect for the First Amendment while simultaneously advocating “opening up” the libel laws. He and his senior staff members label unfriendly stories as “fake news” while at the same time offering a different version of reality based on what they unblushingly described as “alternative facts.” In this parallel universe, words simply don’t have the meanings they once did. These people would be right at home in Orwell’s Oceania.

Given the long history of misdirection by those seeking to avoid the appearance of misusing power, it is no wonder that euphemism is the weapon

41. ‘Freedom Is About Authority’: Excerpts From Giuliani Speech on Crime, N.Y. TIMES (Mar. 20, 1994), <http://www.nytimes.com/1994/03/20/nyregion/freedom-is-about-authority-excerpts-from-giuliani-speech-on-crime.html>.

42. Catherine Rampell, Opinion, *A Fraternity Was Told it Was ‘Appropriating Culture.’ Administrators Won’t Say Which*, WASH. POST (Apr. 21, 2017), https://www.washingtonpost.com/opinions/a-fraternity-was-told-it-was-appropriating-culture-administrators-wont-say-which/2017/04/20/d57fa01a-25e1-11e7-b503-9d616bd5a305_story.html?utm_term=.364feae3ae96.

43. Ambassador Sergei N. Martynov, *Letter to the Editor, Free Expression in Belarus*, WASH. POST (June 5, 1996) at A22.

of choice among censors in America. Perhaps nothing illustrates this more clearly than the ongoing controversy about whether burning or otherwise desecrating an American flag is an expressive act that is protected by the First Amendment. The Supreme Court touched off a firestorm of protest in 1989 when it held in a 5-4 vote that the prosecution of a demonstrator under a Texas flag desecration law was unconstitutional.⁴⁴ The decision resulted in federal legislation—which also was struck down—and prompted three unsuccessful attempts to amend the First Amendment to permit making physical desecration of the flag a crime.⁴⁵

The essence of the debate between those who favor or oppose flag desecration laws boils down to a matter of semantics—is burning a flag in protest “speech?” Proponents of such laws argue that it is not; that burning our nation’s symbol is a meaningless and distasteful act and that nothing in our Constitution prevents the government from banning such bad behavior. Former Chief Justice William Rehnquist wrote in a dissenting opinion that the public burning of the American flag is “no essential part of any exposition of ideas”⁴⁶ and a Senate Report on one of the subsequently proposed constitutional amendments dismissed displays of disrespect for the flag as nothing more than “despicable conduct.”⁴⁷ But these assertions gloss over the paradox that those seeking to protect the flag do so *because* of its symbolic value—that it communicates deeply rooted feelings.

It is illogical to suggest that displaying a flag with pride has great communicative value while destroying the banner to show disdain does not. Nor can it be reasonably maintained that such an act—either out of respect or disgust—is not “speech” under our constitutional framework because it does not necessarily involve the use of words. Words themselves are nothing more than symbols that can be arranged to convey particular meanings, and from the beginning of First Amendment jurisprudence, the Supreme Court has recognized that the symbolic value of flying a flag is constitutionally protected. In its first case ever to uphold a First Amendment claim, the Court in 1931 reversed a conviction under a state law that prohibited display of a red flag as an emblem of opposition to organized government or as an aid to anarchistic action. In doing so, Chief Justice Charles Evans Hughes found it unnecessary even to discuss whether the symbolic act constituted expression. Writing for a seven-

44. *Texas v. Johnson*, 491 U.S. 397 (1989).

45. *United States v. Eichman*, 496 U.S. 310 (1990).

46. *Johnson*, 491 U.S. at 432 (Rehnquist, C.J., dissenting).

47. CONSTITUTIONAL AMENDMENT TO PROHIBIT PHYSICAL DESECRATION OF U.S. FLAG, S. REP. 108-334 (2d Sess. 2004).

justice majority, he said that the law was plainly “repugnant to the guaranty of liberty” contained in the First Amendment.⁴⁸

The argument, then, is not that flag burning isn’t speech. It is simply speech that those who favor flag desecration laws really, *really* hate. President-elect Trump briefly revived this controversy in November 2016 when he tweeted that those who burned the American flag should be stripped of U.S. citizenship. As he put it in an early morning tweet: “Nobody should be allowed to burn the American flag—if they do, there must be consequences—perhaps loss of citizenship or year in jail!”⁴⁹

Much the same may be said of those who repeat the slogan “money isn’t speech” as they support constitutional amendments to empower Congress to pass laws regulating political campaigns. One such proposal to amend the First Amendment was offered in the wake of the Supreme Court’s controversial decision in *Citizens United v. Federal Election Commission*, which invalidated a law banning the use of corporate funds for “electioneering communications.”⁵⁰ The amendment proposed to overturn *Citizens United* would enable Congress and the states to regulate the raising and spending of money and in-kind equivalents in federal and state elections, including limits on contributions and “the amount of funds that may be spent by, in support of, or in opposition to such candidates.”⁵¹ Decoding this linguistic dodge, the legendary First Amendment lawyer Floyd Abrams said of the proposal’s text: “That’s one way to say it, but I think it would have been more revealing to have said that it actually ‘relate[s] to *speech* intended to affect elections.’ And it would have been even more revealing, and at least accurate, to have said that it relates to *limiting* speech intended to affect elections.”⁵²

Of course money is not speech in the abstract, just as a gasoline-soaked flag and a match convey no inherent message unless put to some communicative use. But when money is spent on political campaigning, it ignores logic to suggest that restricting it has no effect of freedom of expression. Restrictions on political expenditures and contributions necessarily entail censorship, and, while there is a meaningful debate to be had about the degree of regulation that might be acceptable under the First Amendment, there is no denying such measures limit speech. But the

48. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

49. See David Wright, *Trump: Burn the Flag, Go to Jail*, CNN (Nov. 29, 2016), <http://www.cnn.com/2016/11/29/politics/donald-trump-flag-burning-penalty-proposal/index.html>.

50. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 319 (2010).

51. S.J. Res. 19, 113th Cong. (2013) (as amended by Senate, June 18, 2013).

52. *Hearing Before the Sen. Judiciary Comm. on S.J. Res. 19*, 113th Cong. (2014) (Statement of Floyd Abrams).

insistence by some that such regulations do not restrict “speech” at all is just another illustration of the censor’s dilemma at work. Few Americans want to admit to being a censor.

They Have to Be Carefully Taught

The same dynamic has infected how college administrators and some student activists describe their efforts to control speech on America’s campuses. One thinks of our universities as the model of the marketplace of ideas, where controversial thoughts may be conceived, exchanged, and openly debated. And this is how they should be, as true education can occur only in an environment where our most cherished ideas can be put to the test by repeated dialogue involving successive generations of scholars and students. Of course, education during the college years is not confined to academic subjects. Many of us grew up in campus settings in which the civil rights movement, antidraft efforts, and protests to end the Vietnam War defined the political environment.

But the reality on university campuses today often is quite different as a majority of students and faculty members are convinced that it is not safe even to *hold* controversial views in this setting, of all places.⁵³ One reason is that a culture of free expression—the belief in freedom even for the ideas that we hate—and a willingness to hear and discuss those ideas is being lost. In a one month period in 2014 alone, student protests led Christine Lagarde, the first woman to head the International Monetary Fund, to withdraw as commencement speaker at Smith College, and Condoleezza Rice, former Secretary of State, to cancel as commencement speaker at Rutgers University. Brandeis University, named for the Supreme Court justice who once wrote that the “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth,” cravenly rescinded its offer of an honorary degree to women’s rights advocate Ayaan Hirsi Ali, because of protests over her statements condemning Islam.⁵⁴ In 2016, invitations reportedly were revoked, or

53. ERIC L. DEY ET AL., *ENGAGING DIVERSE VIEWPOINTS: WHAT IS THE CAMPUS CLIMATE FOR PERSPECTIVE-TAKING?* 7 (2010).

54. Richard Perez-Pena, *After Protests, I.M.F. Chief Withdraws as Smith College’s Commencement Speaker*, N.Y. TIMES (May 12, 2014), <https://www.nytimes.com/2014/05/13/us/after-protests-imf-chief-withdraws-as-smith-colleges-commencement-speaker.html>; Emma G. Fitzsimmons, *Condoleezza Rice Backs Out of Rutgers Speech After Student Protests*, N.Y. TIMES (May 3, 2014), <https://www.nytimes.com/2014/05/04/nyregion/rice-backs-out-of-rutgers-speech-after-student-protests.html>; Richard Perez-Pena & Tanzina Vega, *Brandeis Cancels Plan to Give Honorary Degree to Ayaan Hirsi Ali, a Critic of Islam*, N.Y. TIMES (Apr. 8, 2014), <https://www.nytimes.com/2014/04/09/us/brandeis-cancels-plan-to-give-honorary-degree-to-ayaan-hirsi-ali-a-critic-of-islam.html>.

attempts made to block speakers, at forty-three American universities. This is a seven-fold increase from the number of such incidents reported in 2000.⁵⁵

By 2017, mere denunciation of controversial speakers was replaced on some campuses by violent mob action that caused speeches to be cancelled. At Berkeley—ironically the birthplace of the student Free Speech Movement in the early 1960s—masked demonstrators shattered windows and set fires to block the appearance of the confrontationally conservative former Breitbart News editor Milo Yiannopoulos.⁵⁶ Several weeks later, angry students at Middlebury College disrupted a presentation by conservative sociologist Charles Murray and gave chase to Murray and Professor Allison Stanger, the faculty interlocutor of the event, as they tried to leave campus. Professor Stanger received a concussion in the scuffle and ended up in a neck brace. In the ensuing weeks, violence and threats of violence led campus officials to cancel speakers at Auburn University, Claremont McKenna College, and (again) Berkeley.⁵⁷ In a couple of the cases, speeches were rescheduled because of a court order and/or the glare of bad press. Clearly, something odd and disturbing is happening on U.S. college campuses.

One reason for this cultural shift is that expression on campus is becoming more tightly regulated. In many cases, this is based on the theory that no one should ever be subjected to words or ideas that might offend. The locations at universities where students may express their views freely (and without advance approval from administrators) are becoming tightly circumscribed and often relegated to tiny, out-of-the-way locations. These restricted areas are ironically called “free speech zones.” And the regulation of potentially offensive speech is not called censorship at our universities. Heavens, no; that would be wrong. Rather, under various types of campus policies, such language is prohibited as “verbal conduct” or “harassment,” as if the change in terminology could hide the fact that the rules are designed to restrict speech.

55. Alex Morey, *Campus Disinvitations Set Record in 2016*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Dec. 20, 2016), <https://www.thefire.org/campus-disinvitations-set-record-in-2016/>; see *Pomp and Circumstances: Booted Speakers Raise Academic Concerns*, NBC NEWS (May 2, 2014), <https://www.nbcnews.com/news/education/pomp-circumstances-booted-speakers-raise-academic-concerns-n90141>.

56. Lucy Pasha-Robinson, *Berkeley Cancels Milo Yiannopoulos Speech After Violent Protests Erupt*, INDEPENDENT (Feb. 2, 2017), <http://www.independent.co.uk/news/world/americas/uc-berkeley-cancels-milo-yiannopoulos-speech-after-violent-protests-erupt-a7559056.html>.

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

Of course, one thing that has not changed on college campuses is the capacity for rationalization. Scholar Stanley Fish thus defended censorship in his essay, “There’s no Such Thing as Free Speech, and it’s a Good Thing, Too,” in which he embraced the notion that those who are clearly right ought to be able to impose their collective will and silence the other side. He dismissed talk of the value of free expression for its own sake as an “empty piety” and suggested that the debate over the protection of speech has always been about promoting messages that one side wants heard and regulating ideas they want silenced. And he is fine with that because, after all, everybody does it. Or, more fundamentally, he is fine with it because, in his view, all First Amendment arguments amount to nothing more than a contest of opposing political wills. Thus, from his perspective, public universities should be able to impose speech codes on their students and the government should be able to prohibit “hate speech” (however one might define that nebulous concept).⁵⁸ That is, censorship is good, if done for the “right” reasons or by the “right” people.

But then, everyone has their reasons, don’t they? Still, one might hope that a robust defense of censorship would be more intellectually satisfying than the rationalization of Nixon loyalists to the abuses of Watergate—the claim that most politicians engage in dirty tricks anyway. Ultimately, Professor Fish tips his hand to show that he is caught up in the censor’s dilemma when he complains about the unfairness of the First Amendment as the ultimate trump card. He scowls that “in our legal culture as it is now constituted, if one yells ‘free speech’ in a crowded courtroom and makes it stick, the case is over.”⁵⁹ In this view, First Amendment “values” should never trump political values since there is no such thing as a free speech “value” in the first place. Freedom’s just another word for nothing left to lose, right?

The defensiveness evident in this position is nowhere to be found in the writings of Herbert Marcuse, the Frankfurt School philosopher of the mid-twentieth century who championed political repression to advance truth as he saw it. Marcuse is to political discourse what Anthony Comstock was to cultural purity. Comstock was on a mission from god to wipe out all sources of lust and impiety; Marcuse argued the necessity of “conditioning” (that is, restricting) political argument so that the people would be capable of understanding the real truth. To do so would require the government to abandon its traditional impartiality toward political ideas so that society

58. STANLEY FISH, *THERE’S NO SUCH THING AS FREE SPEECH, AND IT’S A GOOD THING, TOO* 102–133 (1990).

59. *Id.* at 105.

could be freed from “the prevailing indoctrination.” That is, to permit the people to be autonomous and think freely “they would have to get information slanted in the opposite direction.”⁶⁰

What do these abstractions mean in practice? In his classic 1965 essay, “Repressive Tolerance,” Marcuse acknowledged that to establish true democracy “may require apparently undemocratic means.” This would mean restricting the rights of speech and assembly for “groups and movements which promote aggressive policies, armament, chauvinism, discrimination on the grounds of race and religion, or which oppose the extension of public services, social security, medical care, etc.” As he put it, “the restoration of freedom of thought may necessitate new and rigid restrictions on teachings and practices in the educational institutions which, by their methods and concepts, serve to enclose the mind within the established universe of discourse and behavior—thereby precluding a priori a rational evaluation of the alternatives.” The “restoration of freedom of thought” would also require censorship of “scientific research in the interest of deadly ‘deterrents,’ of abnormal human endurance under inhuman conditions, etc.” In this view, “liberating tolerance” means “intolerance against movements from the Right and toleration of movements from the Left.”⁶¹

As Marcuse put it, “tolerance cannot be indiscriminate and equal with respect to the contents of expression” and “it cannot protect false words and wrong deeds” that “contradict and counteract the possibilities of liberation.” In short, to guarantee the blessings of liberty “certain things cannot be said, certain ideas cannot be expressed, certain policies cannot be proposed, certain behavior cannot be permitted without making tolerance an instrument for the continuation of servitude.”⁶²

Who is to be the arbiter of this system of enforced truth? According to Marcuse there is only “one logical answer” regarding who is qualified “to make all of these distinctions, definitions, [and] identifications for the society as a whole”—it is “the democratic educational dictatorship of free men.”⁶³ However, in a society currently governed by the power elite, indoctrination, and capitalism, those qualified to identify and enforce the right ideas “would be a small number indeed.” Somehow, this core group of the intelligentsia would have to break “the tyranny of public opinion and its

60. HERBERT MARCUSE, *Repressive Tolerance* in R. PAUL ET AL., *A CRITIQUE OF PURE TOLERANCE* 95–137 (1969).

61. MARCUSE, *supra* note 60, at 109.

62. MARCUSE, *supra* note 60, at 109.

63. MARCUSE, *supra* note 60, at 109.

makers in the closed society” by such means as “cancellation of the liberal creed of free and equal discussion.”⁶⁴

Let’s ponder the above statement for a second. What does it say about a person if, when asked the question, “who should be the guardians of truth and the final censors for all social discourse?” the answer comes back: “Me and a few guys just like me?” To state Marcuse’s argument is to discredit it.

Unfortunately, these notions have gained additional adherents as college campuses have become polarized battlegrounds between the Left and Right. And such demands to silence unwelcome speech are not limited to the academics on today’s college campuses, where denunciations of speakers and calls to censorship are as likely (if not more so) to emanate from students as from faculty. The “disinvitations” of commencement speakers usually happen because of protests from students, not administrators or faculty, as the willingness to even hear contrary points of view—much less engage in debate—has dissipated on campus.

This trend was pointedly underscored in late 2015, as student protests around the country exhibited naked hostility to freedom of expression. In an exchange captured on video that went viral, students at Yale University confronted Professor Nicholas Christakis, whose wife, Erika Christakis, a fellow professor, had written an email to students calling for tolerance of other students who might wear “provocative” Halloween costumes. When Christakis observed that “other people have rights, too,” a student exploded at him: “Be quiet! It is not about creating an intellectual space!” Christakis’s calm response that he disagreed with her position was met with the following diatribe: “Why the fuck did you accept the position [as master of a residential college]? Who the fuck hired you? You should step down.”⁶⁵ Erika Christakis resigned from Yale, and about a year later, Nicholas stepped down from his administrative position as master of a residential college. However, Nicholas retained his teaching position.

Meanwhile, at the University of Missouri, a student photographer who was covering antiracism protests was physically ejected from a “safe area” where student protesters had gathered. An assistant professor of communications named Melissa Click demanded that the photographer leave the area, tried to grab his camera, and called out for “some muscle” to make it so. Like the confrontation at Yale, her deplorable actions were distributed

64. MARCUSE, *supra* note 60, at 109.

65. Blake Neff, *Yale Student Shrieks at Prof for Denying Her ‘Safe Space,’* DAILY CALLER (Nov. 6, 2015), <http://dailycaller.com/2015/11/06/yale-student-shrieks-at-prof-for-denying-her-safe-space-video/>.

widely on YouTube.⁶⁶ Since then, there have been an increasing number of full-throated demands for censorship on a growing number of college campuses. Such unapologetic endorsements of the need to suppress contrary ideas seem to contradict the premise that censors in a free society are embattled and defensive. Are these the exceptions that prove the rule?

To begin with, exceptions do not prove rules, they test them. In this instance, Marcuse's concept of "repressive tolerance" merely illustrates the rule. Censorship is wrong, the argument goes, except when it is necessary to put down ideas or institutions that would limit human liberation. Using this logic, censorship by the correct people promotes "freedom of thought," while unfettered expression is a tool of suppression. So, presto change-o, censorship is not really *censorship* when employed by, as Marcuse would have it, "the democratic educational dictatorship of free men." It is merely using the tools of censorship to battle the larger repressions of the established order. And shouting down a campus speaker with unwelcome ideas is not the heckler's veto; it is an act of liberation that frees up the voices of the "oppressed."

So, we are to free the mind through censorship?

Somewhere, Big Brother is beaming with pride. The message of the censor is clear and unmistakable: I, or we, know the truth, and must control the ideas or influences to which you may become exposed, to protect you from falling into error, or even sin. Truth may be revealed by whispers from god, by political theory, by popular vote, or by social science, but once it has been determined, the time for debate is over. Anthony Comstock did not invent censorship, but his DNA may be found in the genetic code of every would-be censor who walks the earth.

The Law Evolves

This notion clashes headlong into the American ethos of free expression (which generally tells the government to mind its own god damn business), and along with it, the development of First Amendment law over most of the past century. When initially exposed to that history, students often are surprised to learn that the seemingly clear language of the First Amendment, which provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press," was not found to protect free expression in any

66. Kyung Lah, *Missouri Media Professor Blocks Journalists*, CNN (Oct. 3, 2017), <http://www.cnn.com/videos/us/2015/11/11/missouri-professor-blocks-journalists-lah-nr.cnn/video/playlists/univ-of-missouri-president-resigns-after-race-protests/>.

Supreme Court case until 1931—one hundred and forty years after the Bill of Rights was ratified.⁶⁷

Before then, the Court was not quite sure what to make of the First Amendment. Among other things, it had allowed the deportation of “anarchists,” permitted the Post Office to exclude certain publications from the U.S. mail, upheld a state flag “misuse” law, as well as a law that prohibited any publication that tended to incite crime or disrespect for the law.⁶⁸ The Court often avoided dealing with First Amendment controversies by ruling that free speech issues were outside its jurisdiction, or by categorizing the behavior at issue as something other than “speech.” In a 1911 case, for example, it held that union advocacy of a boycott was a “verbal act,” not protected expression.⁶⁹

But the Court’s ability to sidestep First Amendment questions came to an abrupt end with America’s entry into World War I and Congress’ passing of the Espionage Act. Among other things, that 1917 law made it a crime for anyone to willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the United States’ military or naval forces. Its sweeping prohibitions on dissent begged courts to answer the question of just what it means for the Constitution to command that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” And if the law’s language were not enough, the sheer number of prosecutions—nearly 2,000 during the Great War alone—made a Supreme Court confrontation inevitable.⁷⁰

The Court did not have long to wait. In 1919, it upheld the convictions of members of the Socialist Party, under the Espionage Act, for circulating anti-draft pamphlets.⁷¹ This was followed in quick succession by decisions upholding a conviction of a newspaper publisher for articles that criticized the war effort,⁷² and for a speech by socialist (and presidential candidate) Eugene Debs that purportedly obstructed the military draft.⁷³ There were many others.⁷⁴

67. U.S. CONST. amend. I; *see generally* *Stromberg v. California*, 283 U.S. 359 (1931); *Near v. Minnesota*, 283 U.S. 697 (1931).

68. *See generally* *Fox v. Washington*, 236 U.S. 273 (1915); *Patterson v. Colorado*, 205 U.S. 454 (1907); *Halter v. Nebraska*, 205 U.S. 34 (1907); *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904); *Ex parte Rapier*, 143 U.S. 110 (1892); *Ex parte Jackson*, 96 U.S. 727 (1878).

69. *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 439 (1911).

70. ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 3 (1941).

71. *Schenck v. United States*, 249 U.S. 47 (1919).

72. *Frohwerk v. United States*, 249 U.S. 204 (1919).

73. *Debs v. United States*, 249 U.S. 211 (1919).

74. *See generally* CHAFEE, *supra* note 70, at 36–107.

But a break of sorts came in a case upholding Espionage Act convictions (yet again) for the circulation of leaflets by socialists questioning the war. Although it would be another dozen years before the Court would strike down a law restricting freedom of expression, the first crack in the wall came with Chief Justice Oliver Wendell Holmes' powerful dissent in the 1919 case *Abrams v. United States*.⁷⁵ Holmes was reconsidering his position on the constitutionality of the Espionage Act even though he had authored three opinions upholding convictions under the Act just months earlier. Now, in the fourth case, he wrote that "Congress certainly cannot forbid all effort to change the mind of the country," much less criminalize "publishing of a silly leaflet by an unknown man." But Holmes's main argument was not based on the practical consideration that speech should be allowed because it is impotent and harmless. Quite the contrary, he maintained that we must be "eternally vigilant against attempts to check the expression of opinions we loathe and believe to be fraught with death" unless "an immediate check is required to save the country."⁷⁶

In reaching this conclusion, the Chief Justice directly addressed the creed of the censor: "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition."⁷⁷ But he added, "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."⁷⁸

This notion of a marketplace of ideas, Holmes posited, "is the theory of our Constitution."⁷⁹ He cautioned that "[i]t is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."⁸⁰ From this basic premise that flowed from Holmes's pen in 1919, First Amendment law evolved throughout the twentieth century.

75. *Abrams v. United States*, 250 U.S. 616 (1919).

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

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

Because legal doctrine is fashioned in this process of case-by-case adjudication, with each decision drawing on or distinguishing the reasoning of prior rulings, First Amendment law reflects the times in which it is crafted. Just as an archeologist may gain a better understanding of modern society by studying the prior civilizations on which it is built, those who want to grasp the American imperative of free expression—and our innate aversion to censorship as a people—should examine the many circumstances in which these principles were developed and applied.

Disputes involving radical politics as well as labor disputes underlie many of the cases the Supreme Court confronted in the 1930s and 1940s. The rights of minority religious groups like the Jehovah's Witnesses gave rise to a series of cases through the 1940s and 1950s. During this period and continuing into the 1960s, the Red Scare and McCarthyism generated numerous cases involving academic freedom, loyalty oaths, and the general right to question political orthodoxy. The cultural and political upheavals of the 1950s through the 1970s led to a series of landmark cases that set the standards for doctrines involving defamation, public protest, and obscenity. In this sense, the development of the law of free speech is intertwined with the rise and fall of the Cold War, the Civil Rights Movement, anti-war demonstrations, and general cultural changes. In more recent years, cases have extended legal protections for commercial speech and have subjected political campaign regulations to constitutional scrutiny.

It has been an evolutionary process, and that evolution has trended toward greater levels of tolerance for—and legal protection of—divergent expression. And it is a level of tolerance that tends to mirror what society is prepared to accept. There are exceptions, of course, since evolution generally does not progress in a straight line. And it often takes years—and sometimes decades—for courts to catch up with the culture.

But the interconnected nature of legal and social attitudes toward free expression was well articulated by Justice Anthony Kennedy in a 2000 case:

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 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. 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.⁸¹

This growing level of tolerance for free expression, and by extension, an inherent distaste for arbitrary authority, means that many current battles over free expression are being fought along the fringes of the culture war, and involve issues that form the fault lines in our polarized society. Current cases ask whether some types of expression are simply too offensive to merit the protection of the Constitution or too trivial to qualify for a First Amendment shield. They reframe the question posed by Chief Justice Holmes in 1919—whether “enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper.”⁸²

A Bridge Too Far?

In recent years the Supreme Court has held that the First Amendment protects the hateful and delusional rantings of the Westboro Baptist Church.⁸³ Additionally, the Court struck down a federal law that prohibited distasteful “crush videos” that cater to a small number of people with cruel sexual fetishes,⁸⁴ as well as a federal law that criminalized lying about having earned military honors.⁸⁵ The Court also has held that the First Amendment prohibits states from regulating violence-themed video games for the important purpose of protecting our children from being desensitized (or worse) by gory imagery.⁸⁶ Has the Supreme Court gone too far?

Some think so. The Freedom Forum’s First Amendment Center has conducted an annual survey since 1997 of American attitudes of the First Amendment. The resulting “State of the First Amendment” report addresses various issues, including topics that happen to be in vogue in a given period. But one question that has remained constant from the beginning asks whether the First Amendment “goes too far in the rights it guarantees.” The answers given to that question often depend on current events and on the issues that concern the respondents most at the time of the survey. In the first report following the terrorist attacks of September 2001, for example, almost half

81. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 818 (2000).

82. *Abrams*, 250 U.S. at 629.

83. *Snyder v. Phelps*, 562 U.S. 443 (2011).

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

85. *United States v. Alvarez*, 567 U.S. 709 (2012).

86. *Brown v. Ent. Merch. Ass’n*, 564 U.S. 786 (2011).

of those surveyed—forty-nine percent—agreed with the statement that the First Amendment goes too far.⁸⁷

This is not unexpected. Notwithstanding Benjamin Franklin's sage maxim that those who would "give up essential liberty, to purchase a little temporary security, deserve neither liberty nor safety,"⁸⁸ it has been our experience as a nation that times of great peril put significant stress on our commitment to the liberties for which the country was founded. Just ask the Japanese Americans who sat out World War II in what we euphemistically called "internment camps."

But it says a great deal that even in the shadow of 9/11, most Americans—if only a bare majority—believed that the First Amendment does *not* go too far in the rights it protects. In years not marked by a national crisis, the solid majority of Americans disagree with the statement that the First Amendment's protections are excessive. The average, over twenty years of surveys, was that slightly less than twenty-seven percent responded that the First Amendment provides too much freedom, which means about three-quarters of Americans are comfortable with broad legal protections for expression—including potentially dangerous speech. This overall finding endures even in times of great political stress. After one of the most divisive years in American history, the 2017 survey found that sixty-nine percent of respondents disagreed with the statement "the First Amendment goes too far."⁸⁹ And in some years, like 2012, only thirteen percent said the First Amendment goes too far.⁹⁰

Of course, public opinion polls have their limits. What, exactly, do they measure? According to the survey results, most people cannot name the five freedoms protected by the First Amendment—freedom of religion, freedom of speech, freedom of the press, freedom of assembly, and freedom to petition the government. The Freedom Forum regularly finds that a sizeable minority of the respondents, ranging from twenty-nine percent to forty percent, cannot name *a single one* of the rights the First Amendment guarantees. Most are aware, however, that freedom of speech is constitutionally protected. But this result puts an interesting spin on the question of whether the First Amendment goes too far. How can a person believe that a constitutional guarantee provides "too much" protection if he doesn't know the subject it protects? "Too much" of what? The only reason

87. NEWSEUM INSTITUTE, FIRST AMENDMENT CENTER, THE STATE OF THE FIRST AMENDMENT 2002 (2002).

88. Benjamin Franklin, Reply to the Governor (Nov. 11, 1755).

89. NEWSEUM INSTITUTE, FIRST AMENDMENT CENTER, THE STATE OF THE FIRST AMENDMENT 2017 11 (2017).

90. *Id.*

the answer to the overall question is intelligible at all is because the respondents are read the text of the First Amendment before being asked to opine on whether it provides too much freedom.

Before succumbing to despair over the overall state of ignorance about some of our most basic rights as Americans, it is useful to keep in mind that people live their lives based on general understandings of pretty much everything, from nutrition to traffic laws. Most people are not constitutional experts, nor need they be in order to be good citizens. And in this context, the average person's *general* reactions based on *general* understandings of constitutional rights are meaningful. Perhaps it is more accurate to think of what is being measured as an instinct rather than an understanding, since it is not based on a deep knowledge of the subject matter. But the upshot of the Freedom Forum "State of the First Amendment" surveys is a confirmation that most Americans instinctively support freedom of expression.

Naturally, people are most enthusiastic about free speech when it comes to views they support, or outraged about censorship when their side is silenced or suppressed. That's just human nature. But the ability to believe in free expression as a matter of principle even when it shields ideas and opinions we despise is ingrained in the American psyche. That basic belief prevails even in times of great peril. This is not to say that this commitment to freedom cannot be challenged by appeals from opportunistic politicians or morals entrepreneurs who try to exploit ignorance or fear to peddle simple answers to complex problems. This may provide an explanation for why the survey results fluctuate from year to year. Some may be swayed by calls for censorship in reaction to a notorious event or message in a given year. But by and large, and over the long haul, Americans support freedom—which is why censors have an uphill battle in this country.

The Triumph of Politics

The same cannot be said of those who might be counted among "the democratic educational dictatorship of free men" as Marcuse put it. Support for the principles of free expression has waned among certain academics—including some who fancy themselves experts on free expression—as the subjects to be protected veered away from issues traditionally associated with progressive politics. Liberal academics generally could be counted on to provide a full-throated defense of free speech when it came to supporting the labor movement, the struggle for civil rights, battles over academic freedom, opposing restrictions on obscenity, defending anti-war protests, and the like. During this period, from the 1930s through the 1970s, liberals primarily supported free expression claims while conservative intellectuals generally were far more skeptical. But this began to change in the 1980s, as

some feminists began to advocate restrictions on pornography as “civil rights” measures and college administrators started adopting anti-“harassment” measures and various types of “speech codes.” Shortly thereafter, political conservatives began to perceive legal threats to a variety of their messages, and they found that they had a First Amendment shield as well. As courts grew increasingly receptive to their arguments, it was now the liberals—particularly within the legal academy—who began to claim that the First Amendment had gone “too far.”

Some began to complain about the First Amendment’s “dark side,” and openly asked “what’s wrong with the First Amendment?” Cornell University Law Professor and First Amendment scholar Steven Shiffrin has criticized recent Supreme Court decisions, claiming that the main problem with the First Amendment “is that it overprotects speech.”⁹¹ He claims that “Americans are afflicted with a form of First Amendment idolatry” and that both liberal and conservative judges “have turned free speech into a fetish.”⁹²

Specifically, Shiffrin decries decisions of the Roberts Court striking down prohibitions on “crush videos,” lying about military honors, and the sale or rental of violence-themed video games to minors (among others) as “loathsome,” representing “a form of First Amendment stupidity.” He has argued that such decisions represent “an indefensible form of absolutism” and that the Court’s recent First Amendment jurisprudence has become “staggeringly strict” in the standards it applies to government actions. Shiffrin suggests that, rather than impose strict First Amendment scrutiny to restrictions on expression, courts should instead engage in an ad hoc balancing of interests and should feel free to expand the categories of speech that the Constitution does not protect. Too much protection, he suggests, represents the “sin” of “First Amendment idolatry” that is “at odds with human dignity.”

So, contrary to current Supreme Court doctrine, Shiffrin would crack down on pretrial publicity, forbid the publication of information on rape victims, prohibit “crush videos” and violent video games (at least as to minors), restrict pornography (however that slippery concept might be defined), punish racist speech, prohibit demonstrations near funerals, limit commercial speech that substitutes “consumer pleasure for human flourishing,” and—of course—limit political speech by corporations. There simply would not be enough hours in the day for the speech police to do their jobs.

91. Steven H. Shiffrin, *The Dark Side of the First Amendment*, 61 UCLA L. REV. 1480 (2014).

92. STEVEN H. SHIFFRIN, WHAT’S WRONG WITH THE FIRST AMENDMENT (2016).

Shiffrin is far from alone among contemporary (mostly progressive) First Amendment scholars. Professor Burt Neuborne of New York University Law School takes much the same position as Shiffrin (albeit more temperate language), arguing that the Supreme Court has elevated “useless or harmful speech to undeserved heights of protection” while downplaying or ignoring democratic values. Neuborne maintains that liberals were fully aligned with strong First Amendment protections through the mid-twentieth century, when they believed that doing so promoted largely progressive causes—what he calls “the First Amendment era of good feelings.” However, once the Court began extending the same protections to “conservative” speakers as well, “some progressives began to suspect they had made a bad First Amendment bargain.”⁹³ Professors Jane and Derek Baumbauer, critiquing this trend, wrote tongue-in-cheek that “[a]ny liberal who still loves the First Amendment is a fool,” as they catalogued a growing number of American academics who believe the Supreme Court’s hostility to speech regulation has ushered in a free speech *Lochnerism* that has engendered a “‘corporate takeover’ of the First Amendment” and the sacrifice of other values, including deliberative democracy, personal choice, and the marketplace of ideas.⁹⁴

It is not the purpose of this Article to plunge into the debate over academic theories of the First Amendment. Suffice to say that the various scholarly complaints about the First Amendment would be easier to credit if the resulting views of “free expression” deviated materially—if at all—from the political outlook of the respective theorists. Or, as the Bambauers put it, “[t]hese scholarly critiques are . . . guilty of the same instrumentalism of which they accuse the Court.”⁹⁵ Their agenda is the mirror image of the alleged new *Lochnerism*. If modern free speech scholarship is any indication, free speech theory is bereft of principle, and its optimal scope depends entirely on one’s political leanings.” So, just as Stanley Fish wrote, “There’s no such thing as free speech, and it’s a good thing, too.” Actually, it is a practical illustration of the truism that most everything politics touches it diminishes or destroys—and that is particularly true of constitutional theory.

In Denial

Contrary to the thesis of this Article, current trends in academia suggest there is no longer any reticence about censorship, particularly among those

93. BURT NEUBORNE, *MADISON’S MUSIC* 106–116 (2015).

94. Jane & Derek Baumbauer, *Information Libertarianism*, 105 CALIF. L. REV. 335, 337 (2017).

95. *Id.* at 338.

who embrace the notion that the First Amendment does indeed go “too far.” But critics like those just mentioned, in the words of the Bard, doth “protest too much” about current protections for speech. Condemnatory rhetoric about First Amendment “stupidity” or “idolatry,” and talk of constitutional “sin,” reveal a fundamental defensiveness in the sense that such scholars evidently believe the best defense is a strong offense. In other words, although a number of scholars advocate restrictions on a broad range of speech, they nevertheless seek to avoid the mantle of “censor” by claiming the Supreme Court has defined the concept of censorship too broadly. *That’s* not speech, they sniff, or, at least, not the kind of speech the Constitution’s Framers had in mind. Who’s a censor? *I’m* not a censor.

Or, take the arguments of antifascist activists (now, with the new, improved label *antifa!*) that they may justifiably silence their political opponents using violence if necessary. As one defender of this position puts it, “[i]nstead of privileging allegedly ‘neutral’ universal rights, antifascists prioritize the political project of destroying fascism and protecting the vulnerable regardless of whether their actions are considered violations of the free speech of fascists or not.”⁹⁶ But this conclusion is drawn from a hodge-podge of arguments that speech isn’t truly free under the current system, that the fascists (or their defenders) would restrict far more speech than they would, and they have a moral obligation to suppress speech they know to be wrong. Thus, far from defending censorship, the claim is made that “the antiauthoritarian position held by the majority of *antifa* is actually *far more pro-free speech* than that put forward by liberals.”⁹⁷ In short, it adds up to nothing more than bargain-basement Marcuse and Stanley Fish and with the same conclusion—that freedom may be achieved through suppression.

In the end, they really are no different than Anthony Comstock, the nation’s first professional anti-vice crusader. His career set the standard, and for many, the rhetorical tone, for those seeking to condemn various forms of speech. Modern advocates of speech restrictions may target other types of expression based on their own moral certainties, but they all are playing the same game. This story has played out again and again in the successive moral panics that have fueled drives to censor dime novels, movies, comic books, jazz music and rock & roll. It supports a regulatory regime that restricts freedom of speech on radio and television, and the continuing efforts to extend the same limitations on the Internet, video games, and other communications innovations. It is manifest in the various speech restrictions

96. MARK BRAY, *ANTIFA: THE ANTI-FASCIST HANDBOOK* 144 (2017).

97. *Id.* at 148.

in American schools—particularly on college campuses—where those who make the rules have embraced the bizarre notion that there is a right never to be offended. Additionally, it finds voice among those who claim that the First Amendment protects some sort of collective “right,” whereby community standards or the public interest may supplant individual rights. Although all who follow in Comstock’s outsized footsteps try to claim moral superiority—characterizing the speech they would restrict as distasteful, trivial, valueless, or downright harmful—the plain fact is that the censor in a free society never has the moral high ground. The censor’s dilemma is that somewhere, down deep inside, he—or she—is painfully aware of it.