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THE FREE SPEECH ISSUE

> Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> – Justice Robert Jackson, 1943

FOREWORD

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Few works on the First Amendment have explored the relation between free speech and certainty. While this relationship is inherent in much free speech theory and doctrine, its treatment has nonetheless been rather opaque. This Essay teases out—philosophically, textually, and operationally—the significance of that relationship and what it means for our First Amendment jurisprudence. This Essay 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. This 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. At the philosophical level, a risk-free First Amendment is a contradiction while at the operational level it is a formula for suppression. 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.

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Speech on America's university and college campuses has been a long-time issue, from classrooms to open spaces, from efforts to protect students to approaches toward invited speakers. These issues especially surfaced in the early twenty-first century, and predominantly in response to invited speakers. Several incidents in early 2017—some involving violent protests—moved these issues into an analytical spotlight. This Article examines efforts to silence controversial on-campus speakers. It does so first through the lens of free speech doctrine and how it addresses this development. Second, this Article seeks to explain this increasing intolerance for the expression of ideas: an escalating crisis in confidence in American institutions and democratic principles fueled by contemporary shifts in political and social landscapes. The Article concludes by offering suggestions aimed at enhancing a principal purpose of higher education—knowledge creation through the exchange of ideas.

Certainty and the Censor's Dilemma
http://bit.ly/2jwBjvO
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In a free society the censor never has the moral high ground. This fact rests uneasily with one of the primary qualities of the censor—certainty. It's right there in the job description. As Justice Anthony Kennedy has written, "[s]elf-assurance has always been the hallmark of a censor." Chief Justice Oliver Wendell Holmes captured the ethos of censorship nearly a century ago in his famous *Abrams v. United States* dissent: "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." Censors through the ages have thus acted to suppress expression they hate based on certainty borne of whispers from their various gods,

appeals to ideological purity or political orthodoxy, and reliance on social science. This censorial impulse is not confined by party or creed; it truly is part of a vast bipartisan conspiracy. But the self-confidence of the censor has been shattered by the antiauthoritarian instincts of most Americans and an evolving First Amendment jurisprudence through the twentieth century denying government power to serve as the arbiter of truth or morality. This has forced would-be censors to cloak their endeavors in academic doubletalk and political euphemism, thus acknowledging their own illegitimacy. This is the censor's dilemma, and it is why defensiveness pervades their occupation. Those who engage in or support the business of censorship have an inferiority complex for a reason—at some level they understand their enterprise is fundamentally un-American.

Clash of the First and Second Amendments: Proposed Regulation of Armed Protests
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The United States has strayed far from its traditional use of citizen militias to demand freedom from the British and has taken a deep dive into a practice of flaunting weapons at political protests as a display of bravado to provoke fear, chill opposition, and reap media attention. The recent "Unite The Right" rally in Charlottesville, Virginia, and its resulting violent pandemonium brought the issue of open carry protests to the forefront of public discourse. Armed protesters cling to their First and Second Amendment rights as shields to justify the semiautomatic firearms slung about their backs, but is this faith misplaced? This Article argues that government regulations of armed protests are a necessary and constitutionally permissible avenue that state legislatures should explore. First, this Article argues that, except for very rare circumstances, open carry during a protest does not contain sufficient elements of expression to constitute symbolic speech. However, even assuming that open carry during a protest does qualify as symbolic expression to bring it under constitutional protection, regulation of that behavior is wholly consistent with the First Amendment under three different doctrinal justifications. Second, this Article argues that the Second Amendment offers no protection to armed protesters because the open carry of firearms during a protest is not a historical right protected by the Second Amendment. Even if the display of a firearm during a protest demonstration fell within the traditional understandings of the Second Amendment, a reasonable regulation would satisfy constitutional scrutiny.

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NOTE

Reviving the Voting Rights Act Post-*Shelby County*: A New Standard for Vote Denial and Voter ID Law Analysis Under Section Two
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Since the United States Supreme Court struck down section 4(b) of the Voting Rights Act ("VRA") and effectively disabled its section 5 enforcement provision in *Shelby County v. Holder*, States across the country have passed and updated election laws with far less accountability than during the pre-*Shelby* era. Among the most controversial are "voter ID" laws, which require voters to present identification before casting a ballot. Prior to 2013, section 5 of the VRA had been used to challenge these laws in federal proceedings in Texas, Florida, South Carolina, and New Hampshire. The combined decisions of *Shelby* and *Crawford v. Marion County Elections Board*, however, forced challengers to voter ID laws to shift their litigation strategy to argue protections under section 2 of the VRA, where an uncertain standard has since led to inconsistent and problematic litigation results. Reports of vote denial and suppression in critical states during the 2016 presidential election make it imperative to articulate a new, clear, and workable standard for evaluating voter ID laws under section 2 of the VRA. This Note confronts this challenge by proposing a combination of the two-step test articulated by the Sixth Circuit in *Ohio State Conference of NAACP v. Husted*, Jani Nelson's causal context analysis for introducing evidence of implicit bias, and Daniel Tokaji's third step allowing States to show their interests outweigh burdens on voting. This proposed judicial test would provide a workable standard offering both sides ample opportunity to prove their case while simultaneously protecting voters from suppression efforts.

Daggers (†) in footnotes indicate unconfirmed sources or unobtainable page numbers.

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