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AS FREE SPEECH  
AND IT'S A GOOD THING, TOO

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## THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO

Nowadays the First Amendment is the First Refuge of Scoundrels.

—S. Johnson and S. Fish

Lately, many on the liberal and progressive left have been disconcerted to find that words, phrases, and concepts thought to be their property and generative of their politics have been appropriated by the forces of neoconservatism. This is particularly true of the concept of free speech, for in recent years First Amendment rhetoric has been used to justify policies and actions the left finds problematical if not abhorrent: pornography, sexist language, campus hate speech. How has this happened? The answer I shall give in this essay is that abstract concepts like free speech do not have any “natural” content but are filled with whatever content and direction one can manage to put into them. “Free speech” is just the name we give to verbal behavior that serves the substantive agendas we wish to advance; and we give our preferred verbal behaviors *that* name when we can, when we have the power to do so, because in the rhetoric of American life, the label “free speech” is the one you want your favorites to wear. Free speech, in short, is not an independent value but a political prize, and if that prize has been captured by a politics opposed to yours, it can no longer be invoked in ways that further your purposes, for it is now an obstacle to those purposes. This is something that the liberal left has yet to understand, and what follows is an attempt to pry its members loose from a vocabulary that may now be a disservice to them.

Not far from the end of his *Areopagitica*, and after having celebrated

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the virtues of toleration and unregulated publication in passages that find their way into every discussion of free speech and the First Amendment, John Milton catches himself up short and says, of course I didn’t mean Catholics, them we exterminate:

I mean not tolerated popery, and open superstition, which as it extirpates all religious and civil supremacies, so itself should be extirpate . . . that also which is impious or evil absolutely against faith or manners no law can possibly permit that intends not to unlay itself.

Notice that Milton is not simply stipulating a single exception to a rule generally in place; the kinds of utterance that might be regulated and even prohibited on pain of trial and punishment constitute an open set; popery is named only as a particularly perspicuous instance of the advocacy that cannot be tolerated. No doubt there are other forms of speech and action that might be categorized as “open superstitions” or as subversive of piety, faith, and manners, and presumably these too would be candidates for “extirpation.” Nor would Milton think himself culpable for having failed to provide a list of unprotected utterances. The list will fill itself out as utterances are put to the test implied by his formulation: would this form of speech or advocacy, if permitted to flourish, tend to undermine the very purposes for which our society is constituted? One cannot answer this question with respect to a particular utterance in advance of its emergence on the world’s stage; rather, one must wait and ask the question in the full context of its production and (possible) dissemination. It might appear that the result would be ad hoc and unprincipled, but for Milton the principle inheres in the core values in whose name individuals of like mind came together in the first place. Those values, which include the search for truth and the promotion of virtue, are capacious enough to accommodate a diversity of views. But at some point—again impossible of advance specification—capaciousness will threaten to become shapelessness, and at that point fidelity to the original values will demand acts of extirpation.

I want to say that all affirmations of freedom of expression are like Milton’s, dependent for their force on an exception that literally carves out the space in which expression can then emerge. I do not mean that expression (saying something) is a realm whose integrity is sometimes compromised by certain restrictions but that restriction, in the form of an underlying articulation of the world that necessarily (if silently) negates alternatively possible articulations, is constitutive of expression. Without restriction, without an inbuilt sense of what it would be meaningless to say or wrong to say, there could be no assertion and no reason for asserting it. The exception to unregulated expression is not a negative restriction but a positive hollowing

out of value—we are for *this*, which means we are against *that*—in relation to which meaningful assertion can then occur. It is in reference to that value—constituted as all values are by an act of exclusion—that some forms of speech will be heard as (quite literally) intolerable. Speech, in short, is never a value in and of itself but is always produced within the precincts of some assumed conception of the good to which it must yield in the event of conflict. When the pinch comes (and sooner or later it will always come) and the institution (be it church, state, or university) is confronted by behavior subversive of its core rationale, it will respond by declaring “of course we mean not tolerated ———, that we extirpate,” not because an exception to a general freedom has suddenly and contradictorily been announced, but because the freedom has never been general and has always been understood against the background of an originary exclusion that gives it meaning.

This is a large thesis, but before tackling it directly I want to buttress my case with another example, taken not from the seventeenth century but from the charter and case law of Canada. Canadian thinking about freedom of expression departs from the line usually taken in the United States in ways that bring that country very close to the *Areopagitica* as I have expounded it. The differences are fully on display in a recent landmark case, *R. v. Keegstra*. James Keegstra was a high school teacher in Alberta who, it was established by evidence, “systematically denigrated Jews and Judaism in his classes.” He described Jews as treacherous, subversive, sadistic, money loving, power hungry, and child killers. He declared them “responsible for depressions, anarchy, chaos, wars and revolution” and required his students “to regurgitate these notions in essays and examinations.” Keegstra was indicted under Section 319(2) of the Criminal Code and convicted. The Court of Appeal reversed, and the Crown appealed to the Supreme Court, which reinstated the lower court’s verdict.

Section 319(2) reads in part, “Every one who, by communicating statements other than in private conversation, willfully promotes hatred against any identifiable group is guilty of . . . an indictable offense and is liable to imprisonment for a term not exceeding two years.” In the United States, this provision of the code would almost certainly be struck down because, under the First Amendment, restrictions on speech are apparently prohibited without qualification. To be sure, the Canadian charter has its own version of the First Amendment, in Section 2(b): “Everyone has the following fundamental freedoms . . . (b) freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication.” But Section 2(b), like every other section of the charter, is qualified by Section 1: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits

prescribed by law as can be demonstrably justified in a free and democratic society.” Or in other words, every right and freedom herein granted can be trumped if its exercise is found to be in conflict with the principles that underwrite the society.

This is what happens in *Keegstra* as the majority finds that Section 319(2) of the Criminal Code does in fact violate the right of freedom of expression guaranteed by the charter but is nevertheless a *permissible* restriction because it accords with the principles proclaimed in Section 1. There is, of course, a dissent that reaches the conclusion that would have been reached by most, if not all, U.S. courts; but even in dissent the minority is faithful to Canadian ways of reasoning. “The question,” it declares, “is always one of balance,” and thus even when a particular infringement of the charter’s Section 2(b) has been declared unconstitutional, as it would have been by the minority, the question remains open with respect to the next case. In the United States the question is presumed closed and can only be pried open by special tools. 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.

Of course, it is not that simple. Despite the apparent absoluteness of the First Amendment, there are any number of ways of getting around it, ways that are known to every student of the law. In general, the preferred strategy is to manipulate the distinction, essential to First Amendment jurisprudence, between speech and action. The distinction is essential because no one would think to frame a First Amendment that began “Congress shall make no law abridging freedom of action,” for that would amount to saying “Congress shall make no law,” which would amount to saying “There shall be no law,” only actions uninhibited and unregulated. If the First Amendment is to make any sense, have any bite, speech must be declared not to be a species of action, or to be a special form of action lacking the aspects of action that cause it to be the object of regulation. The latter strategy is the favored one and usually involves the separation of speech from consequences. This is what Archibald Cox does when he assigns to the First Amendment the job of protecting “expressions separable from conduct harmful to other individuals and the community.” The difficulty of managing this segregation is well known: speech always seems to be crossing the line into action, where it becomes, at least potentially, consequential. In the face of this categorical instability, First Amendment theorists and jurists fashion a distinction within the speech/action distinction: some forms of speech are not really speech because their purpose is to incite violence or because they are, as the court declares in *Chaplinsky v. New Hampshire* (1942), “fighting words,” words “likely to provoke the average person to retaliation, and thereby cause a breach of the peace.”

The trouble with this definition is that it distinguishes not between fighting words and words that remain safely and merely expressive but between words that are provocative to one group (the group that falls under the rubric "average person") and words that might be provocative to other groups, groups of persons not now considered average. And if you ask what words are likely to be provocative to those nonaverage groups, what are likely to be *their* fighting words, the answer is anything and everything, for as Justice Holmes said long ago (in *Gitlow v. New York*), every idea is an incitement to somebody, and since ideas come packaged in sentences, in words, every sentence is potentially, in some situation that might occur tomorrow, a fighting word and therefore a candidate for regulation.

This insight cuts two ways. One could conclude from it that the fighting words exception is a bad idea because there is no way to prevent clever and unscrupulous advocates from shoveling so many forms of speech into the excepted category that the zone of constitutionally protected speech shrinks to nothing and is finally without inhabitants. Or, alternatively, one could conclude that there was never anything in the zone in the first place and that the difficulty of limiting the fighting words exception is merely a particular instance of the general difficulty of separating speech from action. And if one opts for this second conclusion, as I do, then a further conclusion is inescapable: insofar as the point of the First Amendment is to identify speech separable from conduct and from the consequences that come in conduct's wake, there is no such speech and therefore nothing for the First Amendment to protect. Or, to make the point from the other direction, when a court invalidates legislation because it infringes on protected speech, it is not because the speech in question is without consequences but because the consequences have been discounted in relation to a good that is judged to outweigh them. Despite what they say, courts are never in the business of protecting speech per se, "mere" speech (a nonexistent animal); rather, they are in the business of classifying speech (as protected or regulatable) in relation to a value—the health of the republic, the vigor of the economy, the maintenance of the status quo, the undoing of the status quo—that is the true, if unacknowledged, object of their protection.

But if this is the case, a First Amendment purist might reply, why not drop the charade along with the malleable distinctions that make it possible, and declare up front that total freedom of speech is our primary value and trumps anything else, no matter what? The answer is that freedom of expression would only be a primary value if it didn't matter what was said, didn't matter in the sense that no one gave a damn but just liked to hear talk. There are contexts like that, a Hyde Park corner or a call-in talk show where people get to sound off for the sheer fun of it. These, however, are special contexts, artificially bounded spaces designed to assure that talking

is not taken seriously. In ordinary contexts, talk is produced with the goal of trying to move the world in one direction rather than another. In these contexts—the contexts of everyday life—you go to the trouble of asserting that X is Y only because you suspect that some people are wrongly asserting that X is Z or that X doesn't exist. You assert, in short, because you give a damn, not about assertion—as if it were a value in and of itself—but about what your assertion is about. It may seem paradoxical, but free expression could only be a primary value if what you are valuing is the right to make noise; but if you are engaged in some purposive activity in the course of which speech happens to be produced, sooner or later you will come to a point when you decide that some forms of speech do not further but endanger that purpose.

Take the case of universities and colleges. Could it be the purpose of such places to encourage free expression? If the answer were "yes," it would be hard to say why there would be any need for classes, or examinations, or departments, or disciplines, or libraries, since freedom of expression requires nothing but a soapbox or an open telephone line. The very fact of the university's machinery—of the events, rituals, and procedures that fill its calendar—argues for some other, more substantive purpose. In relation to that purpose (which will be realized differently in different kinds of institutions), the flourishing of free expression will in almost all circumstances be an obvious good; but in some circumstances, freedom of expression may pose a threat to that purpose, and at that point it may be necessary to discipline or regulate speech, lest, to paraphrase Milton, the institution sacrifice itself to one of its *accidental* features.

Interestingly enough, the same conclusion is reached (inadvertently) by Congressman Henry Hyde, who is addressing these very issues in a recently offered amendment to Title VI of the Civil Rights Act. The first section of the amendment states its purpose, to protect "the free speech rights of college students" by prohibiting private as well as public educational institutions from "subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech." The second section enumerates the remedies available to students whose speech rights may have been abridged; and the third, which is to my mind the nub of the matter, declares as an exception to the amendment's jurisdiction any "educational institution that is controlled by a religious organization," on the reasoning that the application of the amendment to such institutions "would not be consistent with the religious tenets of such organizations." In effect, what Congressman Hyde is saying is that at the heart of these colleges and universities is a set of beliefs, and it would be wrong to require them to tolerate behavior, including speech behavior, inimical to those beliefs. But insofar as this logic is persuasive, it applies across the board, for all educational institu-

tions rest on some set of beliefs—no institution is “just there” independent of any purpose—and it is hard to see why the rights of an institution to protect and preserve its basic “tenets” should be restricted only to those that are religiously controlled. Read strongly, the third section of the amendment undoes sections one and two—the exception becomes, as it always was, the rule—and points us to a balancing test very much like that employed in Canadian law: given that any college or university is informed by a core rationale, an administrator faced with complaints about offensive speech should ask whether damage to the core would be greater if the speech were tolerated or regulated.

The objection to this line of reasoning is well known and has recently been reformulated by Benno Schmidt, former president of Yale University. According to Schmidt, speech codes on campuses constitute “well intentioned but misguided efforts to give values of community and harmony a higher place than freedom” (*Wall Street Journal*, May 6, 1991). “When the goals of harmony collide with freedom of expression,” he continues, “freedom must be the paramount obligation of an academic community.” The flaw in this logic is on display in the phrase “academic community,” for the phrase recognizes what Schmidt would deny, that expression only occurs in communities—if not in an academic community, then in a shopping mall community or a dinner party community or an airplane ride community or an office community. In these communities and in any others that could be imagined (with the possible exception of a community of major league baseball fans), limitations on speech in relation to a defining and deeply assumed purpose are inseparable from community membership.

Indeed, “limitations” is the wrong word because it suggests that expression, as an activity and a value, has a pure form that is always in danger of being compromised by the urgings of special interest communities; but independently of a community context informed by interest (that is, purpose), expression would be at once inconceivable and unintelligible. Rather than being a value that is threatened by limitations and constraints, expression, in any form worth worrying about, is a *product* of limitations and constraints, of the already-in-place presuppositions that give assertions their very particular point. Indeed, the very act of thinking of something to say (whether or not it is subsequently regulated) is already constrained—rendered impure, and because impure, communicable—by the background context within which the thought takes its shape. (The analysis holds too for “freedom,” which in Schmidt’s vision is an entirely empty concept referring to an urge without direction. But like expression, freedom is a coherent notion only in relation to a goal or good that limits and, by limiting, shapes its exercise.)

Arguments like Schmidt’s only get their purchase by first imagining speech

as occurring in no context whatsoever, and then stripping particular speech acts of the properties conferred on them by contexts. The trick is nicely illustrated when Schmidt urges protection for speech “no matter how obnoxious in content.” “Obnoxious” at once acknowledges the reality of speech-related harms and trivializes them by suggesting that they are *surface* injuries that any large-minded (“liberated and humane”) person should be able to bear. The possibility that speech-related injuries may be grievous and *deeply* wounding is carefully kept out of sight, and because it is kept out of sight, the fiction of a world of weightless verbal exchange can be maintained, at least within the confines of Schmidt’s carefully denatured discourse.

To this Schmidt would no doubt reply, as he does in his essay, that harmful speech should be answered not by regulation but by more speech; but that would make sense only if the effects of speech could be canceled out by additional speech, only if the pain and humiliation caused by racial or religious epithets could be ameliorated by saying something like “So’s your old man.” What Schmidt fails to realize at every level of his argument is that expression is more than a matter of proffering and receiving propositions, that words do work in the world of a kind that cannot be confined to a purely cognitive realm of “mere” ideas.

It could be said, however, that I myself mistake the nature of the work done by freely tolerated speech because I am too focused on short-run outcomes and fail to understand that the good effects of speech will be realized, not in the present, but in a future whose emergence regulation could only inhibit. This line of reasoning would also weaken one of my key points, that speech in and of itself cannot be a value and is only worth worrying about if it is in the service of something with which it cannot be identical. My mistake, one could argue, is to equate the something in whose service speech is with some locally espoused value (e.g., the end of racism, the empowerment of disadvantaged minorities), whereas in fact we should think of that something as a now-inchoate shape that will be given firm lines only by time’s pencil. That is why the shape now receives such indeterminate characterizations (e.g., true self-fulfillment, a more perfect polity, a more capable citizenry, a less partial truth); we cannot now know it, and therefore we must not prematurely fix it in ways that will bind successive generations to error.

This forward-looking view of what the First Amendment protects has a great appeal, in part because it continues in a secular form the Puritan celebration of millenarian hopes, but it imposes a requirement so severe that one would expect more justification for it than is usually provided. The requirement is that we endure whatever pain racist and hate speech inflicts for the sake of a future whose emergence we can only take on faith. In a

specifically religious vision like Milton's, this makes perfect sense (it is indeed the whole of Christianity), but in the context of a politics that puts its trust in the world and not in the Holy Spirit, it raises more questions than it answers and could be seen as the second of two strategies designed to delegitimize the complaints of victimized groups. The first strategy, as I have noted, is to define speech in such a way as to render it inconsequential (on the model of "sticks and stones will break my bones, but . . ."); the second strategy is to acknowledge the (often grievous) consequences of speech but declare that we must suffer them in the name of something that cannot be named. The two strategies are denials from slightly different directions of the *present* effects of racist speech; one confines those effects to a closed and safe realm of pure mental activity; the other imagines the effects of speech spilling over into the world but only in an ever-receding future for whose sake we must forever defer taking action.

I find both strategies unpersuasive, but my own skepticism concerning them is less important than the fact that in general they seem to have worked; in the parlance of the marketplace (a parlance First Amendment commentators love), many in the society seemed to have bought them. Why? The answer, I think, is that people cling to First Amendment pieties because they do not wish to face what they correctly take to be the alternative. That alternative is *politics*, the realization (at which I have already hinted) that decisions about what is and is not protected in the realm of expression will rest not on principle or firm doctrine but on the ability of some persons to interpret—recharacterize or rewrite—principle and doctrine in ways that lead to the protection of speech they want heard and the regulation of speech they want silenced. (That is how George Bush can argue *for* flag-burning statutes and *against* campus hate-speech codes.) When the First Amendment is successfully invoked, the result is not a victory for free speech in the face of a challenge from politics but a *political* victory won by the party that has managed to wrap its agenda in the mantle of free speech.

It is from just such a conclusion—a conclusion that would put politics *inside* the First Amendment—that commentators recoil, saying things like "This could render the First Amendment a dead letter," or "This would leave us with no normative guidance in determining when and what speech to protect," or "This effaces the distinction between speech and action," or "This is incompatible with any viable notion of freedom of expression." To these statements (culled more or less at random from recent law review pieces) I would reply that the First Amendment has always been a dead letter if one understood its "liveness" to depend on the identification and protection of a realm of "mere" expression distinct from the realm of regulatable conduct; the distinction between speech and action has always been

effaced in principle, although in practice it can take whatever form the prevailing political conditions mandate; we have never had any normative guidance for marking off protected from unprotected speech; rather, the guidance we have has been fashioned (and refashioned) in the very political struggles over which it then (for a time) presides. In short, the name of the game has always been politics, even when (indeed, especially when) it is played by stigmatizing politics as the area to be avoided.

In saying this, I would not be heard as arguing either for or against regulation and speech codes as a matter of general principle. Instead my argument turns away from general principle to the pragmatic (anti)principle of considering each situation as it emerges. The question of whether or not to regulate will always be a local one, and we can not rely on abstractions that are either empty of content or filled with the content of some partisan agenda to generate a "principled" answer. Instead we must consider in every case what is at stake and what are the risks and gains of alternative courses of action. In the course of this consideration many things will be of help, but among them will not be phrases like "freedom of speech" or "the right of individual expression," because, as they are used now, these phrases tend to obscure rather than clarify our dilemmas. Once they are deprived of their talismanic force, once it is no longer strategically effective simply to invoke them in the act of walking away from a problem, the conversation could continue in directions that are now blocked by a First Amendment absolutism that has only been honored in the breach anyway. To the student reporter who complains that in the wake of the promulgation of a speech code at the University of Wisconsin there is now something in the back of his mind as he writes, one could reply, "There was always something in the back of your mind, and perhaps it might be better to have this code in the back of your mind than whatever was in there before." And when someone warns about the slippery slope and predicts mournfully that if you restrict one form of speech, you never know what will be restricted next, one could reply, "Some form of speech is always being restricted, else there could be no meaningful assertion; we have always and already slid down the slippery slope; someone is always going to be restricted next, and it is your job to make sure that the someone is not you." And when someone observes, as someone surely will, that antiharassment codes chill speech, one could reply that since speech only becomes intelligible against the background of what isn't being said, the background of what has already been silenced, the only question is the political one of which speech is going to be chilled, and, all things considered, it seems a good thing to chill speech like "nigger," "cunt," "kike," and "faggot." And if someone then says, "But what happened to free-speech principles?" one could say what I have now said a dozen times, free-speech principles

don't exist except as a component in a bad argument in which such principles are invoked to mask motives that would not withstand close scrutiny.

An example of a wolf wrapped in First Amendment clothing is an advertisement that ran recently in the Duke University student newspaper, the *Chronicle*. Signed by Bradley R. Smith, well known as a purveyor of anti-Semitic neo-Nazi propaganda, the ad is packaged as a scholarly treatise: four densely packed columns complete with "learned" references, undocumented statistics, and an array of so-called authorities. The message of the ad is that the Holocaust never occurred and that the German state never "had a policy to exterminate the Jewish people (or anyone else) by putting them to death in gas chambers." In a spectacular instance of the increasingly popular "blame the victim" strategy, the Holocaust "story" or "myth" is said to have been fabricated in order "to drum up world sympathy for Jewish causes." The "evidence" supporting these assertions is a slick blend of supposedly probative facts—"not a single autopsied body has been shown to be gassed"—and sly insinuations of a kind familiar to readers of *Mein Kampf* and *The Protocols of the Elders of Zion*. The slickest thing of all, however, is the presentation of the argument as an exercise in free speech—the ad is subtitled "The Case for Open Debate"—that could be objected to only by "thought police" and censors. This strategy bore immediate fruit in the decision of the newspaper staff to accept the ad despite a long-standing (and historically honored) policy of refusing materials that contain ethnic and racial slurs or are otherwise offensive. The reasoning of the staff (explained by the editor in a special column) was that under the First Amendment advertisers have the "right" to be published. "American newspapers are built on the principles of free speech and free press, so how can a newspaper deny these rights to anyone?" The answer to this question is that an advertiser is not denied his rights simply because a single media organ declines his copy so long as other avenues of publication are available and there has been no state suppression of his views. This is not to say that there could not be a case for printing the ad, only that the case cannot rest on a supposed First Amendment obligation. One might argue, for example, that printing the ad would foster healthy debate, or that lies are more likely to be shown up for what they are if they are brought to the light of day, but these are precisely the arguments the editor *disclaims* in her eagerness to take a "principled" free-speech stand.

What I find most distressing about this incident is not that the ad was printed but that it was printed by persons who believed it to be a lie and a distortion. If the editor and her staff were in agreement with Smith's views or harbored serious doubts about the reality of the Holocaust, I would still have a quarrel with them, but it would be a different quarrel; it would be a

quarrel about evidence, credibility, documentation. But since on these matters the editors and I are in agreement, my quarrel is with the reasoning that led them to act in opposition to what they believed to be true. That reasoning, as I understand it, goes as follows: although we ourselves are certain that the Holocaust was a fact, facts are notoriously interpretable and disputable; therefore nothing is ever really settled, and we have no right to reject something just because we regard it as pernicious and false. But the fact—if I can use that word—that settled truths can always be upset, at least theoretically, does not mean that we cannot affirm and rely on truths that according to our present lights seem indisputable; rather, it means exactly the opposite: in the absence of absolute certainty of the kind that can only be provided by revelation (something I do not rule out but have not yet experienced), we must act on the basis of the certainty we have so far achieved. Truth may, as Milton said, always be in the course of emerging, and we must always be on guard against being so beguiled by its present shape that we ignore contrary evidence; but, by the same token, when it happens that the present shape of truth is compelling beyond a reasonable doubt, it is our moral obligation to act on it and not defer action in the name of an interpretative future that may never arrive. By running the First Amendment up the nearest flagpole and rushing to salute it, the student editors defaulted on that obligation and gave over their responsibility to a so-called principle that was not even to the point.

Let me be clear. I am not saying that First Amendment principles are inherently bad (they are *inherently* nothing), only that they are not always the appropriate reference point for situations involving the production of speech, and that even when they are the appropriate reference point, they do not constitute a politics-free perspective because the shape in which they are invoked will always be political, will always, that is, be the result of having drawn the relevant line (between speech and action, or between high-value speech and low-value speech, or between words essential to the expression of ideas and fighting words) in a way that is favorable to some interests and indifferent or hostile to others. This having been said, the moral is not that First Amendment talk should be abandoned, for even if the standard First Amendment formulas do not and could not perform the function expected of them (the elimination of political considerations in decisions about speech), they still serve a function that is not at all negligible: they slow down outcomes in an area in which the fear of overhasty outcomes is justified by a long record of abuses of power. It is often said that history shows (itself a formula) that even a minimal restriction on the right of expression too easily leads to ever-larger restrictions; and to the extent that this is an empirical fact (and it is a question one could debate),

there is some comfort and protection to be found in a procedure that requires you to jump through hoops—do a lot of argumentative work—before a speech regulation will be allowed to stand.

I would not be misunderstood as offering the notion of “jumping through hoops” as a new version of the First Amendment claim to neutrality. A hoop must have a shape—in this case the shape of whatever binary distinction is representing First Amendment “interests”—and the shape of the hoop one is asked to jump through will in part determine what kinds of jumps can be regularly made. Even if they are only mechanisms for slowing down outcomes, First Amendment formulas by virtue of their substantive content (and it is impossible that they be without content) will slow down some outcomes more easily than others, and that means that the form they happen to have at the present moment will favor some interests more than others. Therefore, even with a reduced sense of the effectivity of First Amendment rhetoric (it can not assure any particular result), the counsel with which I began remains relevant: so long as so-called free-speech principles have been fashioned by your enemy (so long as it is *his* hoops you have to jump through), contest their relevance to the issue at hand; but if you manage to refashion them in line with your purposes, urge them with a vengeance.

It is a counsel that follows from the thesis that there is no such thing as free speech, which is not, after all, a thesis as startling or corrosive as may first have seemed. It merely says that there is no class of utterances separable from the world of conduct and that therefore the identification of some utterances as members of that nonexistent class will always be evidence that a political line has been drawn rather than a line that denies politics entry into the forum of public discourse. It is the job of the First Amendment to mark out an area in which competing views can be considered without state interference; but if the very marking out of that area is itself an interference (as it always will be), First Amendment jurisprudence is inevitably self-defeating and subversive of its own aspirations. That's the bad news. The good news is that precisely *because* speech is never “free” in the two senses required—free of consequences and free from state pressure—speech always matters, is always doing work; because everything we say impinges on the world in ways indistinguishable from the effects of physical action, we must take responsibility for our verbal performances—*all* of them—and not assume that they are being taken care of by a clause in the Constitution. Of course, with responsibility comes risks, but they have always been our risks, and no doctrine of free speech has ever insulated us from them. They are the risks, respectively, of permitting speech that does obvious harm and of shutting off speech in ways that might deny us the benefit of Joyce's *Ulysses* or Lawrence's *Lady Chatterly's Lover* or Titian's

paintings. Nothing, I repeat, can insulate us from those risks. (If there is no normative guidance in determining when and what speech to protect, there is no normative guidance in determining what is art—like free speech a category that includes everything and nothing—and what is obscenity.) Moreover, nothing can provide us with a principle for deciding which risk in the long run is the best to take. I am persuaded that at the present moment, right now, the risk of not attending to hate speech is greater than the risk that by regulating it we will deprive ourselves of valuable voices and insights or slide down the slippery slope toward tyranny. This is a judgment for which I can offer reasons but no guarantees. All I am saying is that the judgments of those who would come down on the other side carry no guarantees either. They urge us to put our faith in apolitical abstractions, but the abstractions they invoke—the marketplace of ideas, speech alone, speech itself—only come in political guises, and therefore in trusting to them we fall (unwittingly) under the sway of the very forces we wish to keep at bay. It is not that there are no choices to make or means of making them; it is just that the choices as well as the means are inextricable from the din and confusion of partisan struggle. There is no safe place.

#### Postscript

When a shorter version of this essay was first published, it drew a number of indignant letters from readers who took me to be making a *recommendation*: let's abandon principles, or let's dispense with an open mind. But, in fact, I am not making a recommendation but declaring what I take to be an unavoidable truth. That truth is not that freedom of speech should be abridged but that freedom of speech is a conceptual impossibility because the condition of speech's being free in the first place is unrealizable. That condition corresponds to the hope, represented by the often-invoked “marketplace of ideas,” that we can fashion a forum in which ideas can be considered independently of political and ideological constraint. My point, not engaged by the letters, is that constraint of an ideological kind is *generative* of speech and that therefore the very intelligibility of speech (as assertion rather than noise) is radically dependent on what free-speech ideologues would push away. Absent some already-in-place and (for the time being) unquestioned ideological vision, the act of speaking would make no sense, because it would not be resonating against any background understanding of the possible courses of physical or verbal actions and their possible consequences. Nor is that background accessible to the speaker it constrains; it is not an object of his or her critical self-consciousness; rather, it constitutes the field in which consciousness occurs, and therefore the pro-



ductions of consciousness, and specifically speech, will always be political (that is, angled) in ways the speaker cannot know.

In response to this, someone might say (although the letters here discussed do not rise to this level) that even if speech is inescapably political in my somewhat rarified sense, it is still possible and desirable to provide a cleared space in which irremediably political utterances can compete for the public's approval without any one of them being favored or stigmatized in advance. But what the history of First Amendment jurisprudence shows is that the decisions as to what should or should not enjoy that space's protection and the determination of how exactly (under what rules) that space will first be demarcated and then administered are continually matters of dispute; moreover, the positions taken in the dispute are, each of them, intelligible and compelling only from the vantage point of a deeply assumed ideology, which, like the ideology of speech in general, dare not, and indeed cannot, speak its name. The structure that is supposed to permit ideological/political agendas to fight it out fairly—on a level playing field that has not been rigged—is itself always ideologically and politically constructed. This is exactly the conclusion reached reluctantly by Robert Post in a piece infinitely more nuanced than the letter he now writes. At the end of a long and rigorous analysis, Post finds before him “the startling proposition that the boundaries of public discourse cannot be fixed in a neutral fashion” (“The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler v. Falwell*,” *Harvard Law Review* 103, no. 3 [January 1990]: 683). “The ultimate fact of ideological regulation,” he adds, “cannot be blinked.” Indeed not, since the ultimate fact is also the *root* fact in the sense that one cannot get behind it or around it, and that is why the next strategy—the strategy of saying, “Well, we can’t get beyond or around ideology, but at least we can make a good faith try”—won’t work either. In what cleared and ideology-free space will the “try” be made? one must ask, and if the answer is (and it must be by Post’s own conclusion) that there is no such cleared space, the notion of “trying” can have no real content. (On a more leisurely occasion I would expand this point into an argument for the emptiness of any gesture that invokes a regulative ideal.)

No such thing as free (nonideologically constrained) speech; no such thing as a public forum purged of ideological pressures or exclusions. That’s my thesis, and waiting at the end (really at the beginning) of it is, as my respondents have said, politics. Not, however, politics as the dirty word it becomes in most First Amendment discussions, but politics as the attempt to implement some partisan vision. I place the word “vision” after “partisan” so as to forestall the usual reading of partisan as “unprincipled,” the reading Post attributes to me when he finds me “writing on the assump-

tion that there is some implicit and mutually exclusive dichotomy between politics and principle.” In fact, my argument is exactly the reverse: since it is only from within a commitment to some particular (not abstract) agenda that one feels the deep urgency we identify as “principled,” politics is the *source* of principle, not its opposite. When two agendas square off, the contest is never between politics and principle but between two forms of politics, or, if you prefer, two forms of principle. The assumption of an antagonism between them is not mine, but Post’s, and it is an assumption he doubles when he warns of the danger of “unprincipled self-assertion.” This is to imagine selves as possibly motivated by “mere” preference, but (and this is the same point I have already made) preference is never “mere” in the sense of being without a moral or philosophical rationale; preference is the precipitate of some defensible (and, of course, challengeable) agenda, and selves who assert it, rather than being unprincipled, are at that moment extensions of principle. Again, it is Post, not me, who entertains a picture of human beings “as merely a collection of Hobbesian appetites.” I see human beings in the grip of deep (if debatable) commitments, commitments so constitutive of their thoughts and actions that they cannot help being sincere. Franklin Haiman and Cushing Strout (two other correspondents) could not be more off the mark when they brand me cynical and opportunistic. They assume I am counseling readers to set aside principle in favor of motives that are merely political, whereas in fact I am challenging that distinction and counseling readers (the counsel is superfluous) to act on what they believe to be true and important, and not to be stymied by a doctrine that is at once incoherent and (because incoherent) a vehicle for covert politics.

In general, the letter writers ignore my challenge to the binaries on which their arguments depend, and take to chiding me for failing to respect distinctions whose lack of cogency has been a large part of my point. Thus, Professor Haiman solemnly informs me that an open mind is not the same as an empty one; but, in my analysis—which Professor Haiman is of course not obliged to accept but is surely obliged to note—they *are* the same. An open mind is presumably a mind not unduly committed to its present contents, but a mind so structured, or, rather, *unstructured*, would lack a framework or in-place background in relation to which the world (both of action and speech) would be intelligible. A mind so open that it was anchored by no assumptions, no convictions of the kind that order and stabilize perception, would be a mind without gestalt and therefore without the capacity of keeping anything *in*. A consciousness not shored up at one end by a belief (not always the same one) whose negation it could not think would be a sieve. In short, it would be empty.

Professor Strout ventures into the same (incoherent) territory when he

takes me to task for “confusing toleration with endorsing” and “justifying” with “putting up with.” The idea is that a policy of allowing hate speech does not constitute approval of hate speech but shifts the responsibility for approving or disapproving to the free choice of free individuals. But this is to assume that the machinery of deliberation in individuals is purely formal and is unaffected by what is or is not in the cultural air. Such an assumption is absolutely necessary to the liberal epistemology shared by my respondents, but it is one that I reject because, as I have argued elsewhere, the context of deliberation is cultural (rather than formal or genetic), and because it is cultural, the outcome of deliberation cannot help being influenced by whatever notions are current in the culture. (Minds are not free, as the liberal epistemology implies, for the same reason that they cannot be open.) The fact that David Duke was rudely and provocatively questioned by reporters on “Sixty Minutes” or “Meet the Press” was less important than the fact that he was on “Sixty Minutes” and “Meet the Press” in the first place, for these appearances legitimized him and put his views into national circulation in a way that made them an unavoidable component of the nation’s thinking. Tolerating may be different from endorsing from the point of view of the tolerator, who can then disclaim responsibility for the effects of what he has not endorsed, but, if the effects are real and consequential, as I argue they are, the difference may be cold comfort.

It is, of course, *effects* that the liberal epistemology, as represented by a strong free-speech position, cannot take into account, or can take into account only at the outer limits of public safety (“clear and imminent danger,” “incitement to violence”). It is, therefore, perfectly apt for Professor Haiman to cite Holmes’s dissent in *Abrams*, for that famous opinion at once concisely states the modern First Amendment position and illustrates what I consider to be its difficulties, if not its contradictions. Holmes begins by acknowledging the truth basic to my argument: it makes perfect sense to desire the silencing of beliefs inimical to yours, because if you did not so desire, it would be an indication that you did not believe in your beliefs. But then Holmes takes note of the fact that one’s beliefs are subject to change, and comes to the skeptical conclusion that since the course of change is unpredictable, it would be unwise to institutionalize beliefs we may not hold at a later date; instead, we should leave the winnowing process to the marketplace of ideas unregulated by transient political pressures.

This sounds fine (even patriotic), but it runs afoul of problems at both ends. The “entry” problem is the one I have already identified in my reply to Professor Post: the marketplace of ideas—the protected forum of public discourse—will be structured by the same political considerations it was designed to hold at bay; and therefore, the workings of the marketplace will

not be free in the sense required, that is, be uninflected by governmental action (the government is given the task of managing the marketplace and therefore the opportunity to determine its contours). Things are even worse at the other end, the exit or no-exit end. If our commitment to freedom of speech is so strong that it obliges us, as Holmes declares, to tolerate “opinions . . . we . . . believe to be fraught with death” (a characterization that recognizes the awful consequentiality of speech and implicitly undercuts any speech/action distinction), then we are being asked to court our own destruction for the sake of an abstraction that may doom us rather than save us. There are really only three alternatives: either Holmes does not mean it, as is suggested by his instant qualification (“unless . . . an immediate check is required to save the country”), or he means it but doesn’t think that opinions fraught with death could ever triumph in a free market (in which case he commits himself to a progressivism he neither analyzes nor declares), or he means it and thinks deadly opinions could, in fact, triumph, but is saying something like “*qué será, será*,” (as it would appear he is in a later dissent, *Gitlow v. New York*). Each of these readings of what Holmes is telling us in *Abrams* and *Gitlow* is problematic, and it is the problems in the position born out of these two dissents that have been explored in my essay. The replies to that essay, as far as I can see, do not address those problems but continue simply to rehearse the pieties my analysis troubles. Keep those cards and letters coming.