Free Speech Skepticism

Susan J. Brison

sbrison@princeton.edu
Susan.Brison@Dartmouth.edu

(Thank you for taking the time to read this very draft-y draft. Please don't cite or circulate it beyond the workshop. I'm thinking of it as an invitation to a conversation, which I look forward to having with you on Friday.)

I. Introduction

Contemporary theorizing about free speech done by American scholars tends to take the free speech clause of the First Amendment of the U.S. Constitution to be the articulation of a legal right grounded in a fundamental human right, rather than a piece of positive law which may or may not be based on a moral imperative. U.S. legal theorists engaged in debates about free speech controversies typically argue that the First Amendment, when interpreted correctly, clearly supports their position. Virtually no theorists question whether the First Amendment is morally justified to begin with.[1] But if the right to free speech is to be considered as prior to and more fundamental than mere positive law, if it is, rather, the principle underlying the series of cases that the courts decided (or at least those that were decided correctly), then the right to free speech must be grounded in something *other* than the precedents of earlier cases —it must have a foundation of some sort.

I think there's reason to be skeptical that there is such a foundation. In this paper, I argue that, although there is, as a matter of contingent historical fact, a right to free speech embedded

[1] Two rare exceptions are Robin L. West ("Constitutional Skepticism," in Susan J. Brison and Walter Sinnott-Armstrong, eds. *Contemporary Perspectives on Constitutional Interpretation*, Boulder, CO: Westview Press, 1993, pp. 234-258) and Mary E. Becker ("The Politics of Women's Wrongs and the Bill of 'Rights': A Bicentennial Perspective," in Geoffrey R. Stone, Richard A. Epstein, and Cass R. Sunstein, eds., *The Bill of Rights in the Modern State,* Chicago: University of Chicago Press, 1992, pp. 453-517).

in the U.S. Constitution, there is no sound philosophical basis for always giving such a right priority when it comes into conflict with other rights, such as the right to equality (or the right to be free from discrimination, harassment or intimidation) nor is there reason to think that there is such a thing as a universal human right to free speech. My view is not that there is no right to free speech, however, but, rather, that there is no special right distinct from a general right to liberty. That is, free speech is not a special right in the sense that there is something special about speech itself, as opposed to all other human conduct, that requires us to grant it favored status.

Whereas the right to freedom of expression, including the right to engage in hate speech, is widely considered in the United States to be a fundamental human right of virtually paramount value, in other countries, free speech rights are constrained by other rights, such as the rights to dignity, respect, and equality; and laws restricting hate speech, such as speech inciting racial hatred and Holocaust denial, are relatively uncontroversial (Bollinger 1986; Schauer 2005).

There is today an international consensus that, however valuable the right to freedom of expression may be, it is overridden or irrelevant in the case of most of what gets labeled "hate speech."[2] No other country has the strong constitutional protection of hate speech that the First Amendment jurisprudence has led to in the United States.

The extraordinary protection of hate speech in the United States can be explained by the existence of the First Amendment of the US Constitution, ratified in 1791, which states: "Congress shall make no law … abridging the freedom of speech, or of the press." (The Fourteenth Amendment due process guarantee applies this constraint to state legislatures as

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[2] Frederick Schauer, "The Exceptional First Amendment," in Michael Ignatieff (ed.), *American Exceptionalism and Human Rights*. Princeton: Princeton University Press, 2005, p. 33.

well.) No other country's legal system has such a longstanding and firmly entrenched protection of free speech.

Until after World War II, most other liberal democracies lacked constitutions that protected the right to freedom of expression against majoritarian legislation (Lewis 2007: xii). It was only after World War II and the devastation wrought by the Nazis that the United Nations adopted the Universal Declaration of Human Rights (UDHR) in 1948, the Council of Europe adopted the European Convention on Human Rights in 1950, and country after country adopted constitutional democracy, giving courts the last word on matters of basic rights. Such documents and constitutions asserted a right to free speech, but it was always accompanied – and constrained – by other equally or more important fundamental rights.

For example, while Article 19 of the UDHR says "everyone has the right to freedom of opinion and expression," Article 1 asserts that "[a]ll human beings are born free and equal in dignity and rights" and that "[t]hey are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." And Article 7 states "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." In addition, Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination, adopted by the United Nations General Assembly in 1965 and implemented in 1969, contains extensive prohibitions against hate speech, including the declaration that "all dissemination of ideas based on racial superiority or hatred [and] incitement to racial discrimination" are "offense[s] punishable by law."

Even countries with laws, charters, or constitutions that explicitly protect the right to free speech consider this right to be legitimately constrained by prohibitions against hate speech. While Article 5 of the Basic Law, Germany's Constitution, adopted in 1949, states that everyone has "the right to freely express and disseminate their opinions…" it also states that this right is "subject to limitations embodied in the provisions of general legislation, statutory protections for the protection of young persons and the citizen's right to personal respect." Likewise, although freedom of expression is one of the fundamental freedoms guaranteed by the Canadian Charter of Rights and Freedoms, assented to in 1982, the rights and freedoms outlined in the Charter are subject to "reasonable limits" that "can be demonstrably justified in a free and democratic society"; the Supreme Court of Canada ruled in *R. v. Keegstra*[3] that the section of the Criminal Code proscribing speech willfully inciting hatred of an identifiable group was constitutional, given the importance of Parliament's objective of preventing the harm caused by hate propaganda. Germany, France, Canada, and Israel, among other countries, have laws prohibiting Holocaust denial.

The Charter of Fundamental Rights of the European Union, which was proclaimed in 2000 and became legally binding with the Lisbon Treaty in 2009, sets out the range of political, civil, economic, and social rights of all European citizens and residents of the EU. Although Article 11 of the EU Charter asserts that "[e]veryone has the right to freedom of expression," Article 1 states that "[h]uman dignity is inviolable" and "must be respected and protected." The dignity of persons is taken to be not only a fundamental right, but the basis for other fundamental rights. Article 54 provides that "[n]othing in this Charter shall be interpreted as implying any

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[3] *R. v. Keegstra*, 3 S.C.R. 697 (1990).

right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized in this Charter."

In contrast, in the U.S., the right to free speech is taken to be so central that it functions rhetorically as the *sine qua non* of the right to *all* freedoms. This may have something to do with the fact that, in the U.S., the commitment to free speech came before—almost a century before—the commitment to equality of status, to a caste-free state, whereas most other Western democracies formally guaranteed free speech only after WWII, after witnessing the Holocaust.

Not surprisingly, in the digital age, the massive, worldwide, and instantaneous reach of the Internet has made for inevitable clashes among diverse free speech regimes, creating an urgent need for new ways of understanding free speech that might aid in resolving such conflicts.

Views about free speech on the Internet originated, as did the Internet itself, in the United States and so have been heavily influenced by First Amendment exceptionalism. Current controversies over the alleged harms of internet speech are reviving issues raised in the 1980s and 1990s, when U.S. courts ruled, in several cases, that even if pornography or hate speech constitutes a form of harassment or race- or sex-discrimination, it is protected under the First Amendment.[4] In his opinion in *American Booksellers Association v. Hudnut*[5] ruling unconstitutional an anti-pornography ordinance that had been adopted in Indianapolis, Judge Frank Easterbrook conceded the empirical claims made in the ordinance concerning the harmfulness of pornography. He wrote, "we accept the premises of this legislation. Depictions

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[4] *Doe v. University of Michigan,* 721 F.Supp. 852 (E.D.Mich. 1989); *UWM Post v. Board of Regents of the University of Wisconsin,* 774 F.Supp. 1163 (E.D.Wis. 1991).

[5] For the U.S. Court of Appeals, Seventh Circuit, 771 F.2d 323 (1985).

of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, '[p]ornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds].' Indianapolis Code § 16-1(a)(2). " Easterbrook concluded, rather stunningly, given the nature of the harms catalogued: "Yet this simply demonstrates the power of pornography as speech,"[6] which, *because* it is speech, must be protected.

Likewise, in *John Doe v. University of Michigan*, an opinion ruling unconstitutional a University of Michigan policy on discrimination and discriminatory harassment, Judge Avern Cohn wrote: "It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values."[7] Judge Cohn concluded that "While the Court is sympathetic to the University's obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech."[8]

In the U.S., not only jurists, but legal theorists as well, have tended to agree that free speech is, in such cases of conflict, not only paramount, but so obviously so, that little or no

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[6] Ibid. p. 329. One doesn't, however, hear the courts declaring that if segregation harms minorities' opportunities for equal rights this simply demonstrates the power of freedom of association.

[7] 721 F.Supp. 852 (E.D.Mich. 1989), p. 853.

[8] Ibid., p. 863.

argument is needed to support the claim. I have been struck, again and again, by the almost religious fervor with which the right to free speech was invoked. It seemed to me the First Amendment was being adhered to unthinkingly, as dead dogma (to use a phrase of John Stuart Mill's), and invoked, in a pragmatically self-defeating way, to cut off critical inquiry into its own foundations (or lack thereof).

Attempts to analyze the basis for a free speech principle in the 1980s and 90s were stifled by a "which side are you on?" mentality forcing those who were concerned about the damage done by some speech to take a stand on particular hate speech codes or anti-pornography legislation. Invoking the right to free speech typically served not to open a dialogue about what was at stake, about what the relative harms of protecting hate speech vs. regulating it might be, but, rather, to preclude any such discussion. If the pen is mightier than the sword,[9] the right to free speech functioned more like a bludgeon, shutting down all attempts to determine just what the costs and benefits of permitting unbridled hate speech (in which I include misogynistic porn) might be.[10]

Now that it's clear that hate speech and porn are here to stay—not only because restrictions on them haven't survived constitutional scrutiny in the U.S., but also because it may be impossible to regulate them online—perhaps we can have more fruitful discussions about the harms they cause. And with the advent of additional Internet-based harms, including cyber-

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[9] This is from Edward Bulwer-Lytton's play *Richelieu*, where it appears in the line "beneath the rule of men entirely great, the pen is mightier than the sword." This may well be true, but when have we ever been beneath the rule of such men?

[10] I acknowledge that "hate speech" and "pornography" are impossible to define in any satisfactory way. We can talk about this.

harassment, revenge porn, and fake news, we have renewed reason to examine what speech does—and how—and whether it should be treated differently from non-speech conduct.

II. What is a free speech principle?

If the free speech clause of the First Amendment is interpreted to mean that speech is to be granted special protection not accorded to other forms of conduct, then a free speech principle, distinct from a principle of general liberty, must be posited and must receive a distinct justification. Such a principle must hold that speech is special, in the following way, as articulated by Frederick Schauer: "Under a Free Speech Principle, any governmental action to achieve a goal, whether that goal be positive or negative, must provide a stronger justification when the attainment of that goal requires the restriction of speech than when no limitations on speech are employed."[11]

A free speech principle understood in this way protects what we might call procedural free speech, not substantive free speech. It constrains state action, but not private action. The right to free speech protected by the First Amendment is considered a right to be free from governmental interference of a certain sort, not (necessarily) a positive right actually to be able to speak and to have the wherewithal to gain access to others' speech.

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[11] Frederick Schauer, *Free Speech: A Philosophical Enquiry* (New York: Cambridge University Press, 1982), pp. 7-8. To state what a free speech principle requires is not to state that such a principle is justified. Elsewhere, Schauer has evinced a certain amount of skepticism about whether a distinct principle of free speech can be defended. In "The Phenomenology of Speech and Harm," *Ethics*, vol. 103, 1993, pp. 635-653, for example, he notes that his conclusion, viz. that we should reject the hypothesis that speech, as a class, causes less harm than non-speech conduct, "puts more pressure on the positive arguments for a free speech principle, and perhaps no such argument will turn out to be sound." p. 653. For insightful arguments against the existence of *any* justifiable general principle of free speech see Lawrence Alexander and Paul Horton, "The Impossibility of a Free Speech Principle," *Northwestern University Law Review,* vol. 78, December 1983, pp. 1319-57; Stanley Fish, *There's No Such Thing As Free Speech—And It's a Good Thing, Too* (New York: Oxford University Press, 1994); and Larry Alexander, *Is There a Right of Freedom of Expression?* (New York: Cambridge University Press, 2005).

To hold that there is a right to free speech is not, however, to hold that it is absolute, and contemporary U.S. philosophers and legal theorists writing on free speech, like the U.S. courts, reject First Amendment absolutism.[12] Rather, most advocate some sort of balancing between free speech interests and other interests, for example, the interest in national security. The *value* of free speech, however, is taken to justify balancing interests with "a thumb on the scales" in favor of speech. As Thomas Scanlon notes, "on any strong version of the doctrine [of freedom of expression] there will be cases where protected acts are held to be immune from restriction despite the fact that they have as consequences harms which would normally be sufficient to justify the imposition of legal sanctions."[13] On Scanlon's view, *any* theory of free speech which counts as a "significant" one has this consequence, namely, that it considers immune from restriction not only offensive, or morally repugnant, speech, but also *harmful* speech, even where the resulting harms are so serious that the government would normally be justified in trying to prevent them.

III. Is a free speech principle justified?

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[12] By "free speech absolutism" I mean the view that *all* speech is protected. The U.S. Supreme Court has not followed the absolutist interpretation of the First Amendment that one might have thought could be read off its straightforward wording. In spite of Justice Black's famous statement—"I read 'no law abridging' to mean no law abridging . . . . ."—the courts have considered many categories of speech to be unprotected. Justice Hugo L. Black, *Smith v. California* 361 U.S. 147 (1959), p. 157. See also his article, "The Bill of Rights," *New York University Law Review* 35 (1960): 865-881. However, not everyone defines "free speech absolutism" in this way. (At a dinner at Georgetown Law Center [get date], Nadine Strossen, who was at the time President of the ACLU, told me that the ACLU was absolutist about free speech and absolutist about the right to privacy. When I asked what she meant by "free speech absolutism" she said that it is the view that legislation restricting speech triggers strict scrutiny.)

[13] Thomas Scanlon, "A Theory of Freedom of Expression," *Philosophy and Public Affairs* 1 (1972), p. 204.

Some jurists and legal theorists hold that speech simply cannot cause as much—or the same kind of—harm as non-speech conduct.[14] But, if that were the case, a free speech principle would be otiose, adding nothing to a general principle of liberty grounded in the harm principle. Defenders of a robust, and not merely redundant, free speech principle must say why speech is deserving of heightened protection even when it is harmful.

But what justifies this tipping of the scales in favor of speech? Why should speech be considered so special as to be worthy of protection, even when it is conceded to cause real harms—harms which, if brought about by any other means, would be considered unjust and sanctionable?

Our constitutional democracy in the U.S. is based, apart from a few unfortunate aberrations, on the view, articulated by Mill, that the government may justifiably exercise power over individuals, against their will, only to prevent harm to others.[15] Mill considered his harm principle to apply equally to governmental regulation and to "the moral coercion of public opinion." Mill does not, however, specify what counts as harm. Following Joel Feinberg, I consider it to be a wrongful setback to one's significant interests, so it encompasses much more than the hit-on-the-head sort of physical harm.[16] (The U.S. legal system already takes into account harms understood in this way. Even in the case of physical injury, it is not merely the

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[14] "Sticks and stones will break my bones," Justice Scalia pronounced from the bench in oral arguments in *Schenck v. Pro-Choice Network*, "but words can never hurt me. That's the First Amendment." *Paul Schenck and Dwight Saunders, Petitioners v. Pro-Choice Network of Western New York, et al*. No. 95-1065. United States Supreme Court Official Transcript Wednesday, October 16, 1996. 1996 LW 608239 (U.S.OralArg.), at 23.

[15] John Stuart Mill, *On Liberty* (Indianapolis, IN: Hackett Publishing Co., 1978), p. 9.

[16] See Joel Feinberg, *The Moral Limits of the Criminal Law*, Volume 1, *Harm to Others* (New York: Oxford University Press, 1984).

extent of the hurt—that is, the physical pain or damage—that is addressed by the law, but also the harm, construed so as to include long-term financial and emotional damage.)

A defense of a free speech principle must explain why the harm principle does not apply in the case of speech—or applies with less force than in the case of all other forms of human conduct. Many theorists have argued that one thing or another—the desirability of arriving at truth in the long run, say, or the need for a well-functioning democracy—provides the foundation for a right to free speech. This kind of argument proceeds as follows: We value x. The right to free speech is essential for (or at least instrumental in) the achievement of x. Therefore, we must posit the right to free speech and design social structures (constitutions, laws, public policies) to protect and possibly even foster it. Others have raised objections to such consequentialist defenses of free speech and I won't enumerate them here.[17] I will add a few comments, however, about the three most commonly employed consequentialist defenses: 1. the argument from truth, 2. the argument from democracy, and 3. the argument from distrust of government.

1. The argument from truth is best known to us from the writings of John Milton, John Stuart Mill and Justice Oliver Wendell Holmes.[18] In his treatise, *Areopagitica*, Milton argued against government licensing of the presses, on the grounds that such licensing would impede our search for the truth. On Milton's account, government should not be motivated, by fear of the proliferation of pernicious falsehoods, to restrict speech, for, as he urged, "Let [Truth] and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter?"[19] As Holmes wrote, in his famous dissent in *Abrams v. United States* (1919), "when men have

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[17] See the texts cited in fn 11 as well as Alan Haworth, *Free Speech* (London: Routledge, 1998).
[18] Other justices and judges who have invoked the argument from truth in their opinions include Brandeis, Frankfurter, and Hand [cite opinions].
[19] John Milton, *Areopagitica* (New York: New York University Press, 1968), p. 327 [check this edition for p. #] (orig. pub. 1644).

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."[20] Mill had argued, likewise, in *On Liberty* that restrictions on speech would hamper the search for truth.[21] On Mill's account, to suppress speech on the grounds of its falsehood is to assume infallibility, something we can never rightly do. The suppressed speech may, on Mill's view, turn out to be true, or to contain some truth. And even if it turns out to be false, its expression is necessary in order for the truth to be challenged and defended by means of good arguments. Not to permit truths to be challenged would be to allow them to assume the status of dead dogmas, held unthinkingly (and thus tenuously).

The argument from truth has been so prevalent and persistent a defense of free speech that, in 1982, Frederick Schauer observed that "the argument from truth dominates the literature of free speech."[22] Although the argument from democracy and the argument from autonomy have, in the last three decades, become more prevalent in the legal literature, one may still accurately hold, with Schauer, that the argument from truth has been "throughout modern history the ruling theory in respect of the philosophical underpinnings of the principle of freedom of speech."[23] It is also frequently heard in popular debates about free speech. Can the argument from truth succeed in grounding a free speech principle?

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[20] Oliver Wendell Holmes, dissenting, in *Abrams v. United States* 250 U.S. 616 (1919), p. 630.

[21] John Stuart Mill, *On Liberty* (Indianapolis, Ind.: Hackett Pub. Co., 1978) (orig. pub. 1859), Chapter Two.

[22] Schauer, *Free Speech: A Philosophical Enquiry,* p. 15.

[23] Ibid., p. 16

First, we need to examine two different versions of this argument: Milton's and Mill's. Both appear to presuppose an "invisible hand" at work in the marketplace of ideas, ensuring that the outcome is optimal, with respect to truth. This presupposition seems to be held as well by those who advocate "more speech" in response to harmful speech such as hate speech, out of confidence that the truth will win out in the end. Such an attitude seems to presuppose something like the Mandevillian view that "private vices" (e.g. expressions of bigotry) lead to "public virtues," that is, an exchange of ideas that is "uninhibited, robust, and wide open," leading, ultimately, to the truth. This faith in the ultimate victory of truth over falsehood is, for Milton, part of a larger teleological picture in which God's benevolence ensures, in the long run, and in spite of our all-too-human blunderings, that goodness and truth will prevail. On Milton's view, there is a head, the Godhead, guiding the invisible hand. If one accepts this metaphysical assumption, there is some basis for the faith that truth will win out over falsehood. (Given Milton's teleological account, however, it is not clear why the censorship resulting from licensing could not be compensated for by an omnipotent deity. If it is God who ensures that the truth will win out in the end, presumably He could carry out that feat in spite of some censorious meddling by mere mortals.)

On Mill's account, in contrast, there is no agency behind the invisible hand—and it should be noted that he doesn't use the term "invisible hand"—and no explanation (in contrast to the one economists such as Adam Smith and David Ricardo attempted to provide for the workings of the market for goods) for why we should suppose that it will arrange things so that the truth will win out in the market for ideas. Mill's defense of free speech makes sense only if one makes several dubious assumptions. One is that the truth will invariably triumph over falsehood in open competition in the marketplace of ideas—or, at any rate, that it is more likely

to win out in the absence of governmental regulation. Unless one shares Mill's enlightenment vision of humanity as consisting of rational truth-seekers, however, there is no reason to assume that truth has any guaranteed advantage over falsity in the marketplace. Speakers and listeners are motivated by many things apart from a desire for truth, including, most notably where the media and entertainment industry are concerned, a desire to make money.

An additional assumption required by Mill's argument from truth is that the marketplace of ideas is, absent government intervention, truly free, that is, unskewed by irrational forces, inequalities, and private censorship that keep the truth from getting a full hearing (or at least a fuller hearing than it would get with some governmental regulation). As Kent Greenawalt observes, two observations undermine any confidence one might have in this assumption: "the gross inequality among communicators in the marketplace of ideas and the inclination of people to believe messages that are already dominant socially or that serve unconscious, irrational needs."[24]

Another unquestioned, but questionable, assumption in Mill's account is that the search for truth is more important than all other social interests. On Mill's utilitarian account, the unimpeded search for truth is supposed to lead to greater overall utility than any system of censorship, but even if we assume that lack of restrictions on speech best facilitates the search

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[24] Kent Greenawalt, "Free Speech Justifications," *Columbia Law Review* 89 (1989), p. 134. Greenawalt disagrees with me, however, concerning the possible extent of private censorship. He notes that "[o]wners and editors of newspapers and television stations and other private individuals with huge influence over the dissemination of ideas will also have their own objectives to pursue; but private influence is a far cry from outright suppression. No private enterprise can prevent others from speaking." p. 137. For opposing views on the powers of private (that is, non-governmental) censorship, see Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987); Rae Langton, "Speech Acts and Unspeakable Acts," *Philosophy and Public Affairs* 19 (1993), pp. 292-330; and Frank Michelman, "Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation," *Tennessee Law Review* 56 (1989), pp. 291-319.

for truth, an additional argument is needed to show the connection between truth and utility, and such an argument is not forthcoming in Mill's account. One can certainly come up with individual cases in which the suppression of truths leads to greater overall utility. One example is the government censorship of military secrets concerning the location of troops in wartime. Another is the example given by Joel Feinberg of a neighborhood busybody who decides to reveal the truth about a now-upstanding neighbor's sordid long ago and far away past as a prostitute and drug addict, knowing the cost will be the ruin of this woman's present life and the well-being of her family. As Feinberg notes, on Mill's own account, the broadcasting of even malicious *truths* in cases such as this cannot be supported by appeal to the principle of utility.[25]

In the case of harmful speech, one also needs to take into account the possibility of the silencing effect of the speech on those harmed by it. (I suppose the most extreme case would be the deathly silence of those duped by false advertising of potentially lethal products.) For example, if vulnerable minority members are targeted by hate speech, they may well become less, rather than more, likely to express their ideas, and, even if they do speak, they may not be taken as seriously as they would be in an environment that did not tolerate hate speech. As Fran Kobel has noted, "free trade in ideas" does not always require (and may sometimes be impeded by) free trade in words.[26]

A further objection to the argument from truth is that, at some point, an increase in speech may become counterproductive if there is so much information (including redundancies and misinformation) to be examined that arriving at the truth becomes more difficult or takes

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[25] Joel Feinberg, "The Limits to Freedom of Expression," in Joel Feinberg and Hyman Gross, eds., *The Philosophy of Law*, Fourth Edition (Belmont, CA: Wadsworth Publishing Co.). One could list many other examples of truthful speech that could arguably be prohibited by Mill's harm principle, e.g. speech violating someone's right to privacy or undermining someone's right to a fair trial.

[26] fn to Kobel article

much longer than it otherwise would. We are faced here with something like a violation of H. P. Grice's rule of quantity: saying too much, that is, allowing too many different opinions, including misleading and erroneous ones, to be aired, can get in the way of achieving truth by undermining the informativeness of what is said.[27]

It is interesting to note that theorists and judges employing the argument from truth often use rhetoric that detaches speech from speakers, thoughts from thinkers, as if there were no human agents involved in free speech controversies. One of the more frequently cited examples of such rhetoric is found in Holmes's dissent in *United States v. Schwimmer*: "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[28] This quote is notable not only for the uniquely high status attributed in it to the principle of free speech (taken to be identical to the principle of free thought), but also for the absence of any agency implied by the formulation, "freedom for the thought that we hate."[29] There is nothing comparable in the area of actions. We do not talk about "freedom for the action that we hate," and this is not simply because we do not subscribe to a general principle of freedom of action. Rather, it does not even make sense to talk about actions without agents. Although we do speak of actions as being free or unfree, this is clearly elliptical for talk of

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[27] [fn. to Grice] Grice's rule of quantity is a maxim for effective cooperative conversation and not intended as a guideline for legislation, but there is a moral to be drawn from it here: An increase in speech does not always yield an increase in information. This observation parallels one made by Gerald Dworkin concerning choice, too much of which can end up *undermining* autonomy. See his "Is More Choice Better than Less?" in *The Theory and Practice of Autonomy* (New York: Cambridge University Press, 1988), pp. 62-81.

[28] *United States v. Schwimmer* 279 U.S. 644 (1929), pp. 654-55.

[29] On this account, words and thoughts seem to be viewed as free-floating, detached from agents. And yet this is at odds with the "words don't harm people, people harm people" mentality of opponents of restrictions on assaultive speech. Why is it that words get credit when they do good, but don't get blamed when they cause harm? What would explain this asymmetry?

actions performed freely or under duress by agents. And yet we do talk about thoughts—or ideas—without agents, without thinkers, perhaps because they can be written down and thus detached from those who think them. But actions can be recorded (on film) or described (in language) or notated in a way that makes them reproducible without the intervention of the original agent (as in Labanotation in ballet). A thought or idea has no more life while unthought, or unread in a book, or unheard on a tape, than does an action such as a dance when unperformed.[30]

If we attend more closely to what people *do* with words, we are less likely to see words as having a life of their own, free-floating in a realm in which truths grapple with falsehoods and words we like do battle with words we hate.[31] Although the phrase "freedom of speech" might seem to refer to a state of affairs consisting of unfettered words, pictures, and other symbols, detached from their makers, it is, in so far as it describes a constitutionally protected right, a state of speakers and writers and listeners and readers, a liberty only *people* can enjoy and is, at least in that respect, similar to a general principle of freedom of action.

2. The argument from democracy, put forth by, among others, Alexander Meiklejohn, Owen Fiss, and Cass Sunstein, defends a free speech principle by pointing out that citizens in a democracy need access to information in order to make well-informed political decisions.[32]

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30 I am influenced here by the nominalism of Nelson Goodman and others, but even Platonists should agree that, if ideas can exist unthought as Platonic Forms, so can actions such as dances.

31 I am obviously indebted here to J. L. Austin, *How To Do Things with Words*, as well as to Rae Langton, "Speech Acts and Unspeakable Acts." *Philosophy and Public Affairs* 19 (1993): 293-330, and Jennifer Hornsby, "Speech Acts and Pornography," in Susan Dwyer, ed. *The Problem of Pornography* (Belmont, Mass.: Wadsworth Pub. Co., 1995), pp. 220-32.

32 Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper and Brothers, 1948), *Political Freedom* (New York: Harper and Brothers, 1960); Owen Fiss, "Free Speech and Social Structure," *Iowa Law Review* 71 (1986): 1405-1425. Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: The Free Press, 1993).

They also need to be free from obstruction in making their own views known and having an impact on the political process. If this argument is taken to defend a near-absolute right to free speech which would preclude restrictions even on harmful speech such as hate speech, however, it must presuppose a democratic system in which access to the press is distributed roughly equally and in which voters are interested in getting and can realistically get full access to others' speech. As we know, however, power is distributed unequally in this democracy and many have virtually no access to the enormous political advertising potential of the media.[33] And voters are not prepared to take the time and trouble to wade through masses of political speech. (Processing information has its *costs*.) The argument must assume that letting the market regulate speech is fairer—and more conducive to representative democracy—than any governmental regulation would be, but this assumption requires further defense.[34]

Fiss and Sunstein, who have employed the argument from democracy in their defenses of a principle of free speech, are sensitive to the above concerns and do not take themselves to be advocating anything like absolute protection for speech. Both of these theorists have, on the contrary, defended restrictions on hate speech and pornography on the basis of the democratic rationale underlying the principle of free speech. They are, however, in the minority among free speech theorists and their views are at odds with the courts' decisions in these areas.[35]

3. Vincent Blasi, Frederick Schauer, and Richard Epstein, among others, have given a free speech defense known as the argument from distrust of government, or, alternatively, the argument from governmental incompetence.[36] On this account the government cannot be trusted

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33 Add discussion here of *Citizens United*.

34 Especially since *Citizens United*.

35 *[This section needs to be expanded and updated.]*

34 Vincent Blasi, "The Checking Value in First Amendment Theory," *American Bar Foundation Research Journal* No. 3 (1977): 521-649; Frederick Schauer, *Free Speech: A Philosophical Enquiry*;

to make the appropriate distinctions, to tell truth from falsity, or to act in the best interests of the electorate. Even if one agrees with this premise (and there is surely ample reason to), it, by itself, provides no reason why *speech* should be considered to be the *only* area the government cannot be trusted to meddle in. No explanation is given for why we should suppose that the government is any more competent to regulate us in other domains in which we do allow regulation. The libertarian R.H. Coase has argued that, to be consistent, we should be equally wary of governmental regulation in the market for goods and in the market for ideas.[37] Coase argues from the inadmissibility of governmental interference in the area of speech to the unjustifiability of economic constraints, but one can also run this argument the other way. If the government is considered competent to regulate economic affairs—and, for example, to exact income tax—in the service of important governmental interests such as equality of opportunity, it should also be considered competent to regulate speech for the same purposes.[38]

The difficulty with *any* consequentialist strategy for defending free speech is that it opens the way for restrictions on speech, should such restrictions turn out to promote the good desired to a greater extent than a regime of free speech could. As Stanley Fish points out, if you have any answer to the question 'What is the First Amendment *for*?' "you are necessarily implicated in

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Richard A. Epstein, "Property, Speech, and the Politics of Distrust," in Geoffrey Stone, Richard A. Epstein, and Cass Sunstein, eds., *The Bill of Rights in the Modern State* (Chicago: University of Chicago Press, 1992), pp. .

[37] "The Economics of the First Amendment: The Market for Goods and the Market for Ideas," 64 *American Economic Review*, 1974, p. 384.

[38] Some may hold that the government should be considered competent to regulate economic affairs, but not speech, because property is less essential to our personhood or our autonomy than is the expression of our ideas. On this view, what we risk in allowing the government to regulate the market (viz. being unjustly deprived of our property) is less autonomy-undermining than what we risk in allowing the government to regulate speech. I critique this view in Susan J. Brison, "The Autonomy Defense of Free Speech," *Ethics* 108 (January 1998): 312-339.

a regime of censorship"[39]—if not an actual regime, then a possible one, at the ready to be instituted should circumstances turn out to require it.

Those theorists not wanting their defense of the right to free speech to be hostage to empirical fortune in this way must consider the right to be intrinsically valuable or constitutive of a broader intrinsically valuable right, such as a right to autonomy or moral independence. I've argued that the attempt to ground a special right to free speech in an account of autonomy fails. My strategy was to argue that all existing philosophical accounts of autonomy are inadequate *as accounts of autonomy* and that even a plausible substantive account of relational autonomy would not yield a defense of free speech that could show why hate speech should be protected.[40]

In "Relational Autonomy and Freedom of Expression,"[41] I developed a relational account of autonomy based on Amartya Sen's account of capability and argued that "although this relational account helps to explain why the right to speak and to receive others' speech is important, it does not yield a defense of the view that speech is special, requiring greater justification for its regulation than is needed for the regulation of other conduct."[42] If one grants the empirical claim conceded by the U.S. courts in a number of hate speech and pornography cases—that *failure* to restrict such speech can impair the ability of individuals in targeted groups

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[39] Fish, Stanley, "The Dance of Theory," in Lee C. Bollinger and Geoffrey R. Stone, eds., *Eternally Vigilant: Free Speech in the Modern Era* (Chicago: University of Chicago Press, 2002), p. 199. For the record, Alexander and Horton make this point in their 1983 article in noting that the attempt to justify free speech as an independent principle "necessarily entails the linkage of speech and free speech with more basic values. 'Free speech is justified because . . .'—what comes after the 'because' inevitably will link free speech with something else, usually more basic, and thus will destroy free speech's independence." Lawrence Alexander and Paul Horton, "The Impossibility of a Free Speech Principle," *Northwestern University Law Review* 78 (1983), pp. 1355-1356.

[40] See fn 37.

[41] Susan J. Brison, "Relational Autonomy and Freedom of Expression," in Catriona MacKenzie and Natalie Stoljar, eds., *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self*, (New York: Oxford University Press, 2000), pp. 280-299.

[42] Ibid., pp. 280-281.

to act on *their* choices, then a capability account cannot be invoked to defend such a policy unless one adds the implausible claim that the threat to the would-be speakers' capabilities is even greater. The kinds of harms acknowledged by the courts to result from pornography and hate speech are capability-undermining harms and so one cannot employ a capability account to argue that such speech must be protected.

Free speech is *not* a special right in the sense that there's something special about speech itself, as opposed to all other human conduct, that requires us to grant it favored status. Rather, it just so happens that, of all the rights considered to fall under the rubric of a general right to liberty, the right to free speech, like the right to freedom of religion, has been (and continues to be) one of those particularly vulnerable to governmental invasions. It doesn't follow, though, that speech is "special" or more central to core capabilities than other forms of conduct, any more than it follows that religion is "special" or more central to core capabilities than other human pursuits (or that religious affiliations and practices are more central than, say, sexual affiliations and practices).

IV. Can we distinguish speech from non-speech conduct?

I've argued in previous work that any defense of a fundamental human right to free speech must rest on a speech/conduct distinction which, in turn, rests on an untenable mind/body dichotomy.[43] It should not come as a surprise that free speech theory is vexed by the mind-body problem since speech seems to exist in a twilight realm between the mental and the physical, between thought and behavior. We can think in words (and other symbols) *and* we can perform

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[43] Susan J. Brison, "Speech, Harm, and the Mind-Body Problem in First Amendment Jurisprudence," *Legal Theory* 4 (1998): 39-61.

actions with them and we can do both things simultaneously when we express our thoughts in speech.

Much of the debate about hate speech in the 1980s and 1990s in the U.S. focused on the question of whether or not such speech causes harms significant enough to warrant regulation, either in the form of criminal penalties or civil liability. Two commonly held views were used in arguments against restricting hate speech—the minimalist view that speech causes no harm unredressable by more speech (or causes considerably less harm than other forms of conduct) and the maximalist view that speech can have high costs, but that they are always trumped by its transcendent value.[44] The tension between the view that speech is costless, because inert, and the view that speech is priceless, and thus worthy of protection even when hurtful, however, was not often addressed. I argued that these two views, both of which are found in court opinions and in writings by First Amendment theorists, can be shown to be compatible only if one accepts the implausible claim that any direct injury that may result from speech is under the control of the victim and, thus, could have been avoided by that person.[45] I criticized both views—that speech is costless and that it is priceless—and I argued that they misconstrue not only the harms of assaultive speech, but also the harms of physical assaults with which speech-caused harms are typically contrasted. I argued that these harms have been misunderstood because of an implicit

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[44] For a discussion of minimalist and maximalist views of free speech, see Joshua Cohen, "Freedom of Expression," *Philosophy and Public Affairs*, 22:3 (Summer 1993), pp. 207-63.

[45] In that article, I did not address the question of indirect injury in which a speaker says something to a listener who, as a result, harms a third party. This kind of harm is discussed insightfully in Frederick Schauer, "The Phenomenology of Speech and Harm," *Ethics*, vol. 103 (July 1993), pp. 642-46.

and unexamined acceptance, in First Amendment jurisprudence, of mind-body dualism—a view almost universally rejected by contemporary philosophers of mind.[46]

I argued that all speech is conduct, involving an agent, and all conduct, being intentional action, is expressive (of the motivating intention); that speech does not differ from other conduct in being context-dependent and subject to interpretation; that speech is a physical phenomenon, having physical effects on its listeners, effects which can be caused by the content of the speech; and that verbal assaults can be harmful in the same ways that assaults involving direct bodily contact are. For these (and other) reasons, I concluded that the attempt to assimilate freedom of speech to freedom of thought and in that way distinguish it from freedom of action fails.

In a reply to that article, Charles Collier asserts that, although "[t]he term 'speech' in the First Amendment . . . is a term of art, . . . one possibility can be rejected at the outset: that there is no constitutionally significant difference between speech and any other form of intentional action. As the Supreme Court has recently noted: 'To hold otherwise would be to create a rule that all conduct is presumptively expressive'."[47] I agree that this is the Court's view, but I do not agree that it is, for that reason alone, correct, for it has proven to be notoriously difficult—some would say impossible—for the Court to distinguish speech from other forms of intentional action. Collier cites *Spence v. Washington*, a flag-desecration case in which the Court's analysis began with an inquiry into whether the defendant's "activity was sufficiently imbued with

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[46] See, for example, David M. Rosenthal, ed., *The Nature of Mind* (New York: Oxford University Press, 1991) and Richard Warner and Tadeusz Szubka, eds., *The Mind-Body Problem: A Guide to the Current Debate* (Cambridge, Mass.: Blackwell, 1994).

[47] Charles W. Collier, "Hate Speech and the Mind-Body Problem: A Critique of Postmodern Censorship Theory," 7 *Legal Theory* 203-234 (2001), p. 204, quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). What follows is adapted from Susan J. Brison, “Speech and Other Acts: A Reply to Charles W. Collier, ‘Hate Speech and the Mind-Body Problem: A Critique of Postmodern Censorship Theory’,” 10 *Legal Theory* 261-272 (2004).

elements of communication to fall within the scope of the First and Fourteenth Amendments . . . ."[48] The test used by the Court, which has come to be known as the *Spence* test, was whether "an intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it."[49] The *Spence* test, however, does not succeed in distinguishing speech from non-speech conduct, as Robert Post has persuasively argued:

> A small but telling example plainly demonstrates the problem with the Spence test. Consider laws imposing criminal sanctions for the defacement of public property. Such laws do not "bring the First Amendment into play"; a defendant accused of defacing a city bus would not have a First Amendment defense. This would be true regardless of whether the defacement took the form of random blotches of color spray-painted onto the walls, or the form of words like "Down with Clinton" or "Eric is Cool" carved into the seats. Although in the latter case the defendant has satisfied the Spence test - his words carry a particularized message that is likely to be understood by his audience - no court in the country would consider the case as raising a First Amendment question.
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> This example can be multiplied indefinitely, for any action can at any time be made communicative in a manner that satisfies the Spence test.[50]

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[48] *Spence v. Washington*, 418 U.S. 405, 409 (1974)

[49] Ibid., pp. 410-411.

[50] Robert Post, "Recuperating First Amendment Doctrine," ˆ47 *Stan. L. Rev*. 1249-1281 (1995). Post calls the doctrine embodied in the *Spence* test "transparently and manifestly false." (p. 19). As Post points out, even an apparently non-linguistic physical object can, under the right circumstances, count as speech. An example is Duchamp's urinal: In a gallery, it's artistic expression. In a men's room, it's part of the plumbing. It seems any object or event could—in the right circumstances—be speech, including "found objects" and even natural events. (Shakespeare found "sermons in stones, books in babbling brooks . . . .") A rainstorm by itself is not speech. But if I have told you that I will meet you at your house at 6:30 pm tomorrow if it's raining there then, the rain (there and then) is my way of telling you that I will meet you.

As Post notes, "[i]f the Spence test were to describe actual judicial practice, we would expect criminals routinely to attempt to immunize their crimes by endowing them with particular messages."[51]

Speech does not differ from non-speech conduct in being context-dependent and subject to interpretation. Note that, even according to the *Spence* test, it is the context—whether "an intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it"—that makes all the difference.

There is, of course, the further challenge of defining "speech" for First Amendment purposes—let's call it "speech*"—given that much of what we ordinarily call "speech," e.g. perjury, insider trading, incitement to crime, and "whites only" signs, is not covered by the First Amendment and many things not ordinarily called "speech," e.g. flag-burning, armband-wearing, nude dancing, and corporate campaign contributions, *are*. There is no intrinsic metaphysical difference between speech* and non-speech* nor is there any difference that can be determined functionally by showing, for example, that the former invariably causes less harm than the latter.[52]

V. Can we distinguish laws restricting speech* from laws restricting non-speech*?[53]

Free speech theorists have traditionally treated content-based and content-neutral laws very differently, on the assumption that the message effects of the former would always be wide-ranging and typically violative of individual liberties, whereas the message effects of the latter would be negligible or nil. One of Larry Alexander's many contributions to the free speech literature is his compelling argument that ostensibly content-neutral laws regulating speech (for

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[51] Ibid, p. 1252.

[52] Instead of asking "what is speech*?" it might be more useful to ask "when is speech*?" following the example of Nelson Goodman's approach to art in "When Is Art?"

[53] What follows in this section is a revised excerpt from my review of Larry Alexander, *Is There a Right to Freedom of Expression?* in *Law and Philosophy* 27:1 (January 2008), pp. 97-104.

example, those long-considered-to-be-innocuous time, place, and manner restrictions) can affect the messages received as much as—or even more than—the allegedly much more pernicious content-based laws.[54]

Alexander goes even further than this in his book, arguing that "all laws [not just laws explicitly concerning speech] affect what gets said, by whom, to whom, and with what effect . . . ,"[55] and this deals the final, fatal blow to any attempt to ground a defense of a free speech principle in a theory that purports to distinguish speech* from conduct—or laws restricting speech* from laws restricting non-speech* conduct.

The seeds of these arguments were already present in Alexander and Horton's 1983 article, in which they wrote: "'Speech,' we contend, does not denote any particular set of phenomena. Everything, including all human activities, can 'express' or 'communicate', and an audience can derive meaning from all sorts of human and natural events. Moreover, 'speech' is regulated and affected by regulation in a multitude of different ways and for a multitude of different reasons. Finally, with respect to any value, 'speech' both serves and disserves that value in an indefinite variety of ways and degrees. Considering these points, it would be truly amazing if 'freedom of speech' really did have a coherent and independently justifiable principle all its own."[56]

Alexander's book presents a persuasive diagnosis of "the cause of the failure to find a cogent and defensible principle justifying and delimiting a right of freedom of expression." This failure, according to Alexander, is "part and parcel of the failure of liberalism to provide a

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54 This argument was first presented in Larry Alexander, "Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory," *Hastings Law Journal* 44 (1993), pp. _-_ .

55 Larry Alexander, *Is There a Right* . . . , p. 17.

56 Alexander and Horton, p. 1322.

justification for tolerating illiberal views—which toleration is for many definitive of liberalism."[57] Alexander presents a convincing argument that "liberalism as governmental nonpartisanship (neutrality) towards religion, associations, and expression is an impossibility."[58] As he notes, many other theorists have addressed the paradoxical nature of liberalism insofar as it applies to freedom of religion and freedom of association, but, "with the exception of Stanley Fish, no one seems to have noticed that the same paradox infects that third liberal bulwark, the right of freedom of expression."[59] The gist of this paradox is that "[i]f liberalism is the correct political philosophy, then it cannot attach value to messages that undermine it, just as[,] if freedom of expression is valuable, advocacy of its abolition cannot be."[60]

By the end of this book, Alexander has undermined the very foundations of U.S. free speech jurisprudence, but he's not happy about this remarkable accomplishment. One gets the feeling that he'd like to be able to start afresh, like Descartes on day two of *The Meditations*, by, in Alexander's case, rebuilding the traditional liberal free speech edifice on a firmer foundation. But the best he can do, in good conscience, is to argue that there remain some rule-consequentialist considerations in favor of protecting at least some speech in at least some circumstances. But this, as Alexander concedes, yields, at most, a very weak defense of free speech.

The fact that Alexander's theorizing leads him to accept a conclusion that does not serve his more pragmatic purposes gives a kind of Kantian credibility to his account: it is clear that reason, and not inclination, is what motivates his conclusion. And it is very difficult to find fault

[57] Alexander, *Is There a Right . . .*, p. 147.
[58] Alexander, *Is There a Right . . .*, p. 147.
[59] Alexander, *Is There a Right . . .*, p. 148.
[60] Alexander, *Is There a Right . . .*, p. 175.

with his reasoning. It is not clear, though, why Alexander still thinks we should act *as if* there is a right to free speech, even after he has argued so persuasively that no such right exists. Why, one wonders, doesn't his philosophically-based skepticism about free speech lead him to the normative skepticism of Becker, West, and Fish?

In an article published in the same (1983) journal volume as Alexander and Horton's article, Schauer notes the "intellectual ache . . . shared by many people now engaged in the process of trying to explore the theoretical foundations of the principle of freedom of speech. As we reject many of the classical platitudes about freedom of speech and engage in somewhat more rigorous analysis, trying to discover why speech—potentially harmful and dangerous, often offensive, and the instrument of evil as often as of good—should be treated as it is, our intuitions about the value of free speech, solid as they may be, are difficult to reconcile with this analysis. The ache, it seems to me, is caused by the fact that although the answer to 'Must speech be special?' is probably 'Yes', the answer to '*Is* speech special?' is probably 'No'."[61]

After arguing, for nearly the entirety of his book, that the answer to the question "*Is* speech special?" is most definitely "No," Alexander concludes by quoting, with approval, five paragraphs from an article decrying government censorship on traditional liberal grounds: although it makes us feel good, censorship tends to be "irrational and alarmist;" it is "inimical to democracy," it backfires, and it "doesn't get rid of bad ideas or bad behavior."[62] For reasons Alexander himself gives, however, these problems are not peculiar to government restrictions on speech as opposed to non-speech conduct. Still, the intuition that speech *must* be special is so

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[61] Frederick Schauer, "Must Speech Be Special? *Northwestern University Law Review* 78 (1983), pp. 1284-1306.

[62] Alexander, *Is There a Right* . . . , pp. 192-193, quoting Nan Levinson, *Outspoken* (2003), pp. 18-19.

hard to shake that, nearly three decades after his groundbreaking co-authored article, Alexander seems to still feel the intellectual ache Schauer noted.

I am much more sanguine about life without a free speech principle. Indeed, I'm inclined to celebrate free speech skepticism as a welcome antidote to the free speech fundamentalism adhered to by many of my compatriots.[63] In the U.S., the First Amendment is so central to our self-conception that it is a defining feature of our national identity. It is sometimes taken as a sign that we enjoy freedoms of mythic proportions. Living in a country where, in times of war and economic downturn, the airwaves and the Internet are filled with propaganda such as the song "God Bless the USA" which proclaims "I'm proud to be an American, where at least I know I'm free,"[64] I'm glad to be a free speech skeptic, although sometimes I wish I had a little more company.

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63 Lest my attaching the labeling "fundamentalist" to the free speech faithful seem completely gratuitous, I note the following features shared by free speech fundamentalism and other fundamentalisms:

1. The right to free speech is considered to be basic: the most fundamental right. Thus alleged conflicts between free speech and equality are "resolved" by fiat: free speech trumps equality. (Metaphysical fundamentalism)

2. The right to free speech is unquestionable—and not itself in need of any justification. (Epistemological fundamentalism)

3. The *value* of free speech is paramount (rendering insignificant—or even invisible—all competing values). (Normative fundamentalism)

4. The basis for free speech is textual (the First Amendment) but the text itself, given a literal interpretation, is based on something more fundamental than—and prior to—it: a moral right. (Textual fundamentalism combined with moral realism)

5. The right to free speech is possessed by all human beings at all times and in all places, whether they realize it or not. (Universalism)

64 Lee Greenwood wrote and first recorded this song in the middle of the Reagan years and it continues to be popular. It was broadcast with increased frequency during the first Gulf War, after 9-11, during the U.S. invasion of Iraq, and after the killing of Osama Bin Laden.

In his dissent in *Abrams,* Holmes wrote that “the ultimate good desired”—*truth*—“is better reached by free trade in ideas” than by any restrictions on speech. “That, at any rate,” he continued, “is the theory of our Constitution. It is an experiment, as all life is an experiment.”[65]

Now may be a good time to ask how that experiment is working out in the digital age. As Holmes observed, “time has upset many fighting faiths.” Perhaps the faith in the justifiability of an independent free speech principle is one of them.

[65] *Abrams v. United States* 250 U.S. 616 (1919), p. 630.