1998

The First Amendment Freedoms, Civil Peace and the Quest for Truth

Murray Dry

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I. INTRODUCTION

Judicial review makes American constitutional law as intellectually engaging a subject of study as it is an important part of American government. By combining particular facts and legal controversies with appeals to principles of justice, American constitutional law is the country's practical political philosophy. It covers what Francis Bacon called "knowledges that are drenched in flesh and blood, . . . about the which men's affections, praises, [and] fortunes do turn and are conversant."[1] The first amendment freedoms of speech and religion are particularly interesting and important because of their connection to the liberal principle of toleration, and through that principle to philosophy, or the quest for truth. The connection is the philosophic argument made in defense of laws which encouraged toleration; the argument claimed that truth as well as freedom benefitted from toleration. First made by John Milton and then extended by John Locke and Benedict de Spinoza, this argument succeeded in establishing civil peace and political freedom in England in the seventeenth century and in America and France in the eighteenth century.

The American founders, who drew on Locke and Charles de Montesquieu, believed that constitutional government was informed by philosophic truth. Do we still believe that? There

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1. Francis Bacon said that about "civil history, morality [and] policy," in contrast to natural philosophy, in II, XII *Advancement of Learning* 2 at 122 (G.W. Kitchin, ed., J.M. Dent & Sons Limited, 1973). The work was first published in 1605.

is reason to doubt it. Here is a passage from Justice Oliver Wendell Holmes' dissent in an early speech case decided in 1919.

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[2]

Justice Robert H. Jackson's court opinion in the 1943 flag salute case provides an important gloss on Holmes' statement. Explaining why public schools could not require anyone to salute the flag and recite the pledge of allegiance, Jackson wrote:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[3]

The American founders' understanding of political truth implicitly acknowledged that individuals could define happiness largely in terms of their own desires and tastes. Still, America's philosophic understanding as a people has shifted from belief in a truth based on what it means to be a human being to confidence in progress to a proud affirmation of agreement to disagree. Today, many Americans think that they have no orthodoxy, or at least that "under the First Amendment there is no such thing as a false idea." [4] This "content neutral" approach to the first amendment has led to results that are difficult to reconcile with confidence in the "competition of the market," also known as the "marketplace of ideas" metaphor. For example, in the name of free expression, the Supreme Court has held that nude dancing is expressive conduct protected by the First Amendment.[5] It has also extended constitutional protection to

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2. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

3. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

4. This is from justice Powell's court opinion in *Gertz v. Welch*, 418 U.S. 323, 339 (1974).

5. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991). The Indiana statute requiring the dancers to wear "pasties" and a "G-string" was upheld, 5-4, either on time, place and manner grounds, id. at 566, or, with Justice Souter providing the fifth vote, out of a legitimate concerns about "secondary effects," such as crime. Id. at 566-69; 582 (Souter, J., concurring). But the Court also acknowledged that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the

flag burning,[6] cross burning and other hate speech,[7] pornography,[8] and unlimited expenditures on political campaigns.[9] Virtually unrestricted freedom seems to have buried any serious preoccupation with truth. Yet, the original philosophic arguments made on behalf of freedom of speech and religion were quite serious about the pursuit of truth. Apparently something went wrong along the way, although the Supreme Court continues to assert that "the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas, in which truth will ultimately prevail."[10]

First Amendment scholars have pointed out difficulties with the "marketplace of ideas" thesis, and they have tended to place more emphasis on other justifications for protecting free speech. Thus Frederick Schauer writes that the argument assumes "the prevalence of reason," without evidence, as well as the "priority over other values" of "the search for knowledge." [11] Still, Schauer argues that the "focus on the possibility and history of error makes us properly wary of entrusting to any governmental body the authority to decide what is true and what is false, what is right and what is wrong, or what is sound and what is foolish." [12] Not only is Schauer not troubled by such a contention, he develops the position into a general distrust of government.[13] Schauer connects his general distrust argument to the self-government argument for free speech,[14] but he concludes that "the most persuasive argument for a Free Speech Principle is . . . governmental incompetence."[15] If this argument focuses on speech, it would seem to be limited to political speech; if it is not so limited, then it would seem to apply to regulation of conduct

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First Amendment, though we view it as only marginally so." Id. at 566.

6. *Texas v. Johnson*, 491 U.S. 397 (1989) and *United States v. Eichman*, 496 U.S. 310 (1990).

7. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

8. *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989).

9. *Buckley v. Valeo*, 424 U.S. 1 (1976).

10. *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 390 (1969).

11. Frederick F. Schauer, *Free Speech: A Philosophical Enquiry* 33 (Cambridge U. Press, 1982).

12. Id. at 34.

13. Id. ("The argument from truth may be based not only on its inherent scepticism about human judgment, but also on a more profound scepticism about the motives and abilities of those to whom we grant political power. The reason for preferring the marketplace of ideas to the selection of truth by government may be less the proven ability of the former than it is the often evidenced inability of the latter.").

14. Id. at. 35-46.

15. Id. at 86.

as well; that is, it would be a libertarian argument for minimal government.

Other scholars, such as Edwin Baker and Martin Redish, turn to an argument from autonomy or self-realization to support freedom of speech. Both of these arguments also amount to a general liberty argument, however, and thus fail to address what is distinctive about freedom of speech.[16] Christopher Wonnell has attempted to defend the marketplace theory, but the argument is limited to empirically verifiable questions that are subject to repeated testing by "elite communities."[17] By distinguishing between what he calls "the true" from "the good," Wonnell has strengthened the case for the marketplace approach by narrowing the range of questions to those which can be subject to verification by testing. But the range of such questions may be narrower than he claims.[18]

An examination of the relevant philosophic arguments which led to the theory of the marketplace of ideas will allow us to separate out the philosophic quest for the truth from the political objective of establishing civil peace by means of toleration. This is important because whatever justifications for the first amendment freedoms have merit arise out of, or are related to, these two objectives. I will first examine the relevant philosophic arguments and then turn to some important judicial arguments concerning freedom of speech.

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16. See C. Edwin Baker, *Human Liberty and Freedom of Speech* 5 (Oxford U. Press, 1989), ("I then argue that the constitutional protection of free speech bars certain governmental restrictions on noncoercive, nonviolent, substantively valued conduct, including nonverbal conduct."); Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591 (1982). After noting Baker's criticism of the "marketplace of ideas" notion, Redish asserts that the theory can be retained if it is viewed "as a means of facilitating the value of self-realization." Id. at 619.

17. Christopher Wonnell, *Truth and the Marketplace of Ideas*, 19 U.C. Davis L. Rev. 669 (1986).

18. Wonnell claims that eventually the truths that are verified by the elite communities will become dispersed into society at large. His only example, however, is the law of supply and demand. Id. at 704. Wonnell writes that Thomas Sowell's work is "[a]n example of a system of ideas that can only be appreciated fully within a demand-for-truth paradigm .... Sowell criticizes the 'civil rights vision' that [sic] in its understandable desire for moral condemnation of racism incorrectly attributes the bulk of the disparity in the incomes of ethnic groups to present discrimination." Id. at 705. Sowell may be right, or more right than his critics, but I don't think that Wonnell has shown how everyone must agree with him on the complex question of the relationship between the income of ethnic groups, especially African-Americans, and discrimination.

II. FREEDOM OF SPEECH AND RELIGIOUS FREEDOM IN MODERN POLITICAL PHILOSOPHY

John Milton's *Areopagitica*,[19] written in 1644, is the first work to contain an explicit defense of freedom of speech, in the form of freedom of the press. Writing in defense of learning, and hence the liberty to publish without prior approval from government, Milton urged Parliament to rescind its recently enacted licensing law. Milton's argument is famous for its contention that

> though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?[20]

In addition, Milton argues for toleration, and hence for religious freedom. But each argument is limited: toleration is not extended to "popery," while "mischievous and libellous"[21] publications are subject to subsequent punishment.

Why did Milton place limits on tolerance, if he believed that the truth was strong and would prevail over falsehood? According to one explanation, Milton never held to the "truth wins out" position; he only presented it for rhetorical purposes, since other partisans of toleration who were well respected in Parliament espoused that view of truth.[22] This position emphasizes Milton's interest in philosophic learning. Another explanation is both political and theological. Catholicism threatens the independence of England by making a universal claim on the allegiance of all Christians, regardless of their citizenship. Theologically, Milton wrote: "True Religion is the true Worship and Service of God, learnt and believed from the Word of God only.... He hath Reveal'd and taught it us in the holy Scriptures ... with strictest command to reject all other traditions or additions whatsoever."[23] Connecting that statement to Milton's

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19. The title refers to Areopagus, a hill in Athens where the highest judicial court of the city held its sittings. In particular, Milton is thereby addressing Parliament in the manner that Isocrates addressed a speech to the Areopagus, which was known as his Areopagitic oration.

20. John Milton, *Areopagitica and Of Education* 50 (George H. Sabine, ed., Harlan Davidson, 1987).

21. Id. at 52, 55.

22. Paul M. Dowling, *Polite Wisdom: Heathen Rhetoric in Milton's Areopagitica* ch. 7 (Rowman and Littlefield, 1995).

23. John Milton, *Of True Religion*, quoted in Ernest Sirlock, ed., II *Complete Prose Works of John Milton* 181 (Don M. Wolfe, et al., eds., Yale U. Press, 1959).

contention in *Areopagitica* that we are "searching what we know not, by what we know, still closing up truth to truth as we find it . . ." yields the conclusion that Roman Catholicism, by denying the fundamental thing we know—that divine truth is accessible to human beings through scripture, without the authoritative intervention of ecclesiastical authority—does not deserve toleration and may be proscribed to protect what we already know.[24] The man who initiated the powerful statement that truth wins out, by arguing for a qualified tolerance, did not make clear to his readers whether he expressed his true convictions in that statement or whether he wrote rhetorically.

One scholar thinks Milton wrote as a believer and that nonetheless his argument for freedom of speech is important for modern, i.e. liberal, constitutionalism. In a recently published talk on Milton's *Areopagitica*, Vincent Blasi assumes that Milton was serious about divine providence and that his non-tolerance of Catholics was justified because of their rejection of the supremacy of scripture.[25] Warning us against "try[ing] to secularize Milton," and noting Milton's indebtedness to Machiavelli,[26] Blasi identifies Milton with the position that "public order, public morality, and mutual respect among citizens simply cannot be achieved by coercive legislation alone."[27] For Blasi, who later identifies Milton more with Madison than with Mill, and more with Justice Black than with Justice Holmes, "the crux of *Areopagitica* . . . is that without a robust commitment to free-wheeling disputation . . . it is impossible to sustain an energetic, adaptive, vibrant society."[28] There is something to this, as well as to Blasi's sensible concluding statement that Milton was neither a skeptic nor a democrat, but was "sympathetic to an aristocracy of merit."[29] But that description of Milton is fully consistent with a far less libertarian position on freedom of speech than is reflected in American constitutional law today.

We do learn from Milton's *Areopagitica* that taking the claim regarding truth's success in the world seriously goes together with belief in divine providence. In subsequent formulations of the argument, starting with John Locke, the claim re-

24. Sirlock, II *Complete Prose Works of John Milton* at 181 (cited in note 23).

25. *Milton's Areopagitica and the Modern First Amendment*, delivered at Yale Law School in March 1995 and published as a Yale Law School Occasional Paper, Second Series, no. 1, p. 10. Blasi follows Sirlock in his interpretation.

26. Id. Blasi does not consider that these two positions might be contradictory.

27. Id. at 16.

28. Id. at 17 (see p. 19 for the references to Madison, Mill, etc.).

29. Id. at 18.

garding truth winning out is made rhetorically, notwithstanding the philosophers' own desire for knowledge.

In *A Letter Concerning Toleration*, published in 1690, John Locke argued for the complete separation of religion, whose jurisdiction was salvation of the soul, from government, whose jurisdiction was the body. The magistrate, Locke argued, should manifest no concern for speculative doctrines, since they do not pertain to the civil interests of "life, liberty, health and indolency of body; and the possession of outward things, such as money, lands, houses, furniture and the like."[30] In addition, "the care of the souls cannot belong to the civil magistrate, because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God."[31] Furthermore, even if laws with penalties could change men's minds, they could not help "in the salvation of their souls."

Locke defined a church as a "voluntary society of men, joining themselves together of their own accord, in order to the public worshipping of God . . . ."[32] Since the church is a private association, it is not bound by the duty of toleration to retain anyone who "offend(s) against the laws of the society," but its power is limited to excommunication.[33] As for the magistrate, he may teach or admonish but he may not prescribe by laws and compel by punishment in the matter of an individual's soul. This point is made first with respect to forms and rites of worship and then with respect to doctrines.

The forms of worship must be voluntary to be pleasing to God. Locke says that human authority cannot make "indifferent things" "any part of the Worship of God," since such things cannot "by any Virtue of their own . . . propitiate the Deity."[34] Since Locke holds that every part of the ceremonial, or outward, worship of God involves indifferent things, each church is free to worship as it pleases, so long as the magistrate does not have a legitimate reason to interfere. "The only business of the Church is the salvation of souls; and it no ways concerns the commonwealth or any member of it, that this or the other ceremony be

30. John Locke, *A Letter Concerning Toleration* 26 (James H. Tully, ed., Hackett Pub. Co., 1983).
31. Id. at 27.
32. Id. at 28.
33. Id. at 30.
34. Id. at 40.

there made use of."[35] Locke uses the washing of an infant with water as his example of "an indifferent thing."[36] If the magistrate thought it was necessary to prevent disease, a law could order washing, but not baptism. Government may not require baptism or interfere with baptism. Hence, Jews may not be forced to undergo baptism. Likewise, the religious use of bread and wine is not a concern of government; "both [are] in their own nature and in the ordinary occasions of life, altogether indifferent."[37] Locke distinguishes the circumstances of worship from the fact of worship itself; the latter only seems to be appointed by God, whereas the former are particular instances of "things indifferent." Lest he be misunderstood about the limits of religious freedom in the matter of rituals, Locke makes clear that animal sacrifices are altogether different, from the perspective of government, from human sacrifices.[38] For Locke, the government has primary responsibility for deciding what can and must be done; it includes those actions which preserve each individual's natural rights, his life, liberty, and estate.

Turning from conduct to opinion, Locke distinguishes between speculative and practical articles of religion; of the former, Locke says that since they "terminate simply in the understanding" they are "required only to be believed," and are not the concern of government. In his elaboration, Locke draws on Milton's argument concerning the truth.

> The magistrate ought not to forbid the preaching or professing of any speculative opinions in any church, because they have no manner of relation to the civil rights of the subjects. If a Roman Catholick believe that to be really the Body of Christ, which another man calls bread, he does not injury thereby to his neighbor . . . The power of the magistrate, and the estates of the people, may be equally secure whether any man believes these things or no. I readily grant that these opinions are false and absurd. But the business of laws is not to provide for the truth of opinions, but for the safety and security of the commonwealth, and of every particular mans goods and person. And so it ought to be. For truth certainly would do well enough, if she were once left to shift for herself . . . . Thus much for speculative opinions. Let us now proceed to practical ones.[39]

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35. Id. at 39.
36. Id. at 40.
37. Id.
38. Id. at 41-2.
39. Id. at 46.

Locke's apparent confidence in truth's winning out can also be understood as his indifference to such speculative inquiries. Whatever the results of such speculations, which he has equated with faith, they cannot be imposed upon anyone else. Also, since Locke does not tire of reminding us that each person is orthodox to himself, we must wonder whether he thinks that speculation concerning the soul, and hence the divine, can lead to knowledge. In other words, Locke's use of Milton's phrase about truth winning out in a contest with falsehood is presented rhetorically: his intent is to make sure that doctrinal division does not upset civil peace by becoming a part of governmental strife.

This interpretation is confirmed by examining Locke's discussion of practical opinions, which "influence the will and manners" of men. After acknowledging that "moral actions belong . . . to the jurisdiction both of the outward and the inward court . . . both of the magistrate and conscience,"[40] Locke proceeds to limit concerns of the soul to salvation and hence to the individual, leaving government to deal with life "here upon earth."[41] Since men are apt to prey upon the fruits of other men's labors, this requires the establishment of civil society. Locke's account thus reduces the soul to a self which pursues interests connected to desires of the body.[42]

Having applied his principle of toleration to religious conduct and opinions, Locke addresses the question, "what if the magistrate should enjoin any thing by his authority that appears unlawful to the conscience of a private person?"[43] Locke replies that if government is faithfully administered "this will seldom happen." But if it does, "such a private person," should abstain from the action but undergo the punishment.[44]

But suppose the people at large, not just one private person, disagree with the government? Here Locke offers his dissolution of government argument in miniature. "Who shall be judge

40. Id.

41. Id. at 47.

42. See Harvey C. Mansfield, Jr., *The Religious Issue and the Origin of Modern Constitutionalism* in *America's Constitutional Soul* 101, 103 (Johns Hopkins U. Press, 1991).

43. Locke, *A Letter Concerning Toleration* at 48 (cited in note 30).

44. This argument resembles the civil disobedience arguments of Thoreau and Martin Luther King; but whereas Thoreau and King identify civil disobedience with the requirements of justice, Locke acknowledges that justice may lie with the government and still conflict with the claim of conscience. For Locke's account of what must be done if the government truly acts unjustly, see my next paragraph.

between them? I answer, God alone. For there is no Judge upon earth between the Supreme magistrate and the people."[45] Since the people have the ultimate authority, by virtue of the natural right of each to provide for his preservation, they collectively have the right to displace government.

What confuses the argument is Locke's reference to God, or, as he says in the *Second Treatise*, to Heaven. Recalling Locke's treatment of speculative opinions, that they are private matters between the individual and his God, not the concern of government, we wonder how a political teaching could then take divine providence seriously. If everyone is orthodox to himself, will not everyone think he has God on his side? Locke's teaching is based on the truth about the goods of this life, not salvation in an afterlife. At the same time, his rhetorical treatment of truth shifting for itself in the matter of speculative religious opinions has the effect of freeing philosophers such as himself from the constraints of overreaching theocracy.

Locke's teaching on toleration thus contains a principled account of the different jurisdictions of government and religion and it offers a subtle form of conflict resolution between individual conscience and the authority of government. Locke, like Milton, placed limits on tolerance, but in this case the limits were clearly in the service of establishing the principle of tolerance.

For example, Locke wrote that "those are not at all to be tolerated who deny the being of a God," since "promises, covenants, and oaths, which are the bonds of humane society, can have no hold upon an Atheist."[46]

Some might say that the restriction is meaningless since the untrustworthy atheists will lie. But Locke has in mind the positive effect on the habits of most citizens of knowing that government distrusts anyone who publicly denies the existence of God. This is what is known as "civil religion." Today we rely entirely on voluntary means of cementing support for public spiritedness.

Locke's toleration argument entered American constitutionalism through the efforts of Thomas Jefferson and James Madison. Jefferson's draft of the *Bill for Establishing Religious Freedom*, in Virginia, which was written in 1779, included this statement.

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45. Id. at 49.
46. Id. at 51.

> [T]hat our civil rights have no dependance [sic] on our religious opinions, any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right; ... that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.[47]

Jefferson's confidence in truth winning out was limited to religious opinions. Sound political opinions may require an act of revolution, a successful party organization and political campaign, complete with republican creed, as well as the enforcement of state libel laws for their maintenance. In his reliance on truth prevailing in the matter of religious opinions, Jefferson was every bit as rhetorical as Locke.

Six years later Madison wrote his *Memorial and Remonstrance* against a proposal for public funds to support religious instruction. The twelfth paragraph contained this argument against the Bill.

> Because, the policy of the bill is adverse to the diffusion of the light of Christianity .... [The Bill] at once discourages those who are strangers to the light of [revelation] from coming into the Region of it .... Instead of levelling as far as possible, every obstacle to the victorious progress of truth, the Bill with an ignoble and unchristian timidity would circumscribe it, with a wall of defence, against the encroachments of error.[48]

In her essay on Madison's Memorial, Eva Brann compares this passage to Jefferson's more famous passage, quoted above.

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47. Merrill D. Peterson, ed., *The Portable Thomas Jefferson* 252-53 (Viking Press, 1975).

48. James Madison, *Memorial and Remonstrance* in Marvin Meyers, ed., *The Mind of the Founder: Sources of the Political Thought of James Madison* 14-15 (Bobbs-Merrill, 1973).

> The final sentence of the Christian section [of the Memorial] is reminiscent of the great peroration of Jefferson's bill establishing religious freedom . . ., except that the truth of this paragraph is truth of revelation, and the freedom here called for Christian liberty, a very Madisonian harmonizing of the spirit of enlightenment and the claims of Christianity.[49]

The author of that commentary leaves it to the reader to determine whether that harmonizing is possible, and whether Madison truly thought it was.

Benedict de Spinoza's *Theologico-Political Treatise,* published in 1670, extends the argument for toleration into the sphere of political opinion. While Locke discusses the importance of political opinions in connection with the relationship between the people and their representatives, Spinoza's argument concerning the desirability of democracy gives more prominence to freedom of speech.[50] Spinoza, like Locke and Milton before him, argues on behalf of philosophic freedom. His free speech argument addresses a very important political consideration not found in Locke or Milton however.

The first and most important argument Spinoza makes concerns the proper separation between philosophy and theology, which he identifies with the spheres of truth and faith respectively. Spinoza's way of establishing religious toleration is first to reduce theology to a few simple moral precepts, or dogmas, as he also calls them. They amount to little more than Locke's insistence that one not deny the existence of God. Then, the definitive interpretation of these dogmas is entrusted to the sovereign, the democratic government, in no uncertain terms.

> We may now see in a clearer light . . . that all the decrees of God involve eternal truth and necessity, so that we cannot conceive God as a prince or legislator giving laws to mankind. For this reason the Divine precepts, whether revealed through our natural faculties, or through prophets, do not receive immediately from God the force of a command, but only from those, or through the mediation of those, who possess the

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49. Eva Brann, *Madison's "Memorial and Remonstrance," A Model of American Eloquence* in Glenn Thurow and Jeffrey D. Wallin, eds., *Rhetoric and American Statesmanship* 35 (Carolina Academic Press, 1984), reprinted in Pamela Kraus, ed., *The Past-Present: Selected Writings of Eva Brann* (St. John's College Press, 1997). Where I have placed ellipses in the text, Brann quotes Jefferson that "truth is great and will prevail if left to herself . . . ." See text above at note 47.

50. Spinoza was the first philosopher to argue that democracy was the best form of government. I owe this observation to Leo Strauss, who made it while teaching a seminar on Spinoza in 1959, at the University of Chicago.

> right of ruling and legislating. It is only through these latter means that God rules among men, and direct human affairs with justice and equity.[51]

Spinoza goes on to say:

> This conclusion is supported by experience, for we find traces of Divine justice only in places where just men bear sway; elsewhere the same lot (to repeat again Solomon's words) befalls the just and the unjust, the pure and the impure: a state of things which causes Divine Providence to be doubted by many who think that God immediately reigns among men, and directs all nature for their benefit.[52]

This argument for absolute obedience to democratic government started from the realist premise that might makes right, or that by natural right the big fish eat the small fish. When individuals reflect on their hopes and fears, they will conclude, Spinoza argues, that the rational society would have to be a democracy, where the body politic wields the power of each together for the sake of the security of each severally. Spinoza's argument for freedom of speech begins this way.

> No, the object of government is not to change men from rational beings into beasts or puppets, but to enable them to develope their minds and bodies in security, and to employ their reason unshackled; neither showing hatred, anger, or deceit, nor watched with the eyes of jealousy and injustice. In fact, the true aim of government is liberty.[53]

Spinoza can identify democracy with rationality, which surely distinguishes his political philosophy from that of Plato and Aristotle, on the basis of his previous limitation of rationality to instrumental calculations concerning one's hopes and fears. Spinoza's earlier account of the objects of desire started with the knowledge of things through their primary causes. He also indicated that the ends of government are security and comfort,[54] which means that government's ends are necessarily limited from the perspective of the development of the mind. They are instrumentally rational or sub-rational, as they take their bearings from the desires for security and comfort. This is the source of our self-deception regarding the relationship between

51. Benedict de Spinoza, *A Theologico-Political Treatise* in 1 *The Chief Works of Benedict de Spinoza* 248 (R.H. M. Elwes, trans., George Bell and Sons, 1883).
52. Id. at 249.
53. Id. at 259.
54. Id. at 47.

political freedom and rationality, and hence between political freedom and the truth. Philosophers, in order to make the world safe for philosophy, need to restrain religion, in so far as revealed religion threatens philosophy. In Spinoza's view, the restraining of religion seems to require making an argument against any hierarchical government, lest it be ecclesiastical. Hence he is the first philosopher to argue the superiority of democracy to all other forms of government. Democratic freedom will serve rational self-development, but, if we read carefully, we learn that it is only instrumental rationality, i.e. this reason is in the service of a secure and healthy life, not knowledge of things through their primary causes.[55]

Spinoza's argument for freedom of speech has a special twist which reflects the character of democratic rationality. Spinoza starts with a statement in support of moderate restraints on the expression of opinions. Men should not deny the supremacy of government and they should acknowledge that promises should be kept. But Spinoza goes on to qualify this argument, in the name of what works, and here we note that the hard surfaced realist has a soft, pragmatic core.

> If we hold to the principle that a man's loyalty to the state should be judged, like his loyalty to God, from his actions only—namely from his charity towards his neighbors; we cannot doubt that the best government will allow freedom of philosophical speculation as well as religious belief... He who seeks to regulate everything by law, is more likely to arouse vices than to reform them. It is best to grant what cannot be abolished, even though it be in itself harmful....
>
> It is far from possible to impose uniformity of speech, for the more rulers strive to curtail freedom of speech, the more obstinately are they resisted; not indeed by the avaricious, the flatterers, and other numskulls... but by those whom good education, sound morality, and virtue have rendered more free. Men, as generally constituted, are most prone to resent the branding as criminal of opinions which they believe to be true, and the proscription as wicked of that which inspires them with piety towards God and man; hence they are ready to forswear the laws and conspire against the authorities, thinking it not shameful but honorable to stir up seditions and perpetuate any sort of crime with this end in view. Such being

55. For Spinoza, philosophy may be said to encompass the highest object of legitimate desire, whereas the object of government is limited to security and comfort. Id. at 45, 47.

> the constitution of human nature, we see that laws directed against opinions affect the generous-minded rather than the wicked, and are adapted less for coercing criminals than for irritating the upright; so that they cannot be maintained without great peril to the state.[56]

In other words, precisely because most men are governed by their passions rather than their reason, any attempt to restrain the expression of the form or content of opinion is likely to be met with such a spirited opposition—from the respectable members of society as well as the low-lifes—that as a practical matter it is better to limit the restraints of law to overt acts. Spinoza can therefore be credited with presenting the first philosophic argument in support of both democracy and freedom of speech. The argument deliberately blurs the distinction between philosophy and politics by equating the rational life with the successful pursuit of material well-being. The free speech argument has nothing to do with truth winning out in the marketplace but rather with the kinds of restraints that most people will accept.

In turning from Locke and Spinoza to John Stuart Mill, we turn from the philosophic sources for the American founders to the philosophic source for the modern Supreme Court in its treatment of freedom of speech. In *On Liberty*, published in 1859, Mill assumed the soundness of his predecessors' toleration argument and extended the marketplace of ideas argument from speculative religious opinions to all political opinions. Since Mill's argument for freedom of speech depends upon his larger argument, for individual autonomy, I want to start there.

Mill writes that the object of his essay is to assert one principle, "that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection."[57] Considered in isolation, this statement resembles the liberal arguments of Locke and Spinoza. But Mill's position differs from theirs, as the next passage indicates.

> The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice. He who does anything because it is the custom, makes no choice. He gains no practice either in discerning or in desiring what is best. The mental and

56. Id. at 261-62.

57. John Stuart Mill, *On Liberty and Other Writings* 13 (Stefan Collini, ed., Cambridge U. Press, 1989).

> moral, like the muscular powers, are improved only by being used.[58]

Mill assumes that moral habits develop the same way that intellectual faculties do. What accounts for his sanguine view concerning the results of the fullest freedom of action as well as opinion? The answer lies in Mill's two-part account of human nature. First, Mill likens human nature "not [to] a machine to be built after a model, and set to do exactly the work prescribed for it, but [to] a tree, which requires to grow and develope [sic] itself on all sides, according to the tendency of the inward forces which make it a living thing."[59] Mill emphasizes the "inward forces," rather than the natural term of a tree's growth, as in "from acorn to oak." Hence, he focuses on desires and impulses, not understanding and restraint. "To say that one person's desires and feelings are stronger and more various than those of another, is merely to say that he has more of the raw material of human nature, and is therefore capable, perhaps of more evil, but certainly of more good."[60]

Other philosophers also acknowledged the force of human passions. Moreover, modern political philosophy focuses on having passion control passion (or ambition control ambition as Madison put it in the *Federalist Papers*).[61] But whereas Hobbes, Locke, and Spinoza recognized the need to control passion with strong government, Mill denies there is any conflict between the strong individual and peace and security. He also prefers the Athenian statesman Pericles over either the brilliant but immoderate Athenian Alcibiades or the Christian John Knox,[62] without explaining why, on his own terms, we should not prefer the noble if audacious Alcibiades, who, after all, always lands on his feet.

Mill claims that whatever restrictions are dictated by his principle of no harm to others benefit the social part of the individual. This is difficult to accept, especially when we consider that Mill allows society to require each able bodied individual to help provide for the common defense.[63] After rejecting tradition and custom, and thus habit, as a ground of restraint of one's passions, Mill expects his individuals to agree "[t]o be held to rigid

58. Id. at 59.
59. Id. at 60.
60. Id.
61. See Federalist 51 (Madison).
62. Mill, *On Liberty* at 63 (cited in note 57).
63. Id. at 75.

rules of justice for the sake of others," since it "developes [sic] the feelings and capacities which have the good of others for their object."[64] But Mill's entire argument has minimized the extent to which the community, and hence the good of others, contributes to individual self-fulfillment. It seems that Mill did not want to have to acknowledge that the good life as he describes it puts individuals in direct conflict with one another.

Likewise, Mill's argument for freedom of opinion fails to distinguish between the conditions under which reasoned argument can succeed and the character of political debate. Mill's account of the case for reasoned inquiry, with a willingness to reconsider the grounds of one's position, resonates well in colleges and universities, since, after all, that is what liberal education is all about. But political debate is different; the primary object is to persuade, not to instruct,[65] and the focus of debate is not ordinarily the very foundations of civil society, as it often is in a work of political philosophy.

Mill frames his argument for liberty of opinion this way. First, the opinion that is suppressed may be true, and society will be the loser thereby; second, the opinion that is supported as orthodox may be correct, but it will become a lifeless truth if it is taken for granted, and not fought for against other opinions. Third, and most commonly, the silenced opinion may contain a part of the truth, which will likewise be lost on society.[66] Mill contends that eventually truth will prevail in a condition of freedom.

> It is a piece of idle sentimentality that truth, merely as truth, has any inherent power denied to error, of prevailing against the dungeon and the stake. Men are not more zealous for truth than they often are for error, and a sufficient application of legal or even of social penalties will generally succeed in stopping the propagation of either. The real advantage which truth has, consists in this, that when an opinion is true, it may be extinguished once, twice, or many times, but in the course of ages there will generally be found persons to rediscover it, until some one of its reappearances falls on a time when from favourable circumstances it escapes persecution until it has

64. Id. at 63.

65. The deliberations over the framing and ratifying of the American Constitution are an excellent example of high toned political talk. This is especially true of the discussions recorded by James Madison at the Federal Convention, but that Convention met in secret and the framers agreed to keep their deliberations confidential, which they did.

66. See Mill, *On Liberty* at 20, 37, 47, 53-54 (cited in note 57).

> made such head as to withstand all subsequent attempts to suppress it.[67]

Later, Mill writes that

> [a]s mankind improve, the number of doctrines which are no longer disputed or doubted will be constantly on the increase: and the well-being of mankind may almost be measured by the number and gravity of the truths which have reached the point of being uncontested.[68]

Recall that when Milton referred to truth winning out, he either had in mind divine providence or he was writing rhetorically, as Locke did after him. So what does Mill have in mind here? For someone who advocates full discussion to maintain the vitality of human thought, Mill is surprisingly circumspect on this point. It turns out that Mill identifies political truths with those opinions that satisfy needs, which he believes gradually gain acceptance. He does not consider whether certain needs should be repressed rather than satisfied, either in the name of soul or out of commitment to country.

For example, he supports Socrates as a constructive gadfly, without discussing, let alone criticizing, Socrates' refusal to challenge the Athenians religious beliefs or Socrates' many indications that philosophic inquiry and politics are necessarily in tension with one another.[69] He credits Rousseau's reservations against the Enlightenment as constructive prods to further thinking, although he dismisses Rousseau as more wrong than right, without for a moment considering the latter's discussion of the problem of vanity and the essential difference between individual and civil freedom.[70] He describes the Old Testament as "in many respects barbarous."[71] His account of the moral teachings of the New Testament is more politic, but also quite revealing. While "the sayings of Christ are . . . irreconcilable with nothing which a comprehensive morality requires," nonetheless "many essential elements of the highest morality are among the things which are not provided for . . . in the recorded deliver-

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67. Id. at 31.

68. Id. at 45.

69. See Plato's *Apology of Socrates*, 26a-27e, 30d-32a in Thomas G. West and Grace Starry West, trans., *Four Texts on Socrates* (Cornell U. Press, 1984).

70. See Jean Jacques Rousseau, *Discourse on the Origin and Foundations of Inequality Among Men* part 1 in Rosseau, *The First and Second Discourse* 128-32 (Roger Masters, ed., St. Martin's Press, 1964), and Rousseau, 2 *On the Social Contract* 68 (Roger Masters, ed., St. Martin's Press, 1978).

71. Mill, *On Liberty* at 50 (cited in note 57).

ances of the Founder of Christianity . . ."[72] Mill's Christian morality will be limited to not harming others; it will not ask more of human beings. From the Christian perspective, not harming others does not suffice. From the perspective of the passions, which appears to be that of Mill, the only reason for not harming others is fear of retaliation.

Mill refuses to acknowledge any conflict between self development as he describes it and the requirements of society; however, notwithstanding his description of "desires and feelings," as the "raw material of human nature," he claims that restraints on such inclinations for the sake of the development of others give an individual "a full equivalent in the better development of the social part of his nature . . ."[73]

Mill wrote that given time and freedom, we will come to adhere to the principle of toleration of diverse views on how one should live so that each may live freely and society as a whole may benefit from that energy. The difficulty is that some men may genuinely desire to rule over others and have to be stopped, and stopping them may require a dedication to certain opinions that will support a willingness to fight for them. Mill did not ignore this problem completely. He simply thought it was time enough for society to act when opinions or speech broke out into overt action.

> An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.[74]

As a rule of governmental action in an extreme case, this has much to commend it, and we will turn to such examples from American constitutional law shortly. My major interest in Mill, however, has been to demonstrate that his confidence in the eventual winning out of truth in the marketplace of ideas is as unfounded as is his confidence in individualism unrestrained by custom or tradition or government.

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72. Id. at 51.
73. Id. at 60, 63.
74. Id. at 56.

III. THE PHILOSOPHIC CONTRIBUTION TO FREEDOM OF SPEECH IN AMERICAN CONSTITUTIONALISM

How do these philosophic arguments concerning toleration manifest themselves in American constitutional controversies? I will discuss Madison's response to the Sedition Act of 1798, a modern application of that controversy, and the major "clear and present danger" cases. I intend to show that the best defense of freedom of speech is related to modern republican, or free, government, but this does not assume that the more the speech the more likely the truth, especially the truth about politics, will be known and accepted.

The Sedition Act of 1798, passed in the midst of party conflict, especially over the government's policy toward Revolutionary France, prohibited both conduct and language directed against the government.[75] This included not only the counseling of insurrection or rioting or unlawful assembly, but also the writing or publishing or knowing aiding in the publishing of

> any false, scandalous and malicious writing or writings against the government of the United States, or either house of Congress . . . or the President . . . with intent to defame . . . or to bring them, or either of them, into contempt or disrepute . . . or to excite against them . . . the hatred of the good people of the United States. . . .[76]

Since the Federalist advocates called the Republicans the party of France,[77] it was clear that this law was to be used as a vehicle for partisan suppression of the political opposition.

In opposing the Sedition Act,[78] Madison argued that the English common law rule of "no prior restraint," in the form of

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75. See James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* 6 (Cornell U. Press, 1956).

76. An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 596-97 (1798).

77. Smith quotes Federalist John Allen criticizing Republican leader Albert Gallatin as follows: "Were France herself to speak through an American mouth . . . I cannot conceive what she would say more than what we have heard from certain gentlemen to effect her purposes." Smith, *Freedom's Fetters* at 14-15 (cited in note 75).

78. Jefferson and Madison, who led the Republican opposition to the Alien and Sedition laws, placed great weight on states' rights, or federalism, arguments; they claimed that the enumerated powers of Congress did not extend to the regulation of the press, and that the first amendment was passed to make that fact crystal clear. Walter Berns has emphasized that this was the basis of their opposition in his article, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal* in Philip B. Kurland, ed., *The Supreme Court Review* (U. of Chicago Press, 1970); he reiterates his point in a revised version of this article, published in his book, *The First Amendment and the Future of American Democracy* 80-146 (Basic Books, 1976). Leonard Levy, whose book, *Legacy of*

licensing requirements for publications, was an inadequate understanding of freedom of speech if subsequent punishment was available. This was especially true in America, Madison argued, because republican government was based on popular sovereignty, not Parliamentary supremacy, and the people therefore had to be permitted to criticize the government and its officials.[79]

Noting that "[s]ome degree of abuse is inseparable from the proper use of everything," Madison thinks "it is better to leave a few of [the press's] noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits. And can the wisdom of this policy be doubted by any one who reflects that to the press alone, checkered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression . . . ."[80] Here Madison expresses some confidence in truth's winning out, at least within the context of political speech concerning the government and its policies. The implicit assumption of government by consent is that the people are able, with appropriate information, to judge those who will be deliberating and deciding government action in their name. Madison thinks that injury to reputation by private defamations can be dealt with in the state courts, by ordinary libel laws.[81]

The Sedition Act liberalized the common law rule on libel by making truth a defense and assigning the decision on the law and the fact to the jury. Madison's explanation for the insufficiency of such a rule reveals a serious problem for the contention that speech is protected only because truth wins out. First, the burden of proof shifts to the defendant to prove all his contentions. Second, "opinions and inferences, and conjectural observations," Madison writes, "cannot be subjects of that kind of proof which appertain to facts before a court of law." Finally, there is no way to punish an "*intent* to defame . . . without strik-

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Suppression: Freedom of Speech and Press in Early American History (Harvard U. Press, 1960), fully revised as *Emergence of a Free Press* (Oxford, 1995), has demonstrated that the American framers did not repudiate the law of seditious libel when they enacted the first amendment, has argued that "the [Sedition Act] provoked American libertarians to formulate a broad definition of the meaning and scope of liberty of expression for the first time in our history." Levy, *The Emergence of a Free Press* at 282. Levy's evidence includes the Virginia Report, which Madison authored for the Virginia House of Delegates in the 1799-1800 Session. My discussion draws on the arguments Madison made in that Report which focused on the meaning of freedom of speech in America.

79. Madison, *The Virginia Report, 1799-1800* in Meyers, ed., *The Mind of the Founder* at 330 (cited in note 48).

80. Id. at 332.

81. Id. at 336.

ing at the right of freely discussing public characters and measures; because those who engage in such discussions must expect and intend to excite these unfavorable sentiments, so far as they may be thought to be deserved."[82]

The Supreme Court drew on Madison's argument in its important *New York Times v Sullivan* decision, which held that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct."[83] The new federal rule "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[84] After noting that the controversy over the Sedition Act "first crystallized a national awareness of the central meaning of the first Amendment," Justice William Brennan, writing the court opinion, quoted from Madison on the people's "censorial power . . . over the Government."[85]

The Court extended constitutional protection to defendants charged with libeling a public official, precisely on the grounds that to award substantial punitive damages—the amount in *Sullivan* itself was $500,000—for errors of fact that were clearly no more than negligent, not reckless or malicious, was to chill public criticism of government just as much as seditious libel laws did.

The Sedition Act of 1798 did not get into the courts but it did lapse in 1801. Thomas Jefferson also pardoned those still in prison under the act. The Supreme Court did not get to consider subversive speech cases until 1919. Three cases—*Schenck*, *Frohwerk*, and *Debs*—arose under the Espionage Act of 1917, and a fourth, *Abrams*, involved a 1918 amendment to that Act which is also known as a sedition act. The first three cases involved convictions for willfully obstructing, recruiting or inciting insubordination or disloyalty by circulating pamphlets or newspapers or making speeches in opposition to the war. Justice Holmes wrote the majority opinion upholding the convictions, against a free speech defense, in each case. His *Schenck* opinion contained the following statement:

82. Id. at 340 (emphasis added).
83. 376 U.S. 254, 283 (1964).
84. Id. at 279-80.
85. Id. at 273, 275.

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.... The statute... punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.[86]

The most baffling aspect of Holmes' opinions was that after enunciating his "clear and present danger test," he applied it as no more than a "bad tendency" test. Earlier, in 1917, federal district judge Learned Hand had interpreted the Espionage Act narrowly in a civil case. Distinguishing between words as "the keys of persuasion," and others as "triggers of action," Hand found the paper's articles and cartoons, which were critical of the war effort, outside the statute's reach.

> Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law.... Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists. If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation.[87]

Hand's statement resembles both Spinoza's and Madison's arguments for freedom of speech. Hand, who corresponded with Holmes about freedom of speech, never did persuade the Justice of the merits of the "incitement" approach. However, af-

86. *Schenck v. United States*, 249 U.S. 47, 52 (1919).
87. *Masses Pub. Co. v. Patten*, 244 Fed. Rep. 535, 540 (S.D.N.Y. 1917).

ter his exchange with Hand, Holmes at least took his own test seriously enough to dissent in the *Abrams* case.

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[88]

As Yosal Rogat and James M. O'Fallon have pointed out, this famous opinion remains puzzling. First, support for diversity of expression of dissident views should have precluded Holmes from saying what he did about the logic of persecution.[89] Second, earlier in his dissent, Holmes reaffirmed the correctness of the Court's (and his) *Schenck*, *Frohwerk*, and *Debs* opinions, and he treated an intent to bring about a substantive evil as the same as a clear and present danger of the same.[90] Nonetheless, in this opinion Holmes brings Mill's major justification for freedom of speech into American constitutional law, modestly disclaiming any originality by identifying the position with the theory of our Constitution. But if the Constitution looks up to the self evident truths of the Declaration of Independence, can it also reflect the theory that truth wins out in the marketplace of ideas? Moreover, does Holmes truly believe what he says others "may come to believe," concerning the power of truth in the market place of ideas? Note that from Madison's perspective, which reflects Locke and Spinoza, all four of these cases involve political speech critical of government and its policies. Abrams' call for a general strike, without any specific plans to cause the action to occur, resembles the kind of exuberant political expres-

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88. *Abrams v. United States* 250 U.S. 616, 630 (1919).

89. Yosal Rogat and James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 Stan. L. Rev. 1349, 1388 (July 1984).

90. Id. at 1387.

sion that both Spinoza and Madison thought it best to allow in the name of democratic freedom. In Mill's terms—and Holmes' test reflects this approach—it is a far cry from speaking to a mob in front of a corn dealer's house and calling corn dealers starvers of the poor. The different approaches to free speech support the same position in this case, but the Mill-Holmes approach makes the greater, and I believe insupportable claim, that freedom of expression eventually leads to truth, with no threat to political freedom, as long as the expression does not constitute a "clear and present danger" of violence.

The next two free speech cases, *Gitlow v. New York*[91] and *Whitney v. California,*[92] involved free speech challenges to state sedition laws. Justice Holmes' dissent in Gitlow and Justice Brandeis' virtual dissent in *Whitney* continued to assert the speech protective position that Holmes first stated in Abrams, and that Hand presented, emphasizing incitement, in his *Masses* opinion. While each Justice concurred in the other's opinion, the opinions offer different rationales. In *Gitlow*, Holmes offers a revised version of his *Abrams* expression of confidence in the marketplace of ideas.

> The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.[93]

From this statement, it is clear that Holmes was no longer serious (if he ever was) about his contention, in *Abrams*, that truth wins out in the marketplace. Differently stated, for Holmes the "truth" refers to the social equivalent of a "resultant of forces" in physics, and that may or may not be compatible with liberal democracy. Holmes must have lost interest in concealing his position, for now he says, in effect, "Frankly, my fellow citizens, I just don't give a damn,"[94] after the fashion of his

91. 268 U.S. 652 (1925).
92. 274 U.S. 357 (1927).
93. *Gitlow*, 268 U.S. 652, 673 (Holmes and Brandeis, JJ., dissenting).
94. While Holmes could not have paraphrased the famous final line of a movie that was made twenty years later (*Gone With the Wind*), he did write to Harold Laski: "[I]f my fellow citizens want to go to Hell I will help them. It's my job." Rogat and O'Fallon, 36 Stan. L. Rev. at 1383 (cited in note 89) (quoting M. Howe, ed., 1 *Holmes-Laski Letters*

philosopher's utterance, in his letter to Hand, "Greatest fool of all, Thou not to see that man's destiny is to fight."[95] Having decided, in *Abrams*, to protect freedom of speech, Holmes takes the position that "the only meaning of free speech" is to allow whatever results from the "marketplace of ideas," even if the result is to shut down free government altogether and, with it, all markets, in goods and in ideas, and all other freedoms.

Here, by contrast, is the key portion of Justice Brandeis' opinion in *Whitney*:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . .
>
> If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution.[96]

Brandeis thus provides a defense of freedom of speech from the Madisonian perspective of republican government. The argument that the end of government is to make men free to develop their faculties resembles Spinoza, although Brandeis may have been more optimistic than the philosopher was. The reference to the discovery and spread of political truth is more akin to the Enlightenment philosophers of the seventeenth and eighteenth centuries than to Mill or Holmes. Brandeis' emphasis on time for discussion to expose falsehoods through more speech

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249 (1953)).

95. Letter from Oliver Wendell Holmes to Learned Hand, June 24, 1918, quoted in Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 Stan. L. Rev. 719, 757 (1975).

96. *Whitney*, 274 U.S. at 377 (Brandeis and Holmes, JJ., concurring).

reflects an essential feature of liberal democratic government, reliance on consent of the governed.

After two major Communist party cases and another criminal syndicalism case, the Supreme Court finally adopted the speech-protective position of Holmes and Brandeis. In the second Communist party case, *Yates v. United States*,[97] decided in 1957, Justice Harlan's majority opinion distinguished between "advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end."[98] Now, the Marxist doctrine of violent revolution was termed "abstract advocacy," in contrast to some overt step in preparation for the revolution, such as offering courses in sabotage and street fighting.[99] The Court thus held that something more than mere party membership was required in order to satisfy the advocacy of action requirement. While some of the defendants' cases were remanded, they were dismissed by the trial judge and after *Yates* no new prosecutions were instituted.[100] Then, in 1969, the Supreme Court overturned convictions against the Ku Klux Klan under Ohio's criminal syndicalism act.[101] That act, like the one upheld in *Whitney*, punished the advocacy of the duty or propriety of violence or terrorism. Members of the Klan held a rally and made vulgar threats to blacks and Jews. The Court overturned the law, reversed *Whitney*, and presented the following test:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[102]

This "incitement test" is the current constitutional standard for sedition, or subversive speech. It has been described as combining the best of Hand and Holmes, in so far as it uses the objective requirement of "incitement" and the probabilistic language of clear and present danger; it also reflects the contributions of Brandeis and Harlan.[103] While it may be too speech-protective in cases involving militia preparing for violent

97. 354 U.S. 298 (1957).
98. Id. at 320.
99. Id. at 331-32.
100. Thomas I. Emerson, *The System of Freedom of Expression* 123-24 (Random House, 1970).
101. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
102. Id. at 447.
103. See Gunther, 27 Stan. L. Rev. at 755 (cited in note 95).

action, it properly takes account of the tendency among people to "blow off steam" without necessarily meaning everything they say.[104] This was certainly true with the Communist party, which many people in this country joined without intending to become revolutionaries. As for the Ku Klux Klan, neo-Nazi groups, and armed militias, they must be taken seriously especially at the point where more than mere "abstract advocacy" is involved. The best justification, then, for this speech-protective test has nothing to do with a desire to have truth win out in the marketplace. Rather, it is part of democratic freedom to allow a certain amount of loose talk. To try to stop it, on the grounds that the object of even such abstract advocacy is beyond the principles of liberal democracy, is likely to have a chilling effect on freedom and to anger well-meaning people. This turns out to be the best argument for the flag burning decisions of 1989 and 1990 as well.[105]

IV. CONCLUSION

What does this complicated inquiry into the philosophic grounds of our first amendment freedoms teach us? First, the argument for freedom of speech and religious freedom took the form of an argument for toleration. That argument contained a claim about the power of truth to get itself accepted which, while elusive in Milton, who may have meant Christian providence, was used rhetorically by Locke in the service of both civil peace and the philosophic quest for truth. Spinoza's argument for democratic freedom reflects the same twin objectives, and his account of the conjunction of rational development and freedom is itself rhetorical. Spinoza knew, and made clear to careful readers, that full rational development meant the life of philosophic contemplation; such a life was possible for a few people only, and hence transcended politics. Political freedom does support and encourage rational development on the part of the people in so far as it encourages activity which addresses the hopes and fears of most people.[106] At the same time, such a form of government would not persecute philosophers.

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104. Such an approach may be criticized for not taking seriously what people say, even when they should be taken seriously; tolerance for "loose talk" may invite provocative action. But political speech is inherently spirited and liberal democracies are well advised to follow Spinoza's argument and some leeway for speech, and even for association.

105. *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990).

106. See note 57.

Mill espoused a confidence in truth's winning out in the marketplace that seems to be based on secular faith in progress, a faint reflection of Christian faith in providence. When that position is taken to the limit of its logic, we get Holmes' *Gitlow* opinion, a thinly disguised confession of nihilism. But the thought of Locke and Spinoza, and of Madison, Hand, and Brandeis provide us with an alternative understanding and defense of freedom of speech. That approach does not conflate the quest for truth into politics by means of some idea of historical development. To be able to enjoy the benefits of freedom, we would do well to keep in mind the distinction between politics, which can secure peace and comfort, and philosophy, which engages the mind in an activity that transcends politics even as it ennobles it.

I will close with a short story. A few years ago when I taught Mill's *On Liberty* to a group of bright students at Middlebury, I encountered substantial resistance from most of the class when I offered my criticism of his argument. Then two weeks later as I entered the class a few minutes early, I overheard several of my students engaged in a heated discussion of an opinion piece that one of their number, a very bright student with articulate conservative opinions, had written in the student newspaper. Following the argument from Thomas Aquinas on the natural ends of human life,[107] this student had argued that homosexuality was unnatural and hence while it might be tolerated it should be publicly disapproved. The students not only disagreed with the argument, but they were livid that the student had written the essay for publication in his column and that the newspaper had published it. This was a pedagogic moment sent from Heaven, if you will permit a Lockean use of the term. I put aside my prepared work on some freedom of speech cases to discuss the difference between the merits of the argument and the propriety of publication. And I could not resist reminding my very bright Millians that they had apparently undergone a transformation of opinion regarding the status of freedom of speech and press, since now that they were confronted with something that mattered to them, sexual freedom, they were up in arms that anyone would dare to make an argument against its full recognition. What made it worse for them, better for my pedagogic purpose, was that the argument they opposed was cogently pre-

107. "Whether the natural law contains several precepts or only one," St. Thomas Aquinas, *Summa Theologica*, in Anton C. Pegis, ed., *Introduction to Saint Thomas Aquinas* 634, 635-38 (Modern Library, 1948).

sented and not clearly wrong, to say the least. The Millian interest in autonomy was at war with the Millian interest in freedom to develop an argument. The students gradually came to understand either that they had accepted Mill's argument on freedom of speech too quickly or that they needed to restrain their spiritedness. Perhaps each was true.