CONSTRUCTING FREEDOM OF SPEECH IN ELITE NEWS MEDIA: 2011 - 2020

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There is no way I would have gotten this far on my own. As the poet John Donne once wrote, "No man is an island, entire unto himself…" If he were alive today, he might write that no one earns a doctorate or writes a dissertation alone, either.

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ABSTRACT

Freedom of speech is one of our most important and most contested rights. While the First Amendment guarantees the right to free speech, it does not define it, leaving the matter of determining the boundaries between what we will and will not sanction largely to the courts.

There is also a substantial body of legal scholarship concerning various aspects of freedom of speech. Those ideas, though, are largely relegated to the academic sphere. Media is an important conduit through which the ideas debated and advanced in that academic sphere reach the general public, but its role in doing so has gone largely unexamined.

This dissertation examines how elite media outlets contributed to socially constructing free speech rights. Using thematic analysis, this study examined how those outlets described freedom of speech over the decade from 2011 through 2020. It found that those media outlets served primarily as communicators of classical values about freedom of speech and reinforced an expansive view of speech rights. Primary among those were the necessity of speech to self-government and its function in checking abuses of official power, the need to protect dissent and coarse speech, and recognized some non-verbal behaviors as speech. The media discourse also appealed to personal propriety or civility rather than law as the preferred limiters of speech. Those values also reflect the enduring influence of the marketplace of ideas conception of speech and a preference for the ancient Greek value of parrhesia, or the ability to express one's own views with frankness.

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CHAPTER 1

INTRODUCTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

First Amendment of the U.S. Constitution

Social media giants Facebook and Twitter did something in May of 2020 they had never done before: Banned a sitting president for posting content that violated each platform's terms of service (Fung, 2021; Isaac & Conger, 2021). Apple followed by removing an entire social media platform, Parler, from its App Store for what it found to be consistently objectionable material posted by many of its platform's users (Leswing, 2021). Those moves, and President Trump's ensuing threats to heavily regulate or even shut down the platforms (Bond & Schneider, 2021), added fuel to a free speech debate already under way in the press in the aftermath of the protests that followed the death of George Floyd during his arrest in Minneapolis, Minnesota (Associated Press, 2021).

These were hardly the only events of the past decade provoking public discussions about what people can say, when, and where they can say it. Some occurred in other countries but provoked strong responses in the United States. For example, in 2020, China cracked down on speech in Hong Kong, which had been a model of democracy in Asia (Washington Post, 2020). In 2015, militants attacked the irreverent French magazine *Charlie Hebdo*, killing much of its staff (BBC, 2015). Others were

homegrown, such as a 2020 controversy involving an open letter posted on the Harper's Magazine website, signed by a number of public intellectuals, writers, and artists, decrying what we now call cancel culture (Harper's, 2020). In 2015, controversy erupted at Yale University after the university's Intercultural Affairs Committee warned students about the potential cultural insensitivity of some Halloween costumes. In an email to students, a faculty member challenged that view as an infringement on students' rights of expression, challenging them not to cede control of their choices to administrators. Due to the ensuing uproar from students, the faculty member resigned (Kimball, 2015). A landmark Supreme Court case in 2011 tackled the question of whether a religious group could picket military funerals to protest what the group saw as society's lax moral standards (*Snyder v. Phelps*, 2011).

Arguments over free speech are not new. Some of the cases that helped shaped legal thinking about the First Amendment and free speech ranged from opposition to the military draft (*Schenk v. United States*, 1919) and opposition to the Vietnam War (*Cohen v. California*, 1971); to permit requirements (*Lovell v. City of Griffin*, 1938); from advocacy of potentially illegal activity (*Brandenburg v. Ohio*, 1969; *Dennis v. United States*, 1951) to using public spaces for speech (*Hague v. Committee for Industrial Organization*, 1939); from the right of media to publish (*New York Times Company v. United States*, 1971) to public access to media outlets (*Miami Herald Publishing Company v. Tornillo*, 1974).

Of course, they are a small sample of such cases, some of which became landmarks and some of which did not. However, central to each of them was a conflict over the meaning of the right to freedom of speech as enumerated by the First

Amendment of the U.S. Constitution.

In each case, and in scores more like them, those involved and those watching cited rights under the First Amendment, appealing to some concept of the right of free speech. The First Amendment itself has not always been much help. The text of the amendment is plain enough in acknowledging the right. However, First Amendment itself does not define what it means by freedom of speech and what, if any, limits to that right it would recognize.

Also, the First Amendment distinguished the freedom of speech from freedom of the press as an acknowledgment of different modes and channels of communication. Technological advances in the late 19th century, such as radio, photography, and the telephone, collapsed that distinction into freedom of expression (Bejan, 2021). In the 20th century, the U.S. Supreme Court extended expression to include symbolic acts, such as burning an American flag (*Texas v. Johnson*, 1989).

In the popular imagination, the First Amendment is inviolate, its stance on free speech uncontestable. However, the First Amendment does not have a hard and fast meaning (Stein, 2006). With regards to the law, it is really the product of a series of Supreme Court decisions that reveal a lack of any single unifying theory or value to explain the speech clause. Exacerbated by a political environment that developed over that time to be characterized by competing factions, the result is a "tangle of conflicting ideas" about what the right to free speech is and what it should be (Montanye, 1999, p. 330). The amendment that did make it in was probably intended as a statement of principles to guide future generations rather than a detailed code for their own (Levy, 1985).

What's more, some of the cases that raise the most intense passions lie outside the purview of the First Amendment. Social media hordes censuring or condemning individuals and activists calling for firings and boycotts are exercising their rights to speak. So are social media companies, such as Facebook or Twitter, when they de-platform certain users and private universities when they disinvite certain speakers (Bejan, 2019).

While they all may appeal to the First Amendment, here they supply their own interpretations of the right to free speech and draw their own boundary lines. Here, freedom of speech, as actually practiced in everyday life, is the product of social construction. The law, or perceptions of it, may be part of that process. Just as important, messages sent, received, and exchanged through various media channels, including newspapers, television, and the internet, provide material through which individuals construct their conceptions of the right to freedom of speech.

Also in the past year, the state of Kentucky passed a law making it a crime to insult a police officer (Silverstein, 2021) and Florida barred social media companies from de-platforming political candidates (Ingram, 2021). These actions come amid continuing controversies on college campuses as diverse as the private Williams College and the public University of Tennessee's Health Science Center. At Williams College, after some faculty members advocated the adoption of guidelines protecting freedom of expression, a group of students protested, claiming free speech injured students from historically marginalized groups (Bauer-Wolf, 2019). At Tennessee, a doctoral pharmacy student sued the university, claiming it punished her social media posts, including racy rap lyrics and clothing the administration deemed too revealing, for being unprofessional. The

student sued on grounds the administration's standards are overly broad and target members of certain racial groups (Anderson, 2021). In addition, the rise of Black Lives Matter, both as an organization and a movement, has incited athletes to use their platforms to talk about social issues, led to protests stemming from incidents involving police officers and citizens from ethnic minority groups, and provoked similar incidents that show evidence of a greater push from various groups for recognition in the public sphere.

Approaching this subject from a social constructionist perspective, the purpose of this study is to examine how news media have contributed to the process of socially constructing the right of freedom of speech that is enumerated in the First Amendment of the Constitution over the past decade. Media are important agents in constructing social reality (Berger & Luckmann, 1966), but media are also sites where meanings are advanced and contested (Gamson et al., 1992). Through an in-depth thematic analysis of editorials and op-ed columns, this study explores the following question: *How do elite news media sources describe the right to free speech?*

In-depth analysis of freedom of speech is primarily confined to legal professionals and legal scholars. While there is a large body of literature concerning free speech rights, its boundaries, and the implications of various justifications for these rights, the ideas contained in that literature are not readily disseminated, nor may be readily accessible, to the general public.

The news media, however, are an important conduit by which those ideas about free speech rights reach the public. Media explain legal concepts arising from court decisions and legal scholarship. Media also communicate values concerning free-speech

rights, serving to reflect and reinforce a preferred set of values (Gans, 1979) and to set the boundary between acceptable and unacceptable notions of those rights (Shoemaker & Reese, 2013).

This function of media and its crucial role in shaping freedom of speech in the popular mind is not the concern of much of the legal scholarship concerning freedom of speech. This study begins filling that specific gap in the literature. By examining the role of media in constructing popular conceptions of freedom of speech, it will also serve as part of a program of research that adds an important component to free speech scholarship. In addition to legal analysis, this study aids in understanding how legal concepts concerning speech rights are communicated to, and understood by, the general public.

The project covers the past decade, from 2011 through 2020, examining editorials and op-eds from three elite newspapers, *The New York Times*, the *Washington Post*, and the *Wall Street Journal*. These newspapers were chosen because they are considered important in shaping national policies and in setting the news agenda for other outlets (Billeaudeaux et al., 2003; Dimitrova & Stromback, 2008). Editorials and op-eds were chosen because they are thought to be an important influence on public opinion (McCombs et al., 2011; Golan, 2006) and a barometer of its various currents (Achugar, 2004).

The rest of this chapter briefly discusses the roots of some of the current clashes over free speech, the Greek concepts of *isegoria* and *parrhesia*, as well as the concept of the social construction of reality and the role media play in it. Chapter Two traces the major First Amendment theories that developed in the 20th century with regards to

freedom of speech and Chapter Three discusses the landmark legal cases that shaped the legal contours of speech rights. Chapter Four describes the method used in this study, Chapter Five presents the findings of the study, and this paper concludes with a discussion of those findings in Chapter Six.

Free Speech: A Contested Concept

Current and past controversies over free speech demonstrate the difficulty in defining the right. In fact, when it comes to free speech, it is often unclear just what it is we are talking about. Is it the right of everyone, regardless of position or station, to have an equal say in public debate? Or is it the right to say unpopular, even offensive, things (Bejan, 2019)? What role should the government play in resolving those issues (Stein, 2006)? Those questions are rooted in ancient ideas about the freedom to speak. Philosophers and other early free speech advocates, the courts, and 20th-century theorists have all offered different answers. The right to free speech was, and is, under construction and subject to revision.

The connection between the basic principles of freedom of speech practiced in then Athens and now in the United States is close enough to suggest that the American concept of free speech and debates over it descended from ancient Athens (Werhan, 2008). In Athens, there were two distinct concepts of freedom of expression, each roughly translated as "freedom of speech," and each found its way in one form or another into American free speech thought (Lewis, 1971). Isegoria, the older of the two, enabled every male citizen in good standing the opportunity to directly address the Assembly, the centerpiece of Athenian government. It was primarily political in nature and, at its base, was fundamentally about equality in speech. Parrhesia, the ability to express one's own

thoughts with frank openness, to tell the whole truth as one saw it and risk the consequences, could apply in social as well as political contexts and was primarily about liberty in speech (Werhan, 2008).

These concepts are not only distinct, but often in tension, and sometimes in outright conflict. Where the law does not balance these values, culture must. Parrhesia can be politically and socially useful. For Athenians, it marked the difference between citizen and slave. It also fueled political and religious movements that shaped the Western world (Bejan, 2019). But speaking truth without reservation had a downside, too. For the elites who were critical of democracy, parrhesia suggested a coarseness that threatened to degrade public discourse and undermine public decorum (Werhan, 2008). For unpopular speakers, it meant the possibility of being shouted down or physically accosted (Bejan, 2019).

There are two competing conceptions of *isegoria*, however, that make it less straightforward. The classic liberal doctrine, formulated by John Stuart Mill, grounded speech rights as a necessary extension of freedom of conscience. All those who have minds have the same right to express the contents of those minds. Others are free to ignore other speakers or to offer counter arguments if they wish, as an exercise of their own expressive rights. The only duty of the listener is to refrain from interfering with, or punishing, the speaker (Mill, 1859/2003). Mill did not discount the potential harms of some speech but regarded the freedom to express opinions as absolute and inseparable from freedom of conscience, and therefore exempt from the harm principle central to his ideas. Here, equality is assured through the equal distribution of opportunities for expression (Bejan, 2021).

Over the course of the twentieth century, another conception of isegoria arose as a critique of the classical liberal position. Technological developments provided more ways to express thoughts and ideas. Feminist and critical race theorists began to argue that pornography and racist speech, whether through language, images, or symbols, caused real harms to people (MacKinnon, 1993; Matsuda, 1989) through damaging social standing and effectively relegating them to unequal social status (Langton, 2012).

To them, such assaultive speech stigmatizes its targets and creates an underclass of speakers who cannot gain a hearing. In this conception of isegoria, the right to expression includes a relational aspect in that it carries an implicit right to be heard and a duty to listen. The duty of noninterference proposed by the classical liberal conception is insufficient. In fact, adherents to this newer formulation of isegoria have held that protecting free expression for all permits silencing certain speakers. In doing so, it reformulates one of the central questions of isegoria from the distribution of opportunities for expressive activities to who counts as a social equal, worthy of having a voice of equal weight as others (Bejan, 2021).

The genius of the First Amendment lies in bringing these two distinct conceptions of free speech together (Bejan, 2019). However, that is also part of the difficulty in socially constructing a coherent, agreed-upon definition of what free speech is, and what it is not.

European thinkers in the 17th and 18th centuries would have a significant impact on American thought about free speech. However, though they advocated vigorously for the right to freely express one's own thoughts, they did not always draw the lines between what was permissible and what was not in the same places.

One of the most famous of these advocates, John Milton, made a forceful argument for free speech in his pamphlet, *Areopagitica*, published in 1644. His expansive rhetoric supplied the basis for one of the most enduring metaphors in American free speech thought, the marketplace of ideas (Milton, 1644/1927). However, Milton only extended freedom of speech to Protestant Puritans. Later, he would extend his advocacy to other Protestant groups, but never to Catholics (Levy, 1985).

The Dutch philosopher Spinoza argued that man had a natural right to his own thoughts and had the right to speak against the state, provided the speech was grounded in reason and did not lead to attempts to change the state's authority (Spinoza, 1887).

John Locke (1689/1975) added a layer to arguments for free speech. Advocates for that freedom grounded it in resistance to tyranny, fairness and tolerance, self-interest, appeals to Scripture, the futility of suppression, and the sure triumph of truth in the course of a free exchange of ideas. To these, Locke added the frailty of the human mind. Given the inability to apprehend truth due to the limitations of the human ability to understand, error was inevitable. To Locke, the best way to avoid such error would be to allow freedom of expression so all would be able to hear a range of thought on the various issues and problems that concerned them.

Like his predecessors, Locke was of his time. His interest in free expression centered on the protection of freedom of conscience, concerned primarily with matters of religion and morality rather than matters of the state. To him, the state enjoyed expansive authority to suppress speech that even hinted at disloyalty (Locke, 1689/2000).

Matthew Tindal argued that free speech was a natural right and that ordinary citizens should enjoy the same right to expression as did legislators, including criticism of

the state. Two English gentlemen writing under the pseudonym “Cato” argued for an expansive view of speech and press rights, the proper boundary of which was injury to the rights of others, not the opinions of the powerful, and for truth as a defense in libel cases (Levy, 1985).

These views clashed with the more conservative positions that speech was not a natural right, only belonging to members of Parliament. As such, the state had a legitimate interest in suppressing and punishing seditious libel. A more moderate position also emerged. While unfettered expression was too far, private persons had the right to free speech with reasonable restraints of common law. This freedom would be confined by truthfulness, good taste, due submission to authority, and an absence of malice. This would prevent liberty from degenerating into licentiousness (Levy, 1985).

Twentieth-century American theorists have not brought any more clarity than the earlier philosophers. One of the earliest formulations of free speech theory endorsed the Supreme Court’s clear and present danger standard (Chaffee, 1941). Some subsequent theorists argued that the First Amendment only protected speech related to self-government, and private speech was protected under the Fifth Amendment (Meiklejohn, 1948). Still others proposed that individual interests were as important as democratic ones, government had an affirmative obligation to provide spaces for free expression (Emerson, 1970); the most important value of free speech is to check government power (Blasi, 1977); and a critique of the prevailing marketplace of ideas concept, which should be instead about protecting individual liberty (Baker, 1989).

First Amendment jurisprudence has not brought complete clarity to the matter either. The text of the First Amendment enumerates the right to free speech, but nothing

more. Moreover, there is not currently a single, unified theory of constitutional protection of speech (Han, 2015), so the U.S. Supreme Court has approached free speech questions on a case-by-case basis. The result is complex and sometimes contradictory (Shiffrin & Choper, 2006).

As an example, in one of this country's earliest free speech cases, in accordance with a city ordinance, officials in Boston denied a minister the right to speak in a public park, which the Supreme Court upheld (*Davis v. Massachusetts*, 1897). Just more than 40 years later, the Court overturned a similar ordinance in New Jersey, finding that the public had a lengthy history of using public parks to speak out about matters of public concern (*Hague v. CIO*, 1939).

In another landmark case, *Schenck v. United States* (1919), upholding the conviction of a socialist who distributed leaflets urging men to resist the military draft, the Court formulated the clear and present danger test, drawing a line between protected and unprotected speech. The Court affirmed that standard in *Dennis v. United States* (1951). Also, in *Beauharnais v. Illinois* (1952), the Court upheld the conviction of a publisher of racist literature under group libel statute, citing past and potential violence. However, in *Brandenburg v. Ohio* (1969), the Court both abandoned the clear and present danger test and redrew the line to allow advocacy, but not incitement to commit illegal acts. It affirmed the incitement standard a few years later in *Smith v. Collin* (1978), overturning three city ordinances designed to prevent Nazis from marching in Skokie, Illinois. The Court formulated the fighting words exception in *Chaplinsky v. New Hampshire* (1942), but then essentially abandoned it in subsequent cases (Caine, 2004; Wirenius, 1995).

In the 1960s and 1970s the Court took up the question of the public's speech rights in the media. Three notable cases from that era, *Red Lion Broadcasting v. FCC* (1969), *Columbia Broadcasting System v. Democratic National Committee* (1973), and *Miami Herald v. Tornillo* (1974), all involved policies that attempted to create limited opportunities for the public to speak in, and through, media. The Court, however, addressed the public space aspects of these cases indirectly. New communication technologies, such as internet channels and other computer-based networks, have introduced communication forms that necessitate new legal thinking (Stein, 2006). However, these new forms and channels have inspired uncertainty on the part of the judiciary as to which model of speech rights applies (Horwitz, 1991; Pool, 1990).

The Social Construction of Reality

We encounter the world of individuals, groups, and institutions as the real world, its structures preexisting us and its ways of functioning stable. This we call society. We accept the everyday world of experience as reality, with no need for additional testing or evidence, no need for further verification. Its presence is enough, its reality self-evident. However, that reality is subject to interpretation, through which that life becomes a coherent, subjectively meaningful world (Berger & Luckman, 1966). Therefore, it is both objective and subjective, the product of our interactions with it (Andrews, 2012). Thus, the social reality each individual encounters and navigates daily is not imposed from without but is constructed by and through human activity. As such, social reality is not something to consider apart from the individual. Rather, the social world and the individual are woven together in and through continual everyday interaction (Cuncliffe, 2008).

This world of direct experience that we internalize as facts is one type of social reality: objective social reality (Adoni & Mane, 1984). This consists of knowledge gained through personal experience, but such social experience is usually limited. Few, if any, people directly experience all the knowledge available through direct experience and other possible sources (Surette, 2015).

Another type of social reality is symbolic social reality, which consists of communication through art, literature, or other media (Adoni & Mane, 1984). In this realm, we acquire knowledge from sources outside of our direct experience through the communication of signs, of which language is the most important system (Berger & Luckmann, 1966). Language is the foundational tool through which externalized human activity achieves the character of objectivity; subsequent theoretical developments include other communicative acts as well (Reichartz, 2018). People encounter the institutions that comprise the social world as existing apart from oneself and the collective human efforts that constructed those institutions. They experience a social world constructed by collective human effort as something other than a product of human activity. Language typifies experiences, enabling one to share meaning with others (Berger & Luckmann, 1966). Language, then, is the primary tool through which humans construct social reality (Elder-Vass, 2012, p. 77). We not only create the social world we inhabit, but also the identities of the people with whom we share it (Reichartz, 2018); we must rely on language to describe and explain the world we encounter (Gergen, 2018).

There is a third type of social reality, the subjective. In it, both direct experience and the communication of signs serve as the basis for the interpretation and construction of what we consider the real world (Adoni & Mane, 1984). We interpret the messages or

actions of others, attempting to derive meaning from them (Blumer, 1969). Thus, social construction involves a mixture of experience, communication, and interpretation (Quinney, 1970).

As we accumulate this experience, a social stock of knowledge transmittable to subsequent generations forms. It is also available to the individual in the everyday world and others share in at least part of that knowledge. This participation in a common stock of knowledge enables the formation of shared meanings and shapes social interactions (Berger & Luckmann, 1966).

Such shared meaning is the product of socialization, the process of internalizing the meanings of events and others. One then not only understands others' definitions of shared experience, but also can reciprocate. A socialized individual can also then go through a similar process when introduced into new areas of society. However, such socialization is never a finished process, and every society develops mechanisms to maintain a level of agreement between objective and subjective reality. Reality is first internalized through social processes and maintained in the consciousness through similar social processes (Berger & Luckmann, 1966).

Shared meaning and experience lead to what we call society. However, society is more than coexistence. The systematized stock of knowledge resulting from the accumulation of experience becomes culture. It describes and proscribes social reality, establishing guidelines for appropriate action. However, the socially objectivated facts that form the foundation of culture are the result of complex, historical, and generational processes, not merely the invention of isolated individuals. Ultimately, what we know as culture is the reality that has been approved as valid (Pfadenhauer, 2018).

Media's Role in Social Construction

Media play an important role in the social construction of reality. We carry messages generated and transmitted by media about the world with us, using them to construct meaning about the things we encounter (Gamson et al., 1992). Media also serve to reaffirm our socially constructed realities by affirming that the world we encounter is, in fact, real (Berger & Luckman, 1966).

Framing is one way news media shape the messages we use to construct and maintain reality. Simply put, a frame is a central organizing principle that gives structure and coherence to information (Gamson et al, 1992). A common concept of framing involves selecting or emphasizing certain aspects about an event or issue and connecting them (Entman, 2004). This is an effective way define a problem, to interpret its causes, and to evaluate and/or recommend a solution for that problem (Entman, 1993). Another way to conceive of a frame is as a scenario, or unfolding narrative or storyline (Bennett, 1975). In this more dynamic concept, stories frame events over time. Narratives are powerful because they organize experience, bringing order to them. In this way, narratives help us make sense of the world (Manoff, 1987).

Media discourse contains a set of ideological packages that shape and give meaning to the information media transmits (Gamson & Modigliani, 1989). Such a package is organized around a central idea, such as a frame, but also employs other devices, such as metaphors, exemplars, appeals to principal, catchphrases, and visual images (Gamson & Lasch, 1983). In doing so, news media play an important role in maintaining a deeper set of values (Gans, 1979). Journalism helps establish and maintain boundaries between acceptability and deviance, between those ideas and actions

considered within the mainstream and those outside of it (Shoemaker & Reese, 2013).

In the aggregate, this means the range of views journalists articulate tends to be rather narrow (Lee, 2002). It is possible to place those views into one of three categories: Consensus, legitimate controversy, and deviance. The prevailing journalistic tendency is to advocate values about which there is a consensus while excluding or condemning those ideas and people who violate that consensus (Hallin, 1986). In doing so, news media define and maintain society's ideological boundary lines (Ha, 2017).

The editorial and opposite-editorial, or op-ed, pages are where the ideological perspectives of news media are most clearly articulated, as these sections of the newspaper are less constrained by the principles of the traditional notion of objectivity (Fowler, 1991; Wahl-Jorgensen, 2008). Here, opinion writers may openly express their own views and promote positions of their choosing. Given the latitude available, newspapers play a central role in influencing the primary frameworks for interpreting information that shape their audiences' understandings of events and issues (McNair, 2000).

Influencing dominant frames suggests news media achieve a type of hegemony; however, that view overlooks the fact that hegemony itself is always subject to contest and potential shifting (Kellner, 1990). It also misses an important distinction between two separate realms of discourse. In one realm, the social constructions appear as mere descriptions of reality rather than interpretations, transparent and largely empty of political content. This realm is uncontested. In the other realm, however, discourse is open to competition. Differences in resources and access may give some media actors an advantage, but that is no assurance of dominance. Having a message privileged in media

discourse does not guarantee readers will privilege it as they construct meaning (Gamson et al, 1992). Because of the influence media can exert, it is an important place where various social actors, institutions, and ideologies compete to define and construct social reality (Gurevitch and Levy, 1985).

CHAPTER 2

MAJOR FREE SPEECH THEORIES

The First Amendment is succinct in its recognition of the right to free speech, as it is in each of the five rights it enumerates. However, that economy leaves open quite a bit of room for interpretation concerning the scope of the expression protected as well as the intended purpose in enumerating it in the amendment in the first place.

Moreover, there is not currently a single, unified theory of constitutional protection of speech (Han, 2015), as evidenced in part by the varied theories discussed in this chapter. Some involve consequentialist justifications for speech, concerned with effects, such as discovering truth, enabling self-governance, or preventing abuses of official power. Some involve nonconsequentialist justifications, concerned with human dignity and the ability to pursue individual interests (Greenawalt, 1989). This chapter discusses the prevailing line of demarcation between protected and unprotected speech that preceded the First Amendment, as well as major theorists and their ideas about what the First Amendment sought to do in enumerating the right to free speech.

The English Tradition: Bad Tendency

Until the first quarter of the 18th century, English law recognized freedom of speech on any matters, including those concerning the government, as one reserved for members of parliament. As a civil right, freedom of speech meant individuals could speak openly about religious matters. The term “freedom of speech” appeared in a proclamation by England’s King James I in 1620, but this freedom did not extend to matters of state (Levy, 1985).

After the completion of the Protestant Reformation in the mid-1600s, the monarch

became the head of the state church, so religious questions eventually became political ones. Sedition equaled heresy, which the religious establishment had punished as dangerous to the souls of the masses. Church, state, and morality were inextricably intertwined and open to damage from words alone, whether those words were accompanied by action (Levy, 1985).

English common law recognized different types of libel. Blasphemous libel was directed against the state religion, obscene libel against public morality (Levy, 1980). Private libel was directed against private persons and criminal libel concerned the use of criminal law to avenge defamation (Levy, 1985). Seditious libel meant defaming, condemning, or ridiculing the government or its officials, or subjecting the government or its officials to such ridicule, thereby jeopardizing the public peace (Hawkins, 1788). The government used prosecutions for seditious libel as a means of controlling the press (Seibert, 1952). Freedom of the press meant no prior restraint, but the government could punish offenses after publication (Bhagwat, 2015).

In no case was truth a defense. In fact, the law considered true statements to be more dangerous, making libel more serious, provocative, and potentially injurious to the public peace. The law subjected such statements to what was known as the bad tendency test. Words could lead those who heard them to commit offenses (Levy, 1985).

Some English political philosophers emerged during this era as the foremost proponents of freedom of expression, advocating the free exchange of ideas as the best way to attain truth (Locke 1689/1975; Milton, 1644/1927) Others also argued that free speech was a natural right, not one which the government could give to or take from citizens. In the American colonies, the libel trial of John Peter Zenger was a watershed

event in advancing the idea of freedom of expression. James Alexander, who wrote the seditious articles that led to Zenger's prosecution, designed a trial defense that bore the first philosophy of free speech and press in the colonies. Alexander proposed that truth be a defense for libel and that juries decide whether offending works were libelous, not merely whether defendants had published them, as had been the case. Alexander's ideas eventually became the legal norm, but free speech proponents still accepted prohibitions against sedition, culminating in the Sedition Act of 1789. Despite attacks on bad tendency from editorialists, such as Candor and Father of Candor, religious leaders, such as Roger Williams, and philosophers, such as Spinoza, bad tendency lived on (Levy, 1985).

Zechariah Chafee: "Clear and Present Danger" as the Proper Boundary of Speech

Zechariah Chafee (1885 – 1957), a Harvard Law School professor, was a critic of government prosecutions of speech under the espionage and sedition laws that existed at the time. He explored free speech law and found it almost nonexistent, as the U.S. Supreme Court had not applied the First Amendment or considered the constitutionality of federal laws regarding speech. He recognized the lack of any legal precedent left free speech rights in a weakened position and advocated for greater civil liberties in speech cases. In doing so, he became America's first First Amendment scholar (Garry, n.d.).

In the wake of World War I, a spate of prosecutions arose aimed at suppressing radical politics. The most serious issue facing the United States at the time was a growing sedition, but pre-war jurisprudence gave no clear precedent with which to deal with it. Sedition law used bad tendency as the test of criminality of speech (Chafee, 1941).

A U.S. Supreme Court's decision in a case brought under the Espionage Act of

1917 abandoned bad tendency and created a new test of criminality in speech cases: The clear and present danger test (*Schenck v. United States*, 1919). Subsequent cases brought under the Act employed the clear and present danger test as part of the rationale for the Court's decisions. For example, the Court upheld the conviction of Socialist Eugene Debs for giving a public speech that attempted to interfere with military recruiting during World War I (*Debs v. United States*, 1919). A few months later the Court upheld the convictions of a group of people for circulating literature opposing U.S. involvement in a military operation against Germany on Russian soil (*Abrams v. United States*, 1919). The central question facing the Court was whether the State could punish speech that might influence others to violate the law or only that speech that could directly incite such violations (Chafee, 1941).

While First Amendment protections for press and speech were essential in securing ratification of the Constitution (Montayne, 1999), the Amendment did not establish an absolute freedom of expression (Stein, 2006). It carved out space for public discussion of public questions (Silver & Walden, 2012). However, it was a peacetime provision that could be ignored in wartime (Chafee, 1941).

The purpose for protecting freedom of speech was and is to protect and promote the search for and spread of truth, to which free discussion is essential. Open debate had great value to society (Hindman, 1992). That requires a balance between individual rights and societal interests. To discuss free speech only in terms of rights would lead to dead-lock, as each side in the discussion would fall back on an assertion of rights, which would also neglect the real human needs and desires behind such a claim (Gray 1921/1909; Pound, 1915).

The First Amendment established two kinds of interests concerning free speech. The first was the individual interest of individuals to express themselves. The second was the societal interest in attaining and spreading truth, which would enable society to make the wisest choices and carry them out in the wisest ways. This interest, always important, was even more critical in times of war (Chafee, 1941).

Since the right of expression was and is not absolute (Stein, 2006), the First Amendment also would necessarily establish a boundary line beyond which such expression would not have constitutional protection. That would be the point at which speech would spur unlawful acts. However, authorities must make every attempt to maintain both individual and societal interests unimpaired and must curtail free speech only when public safety is in danger (Chafee, 1941). The clear and present danger test was the proper limit on government interference with freedom of expression (Dow & Shieldes, 1998).

Alexander Meiklejohn: Free speech as foundation of self-government

Alexander Meiklejohn (1872 – 1964), a faculty member and administrator at several colleges and universities, was also on the national committee of the American Civil Liberties Union and a Presidential Medal of Freedom recipient. The core of his First Amendment philosophy was that the primary justification for freedom of speech was self-government and its primary value was that it would produce informed citizens. (Purvis, n.d.).

The Bill of Rights enumerated two different levels of civil liberties. One, the right to religious belief or non-belief, is absolute (*Reynolds v. United States*, 1879). The other, the right to own and use private property and any income derived from it, is limited and

subject to regulation. Confusion between these two rights results in conferring the dignity of humans onto human possessions, equating the two (Meiklejohn, 1948).

The foundation of self-government was an agreement that all matters of public policy be decided and executed by corporate action, that policy decisions would equally bind all citizens, and that government could, through due process of law, force those decisions on anyone who refused to abide by them. Political freedom meant self-control, not freedom from control. Self-government also meant a recognition of limitations on governmental authority and provisions for self-criticism and self-restraint. The Bill of Rights, then, provided checks on power. The self-government provided for by the Constitution was based on a two-fold political agreement: Authority belongs to the people and that the people consent to be subject to that authority (Meiklejohn, 1948). Pursuant to that self-control, the Constitution actually established two freedoms of speech. The First Amendment established freedom to speak about public matters, while speech about private matters fell under the protection of the Fifth Amendment through the due process clause (Bates, 2021).

The First Amendment did not establish an absolute freedom of speech. Congress could abridge certain types of speech or regulate speech in settings designated for purposes other than public discourse (Weinstein, 2011b). But the amendment negated Congressional power, combining speech with rights of religion, press, peaceable assembly, and petition, over which Congress also had no powers to prohibit. The First Amendment's protection of speech, however, was limited to public discussion about public matters. Only speech that bore, directly or indirectly, on the public interest would fall under the First Amendment shield (Silver & Walden, 2012).

Since self-government requires some measure of participation in a common life on the part of citizens, the primary purpose of the First Amendment was to enable all citizens to participate in the public discourse inherent in democratic decision making (Post, 2011). An important part of that discourse is to help citizens understand the issues that face them (Meiklejohn, 1961), so citizens need to be able to hear all the ideas that bear on those issues, akin to what might happen in a town hall meeting (Russomanno, 2015). In such a meeting, however, a free exchange of ideas and opinions required submission to a common set of rules governing the meeting. Essential to that type of exchange is not that everyone get to speak, but that all the ideas worth saying get said. So, for a self-governing society to make wise decisions, all ideas must have a hearing (Meiklejohn, 1948).

Such a productive exchange of ideas required order, which meant that government would have to draw some lines between protected and unprotected speech. The U.S. Supreme Court had formulated the clear and present danger test for drawing such lines. As Justice Holmes wrote in his opinion in *Schenck v. United States* (1919), when speech presented a "clear and present danger to bring about substantive evils Congress has a right to prevent" (p. 52) such speech is not due First Amendment protection.

But the clear and present danger test was an inadequate standard for drawing lines delineating protected and unprotected speech. For one, it denied the constitutional distinction between the public and private rights to speech established by the First and Fifth amendments, respectively, thereby failing to distinguish between public and private policy discussions (Frankel, 1949).

Justice Holmes's argument in *Schenck* is overly broad. It suggests that Congress

can use any means necessary to prevent what he termed substantive evils, but the Bill of Rights denies that inference. Moreover, it would subject legitimate, even necessary, criticism or protest to suppression. The clear and present danger test regards freedom of speech as a device to be abandoned when the public peace is threatened, but those dangers make free speech vital for the efficacy of self-government. (Meiklejohn, 1948)

Just months after the *Schenk* decision, Justice Holmes wrote that the best test of truth is acceptance in the marketplace of ideas (*Abrams v. U.S.*, 1919). However, that is an incomplete test of truth and can lead to intellectual irresponsibility. And, while the central aim of the First Amendment is to enable citizens to understand the issues facing them through the right not only to speak but to hear all relevant ideas, that is only possible if the truth attained through the exchange of ideas is available to all citizens (Meiklejohn, 1961). The clear and present danger test denies the ability of citizens to govern themselves (Meiklejohn, 1948). After all, self-government only works if citizens have encountered everything that one can say either for or against that government and its institutions (*Masses Publishing Company v. Patten*, 1917).

For its defenders, the clear and present danger test also properly balanced the two social interests of protecting public safety and the search and spread of truth. Speech would only be abridgable when it actually endangered public safety. But the integrity of public discussion and the protection of public safety are the same (Meiklejohn, 1948).

However, the Supreme Court's clear and present danger test was problematic. It in effect combined the speech interests enumerated in the First Amendment and Fifth amendments into one. The First Amendment protects collective speech concerning the common good, a freedom unabridgable by Congress. The Fifth Amendment protects

private speech interests, which are subject to limits. The result of combining these interests under one amendment would be to make both interests abridgable (Frankel, 1949).

There are several grounds on which to find the clear and present danger test deficient as a way of delineating protected from unprotected speech. One, it denies the two distinct sets of civil liberties established by the Bill of Rights. One set, as makers of the law, is absolute. The other, as subjects of that law, is limited. It fails to distinguish between public and private policy discussions, and also fails to recognize that advocacy by the government is unabridgable. Moreover, it treats speech as a mere device to be abandoned when it threatens to the public peace, undermining the belief that free people can govern themselves. (Meiklejohn, 1948).

Thomas Emerson: The System of Freedom of Expression

Thomas Emerson (1907 – 1991) served in several capacities in the Franklin D. Roosevelt administration before joining the faculty at Yale Law School. He successfully argued First Amendment cases before the U.S. Supreme Court and wrote extensively about First Amendment issues. His book A System of Free Expression (1970) is considered a seminal work in First Amendment history (Hudson, n.d.).

The root purpose of the First Amendment is to provide the foundation for a system of free expression in a democratic society. Such a system consists of a set of rights: The right to hold any beliefs one chooses (*Reynolds v. United States*, 1879) and the right to communicate those beliefs through any channel one chooses or to keep silent (*West Virginia State Board of Education v. Barnette*, 1943; *Wooley v. Maynard*, 1977) These rights also include the right to hear the ideas of others and to have access to the

information one needs or desires (*Stanley v. Georgia*, 1969).

In a democratic society, the source of most controversies emanates from the need to reconcile the rights of the individual and the rights of others to enjoy the same rights, or the need to reconcile individual rights with other individual or governmental interests. The Constitution aims to limit the state's power to limit individual rights. But constitutional goals go beyond that, to asserting the state's affirmative role in maintaining a system of free expression. To do so, the state must not only protect individual rights to free expression, but also promote such expression by providing spaces in which to engage in free expression and to make the information individuals need available. To do so, it must employ an administrative structure in which to function. This structure should provide a framework of foundational doctrines, practices, and institutions, including written documents that guarantee individual rights, an independent judiciary to review state action, and an independent bar to advocate for individuals and other actors (Emerson, 1970).

Such a system of free expression necessarily assumes that such expression has both inherent and practical value. There are four main premises of that assumption of value. The first is that free expression is a means of assuring individual fulfillment, that proper end of which is realizing one's potential and character (Redish, 1981 – 1982a; Baker, 2011). Another is that free expression advances knowledge. To do so, one must be able to hear all sides of an argument or issue (Russomanno, 2015). Even false ideas can have some value, in that they often force a reevaluation of what has been accepted as true. A third premise is that free expression is essential for participation in the decision-making process upon which self-government is built (Post, 2011). The fourth premise is

that free expression is vital for achieving an adaptable, hence a stable, society. Suppression of expression leads to an inflexible society, one which substitutes force for reason and cannot readily absorb the inevitable conflicts that arise in the course of self-government (Emerson, 1970). In fact, a system of free expression encourages some conflict, but channels conflict into expression and fosters social stability (Greenawalt, 1989).

To do so, the legal system must maintain balance between the various and often competing interests present in a democratic society and the law must be clear about the extent of individual rights and provide some protection for exercising those rights (Mill, 2003/1859). Legal institutions must rely on principle rather than ad hoc solutions in balancing competing interests. Through the application of principle, the system can realize long-term benefits by subordinating immediate interests. Institutions must formulate procedures for adjudicating disputes, thereby relieving internal pressure on the system. Through such adjudication and through social education the system can adjust to new conditions and respond to new threats. In addition to these, a democratic society controls itself when it properly draws a line between state power and individual rights (Emerson, 1970).

There are two important implications of assuming the value of free expression. One is that such expression is a good in itself, playing a vital role in a self-governing society (Weinstein, 2011a). The other implication is that the system distinguishes between expression and action (Schauer, 2015). All other freedoms emanate from the absolute freedom of belief, of which expression is a necessary part. Expression has fewer immediate consequences than behavior, its impact is reparable, and, when injurious to

social goals, does less injury than behavior (Redish, 1981 – 1982a; Schauer 2015).

State power over the individual is pervasive, making the need for balance between the rights of the individual and the imperatives of the state critical. Humans by nature tend to suppress opposition. Dissent, or even unorthodox or fringe expression, is often driven by strong feelings of conviction, so the exchange of ideas is passionate, sometimes heated, and often not polite (Mill, 2003/1859). What's more, a social inertia often leads to a resistance to change, which can also lead to heated exchanges of ideas. A working system of free expression requires much, not only of the state, but of the individual as well. Such a system requires that individuals show self-restraint, discipline, and the maturity to put off short-term individual goals in favor long-term societal goals (Emerson, 1970). From the state, the system requires the strongest commitment to the positive right of free expression, adopting the narrowest of possible grounds for exceptions, which should be as precise as possible (Baker, 2011; Weinstein, 2011a).

The U.S. Supreme Court has not yet developed a cohesive theory of the meaning of the First Amendment and how to apply it in concrete cases (Han, 2015). Instead, it has devised and employed different standards for delineating protected from unprotected speech. Early jurisprudence made that distinction on the basis of bad tendency, derived from English common law (Levy, 1985). Unprotected speech was that which would likely influence hearers to, at some point, commit unlawful acts. It abandoned that in favor of the clear and present danger test, which classified unprotected speech as that which was likely to pose a clear and present danger to cause unlawful acts (*Schenck v. United States*, 1919). The Court later adopted the incitement standard, which considered unprotected speech that which directly incited hearers to commit imminent unlawful acts

(*Brandenburg v. Ohio*, 1969). The Court then began using ad hoc balancing tests to weigh speech against other, competing interests. In some cases, the Court avoided First Amendment questions altogether, instead adjudicating cases by employing doctrines about legal vagueness or overbreadth, or by identifying alternative means (Shiffrin & Choper, 2006).

Hence, a coherent theory of the First Amendment is necessary. The core purpose of the First Amendment is to ensure a working system of free expression in a democratic society (Levy, 1960). This system makes a fundamental and necessary distinction between expression and action. First Amendment protection for expression must be complete. Government may advance other social goals but may not do so by limiting or suppressing expression. Courts must develop specific legal doctrines to govern real-world cases, distinguish expression from action, protect individual rights from government overreach, and adjudicate conflicts between competing interests. The legal system must also define the boundaries of such a system of free expression, to determine the sphere in which these principles apply and which sectors may be excluded (Emerson, 1966).

Vincent Blasi: The checking value

Vincent Blasi (1943 -) served on the faculties of Columbia and the University of Virginia law schools and has written on a wide variety of First Amendment issues. His article "The Checking Value in First Amendment Theory" (1977) proposed that the key function of a free press is to inform the public of government action, thereby acting as a check on official power. He also advocated the view that, in First Amendment cases, the objective of the courts is to "do maximum service" in those periods when intolerance of "unorthodox ideas is most prevalent" and when government is most able to silence

dissent (Hammack, n.d.).

First Amendment theory in the 20th century developed as a way to explain judicial decisions regarding free speech claims of Socialists and anarchists in the 1920s (*Schenk v. United States,* 1919; *Debs v. United States,* 1919), Jehovah's Witnesses in the 1940s (*Cantwell v. Connecticut,* 1940) and Communists in the 1950s (*Dennis v. United States,* 1951). Each of these groups sought either to advocate for their views or to keep them private. The theoretical responses to these cases tended to develop around three basic values. One was the absolute right of belief and individual autonomy in expressing personal beliefs. Another was to the marketplace of ideas and a commitment to diversity in expression. A third value was the idea of the necessity of free expression in self-government, in which each citizen plays a role in the governing process and has the right both to speak and to hear all other ideas relevant to self-governance (Weinstein, 2011a).

Vietnam War protests and civil rights activism in the 1960s laid a different type of claim to free expression. These movements used symbolic speech, such as sit-ins (*Brown v. Louisiana,* 1966) burning American flags (*United States v. O'Brien*, 1968) and draft cards (*Street v. New York*, 1969), and wearing armbands (*Tinker v. Des Moines Independent Community School District*, 1969) to make their points. These movements also employed mass demonstrations (*Shuttlesworth v. Birmi*ngham, 1969), pamphleteering and picketing (*Gregory v. Chicago*, 1969) disclosing classified documents (*New York Times v. United States,* 1971) and more, to communicate their messages.

Unlike the earlier claims to free expression, these were claims to power, and competed with other groups and the U.S. government. Through their coverage of these

movements, news organizations also challenged government and social orthodoxy, making them claimants as well. The U.S. Supreme Court adjudicated many of the cases generated by these movements on a case-by-case basis, addressing statutory issues such as vagueness or overbreadth, and addressing any constitutional questions in an ad hoc manner rather than through any unified theoretical concept of the First Amendment (Shiffrin & Choper, 2006).

Out of claims to media access that were part of the court cases of this era came two ideas that would have enduring theoretical importance. One was that newspapers and broadcast outlets would be treated differently when it came to questions of access. The other was that the internal processes of news organizations should be free from government regulation, thereby protecting journalistic autonomy (*Red Lion Broadcasting Co. v. FCC*, 1969; *Columbia Broadcasting Co. v. Democratic National Committee*, 1973; *Miami Herald Publishing Co. v. Tornillo*, 1974). While the checking value is a supplement to other free expression values, the framers of the Constitution placed a high value on it. In fact, to that point, the checking value was central to the body of thought regarding press freedom (Blasi, 1977).

Much of Locke's *Second Treatise on Civil Government* dealt with the tendency of government officials to abuse their power. In the decades after its publication, the press emerged as an important countervailing force to official power. One of the most popular sources of political thought in the American colonies, Cato's *Letters*, advocated the freedom to criticize government officials (Rossiter, 1953; Levy, 1966). Others, such as Father of Candor and Junius, also advocated the same, emphasizing the checking value of free expression, as did colonial pamphleteers. James Alexander, in defending the verdict

in the watershed trial of John Peter Zenger, also emphasized the checking value (Levy, 1985). James Madison, in his criticism of the Alien and Sedition Acts, argued that the freedom to criticize government officials was essential to self-government, as it was mechanism by which the public could remove from office those officials who failed to carry out their duties (Hunt, 1904).

The central premise of the checking value is that the abuse of government power is a more serious offense than the abuse of private power. The government has substantial investigative powers. It can use violence or force to compel compliance with laws or policies, to which there is no organized counterforce. This makes the government's impact on individuals unique. And the existing system of checks and balances does not argue against the checking value of free expression. In some contexts, such as local government, there may not exist even theoretical interagency checks. What's more, a system with built-in checks and balances works only when the populace demands it. Public officials have a moral obligation to serve the public interest. The investiture of official power is a form of moral approval, which makes officials susceptible to an out-sized view of their own importance. The public tends to be less skeptical of public officials than of private figures, and the damage to society resulting from the misconduct of public officials is greater than that done by private actors (Blasi, 1977).

There are four other premises inherent in the checking value. One is a pessimistic view of human nature and human institutions that holds that humans are too weak to wield power without hurting each other. Another is that a well-informed populace can form a counterforce to government power, as long as that populace has access to mass communication channels. Yet another is that that populace is the ultimate judge of public

officials and exercises its judgment through the voting process. And finally, that misconduct can have meaning within the realm of government decision-making that can include criminal offenses, behavior that violates constitutional provisions, misrepresentations to the public or other government officials or agencies, or violating democratic norms or shared moral standards (Blasi, 1977).

The checking value is implicated in, or stands in contrast to, other First Amendment values. One of those values is autonomy (Baker, 2011). Free speech has inherent value at least in part because it is integral to the process through which individuals not only choose between alternatives, but through which they realize their potential. According to Justice Brandeis, that is the final end of the State (*Whitney v. California*, 1927).

The checking value differs from the value of autonomy in an important way. Whereas autonomy concerns itself with the process of speech, the checking value is concerned with the consequences of speech. What's more, given accumulating scientific discovery, the checking value may prove to be a more enduring value than autonomy, the concept of which may change over time (Gibney, 1975; Schell, 1977). While the concept of autonomy is irreducible, the checking value is balanced against other competing regulatory interests. With regards to the checking value, constitutional protections are a function of who is speaking in what is being said, a stable pattern that enables the categorization of speech. In turn, this enables a distinctive constitutional role for competing social forces. Autonomy makes no such distinction (Redish, 1981-1982b; Weinstein, 2011a).

The checking value shares more in common with the value of diversity, though

there are some differences there as well. While social consequences of unregulated discussion from a variety of voices is likely preferable to the consequences of regulation (Baker, 1989), any benefits may not gain widespread acceptance over time. On the other hand, the stability of the checking value is more likely to appeal to most individuals over time. There are at least two potential reasons for this. One is that distrust of power is ingrained in the American polity. The other is that the checking value creates a narrow band of priorities for protection, whereas diversity potentially implicates a wider range of speech (Blasi, 1977). While both values focus on hearers, the checking value places emphasis on information, whereas the diversity value emphasizes argumentation (Mill, 2003/1859). Both values share a focus on consequences of speech rather than an appeal to an inherent right. Both emphasize the value to the recipients of that speech. And both values affirm the significance of free expression, even in a society with communication processes that may be distorted by resource concentration and manipulation (Blasi, 1977).

The checking value plays an important role in self-government. Both share a concern for the consequences of speech and a focus on the benefits to recipients of messages rather than those to speakers (Meiklejohn, 1948). These values differ in some important ways as well. The checking value focuses on misconduct by public officials, whereas the self-government value is broader, protecting a wider range of speech. This lowers the regulatory cost of the checking value, which offers protections only if the good outweighs the bad by doing so (Blasi, 1977).

As the self-government value is built on the idea of the governed agreeing to this arrangement via the social contract (Meiklejohn, 1948), this raises the question of

whether today's citizenry can be bound by an agreement made by those who came long before. This value envisions an active citizenry continually engaged in the business of governing (Post, 2011; Weinstein, 2011b), but this does not adequately describe the reality of citizens who spend much of their time pursuing their own interests, quite apart from any of the business of self-government. The checking value, on the other hand, does not require the same level of political involvement, leaving citizens free to pursue private interests. They must be able to mobilize to deal with potential political threats, but the checking value does not require the subordination of the pursuit of private interests to self-government. Like diversity, the self-government value emphasizes speech as argumentation (Weinstein, 2011b), whereas the checking value focuses on information. The self-government value envisions no special role in the decision-making process for any group, whereas the checking value see decision-making as the product of competing forces: Majority-party officeholders, minority-party officeholders, and the professional press (Blasi, 1977).

The checking value interacts with developed doctrine concerning defamation as well. While private citizens enjoy a large measure of protection from public exposure by news media, an important element of the work of self-government is the ability to hold public officials accountable for their conduct in office through public exposure (Hindman, 1992). The U.S. Supreme Court recognized that and carved out an exception to defamation doctrine to allow criticism of public officials. The actual malice standard the Court created raised the bar public officials had to clear in order to successfully sue for libel, giving news media far more freedom in reporting on public affairs (*New York Times v. Sullivan* (1964).

The Court would expand the *Times* privilege to cover libel actions brought by public figures in *Curtis Publishing Co. v. Butts* (1967). The Court expanded the scope of the *Times* privilege again in *Rosenbloom v. Metromedia, Inc.* (1971) to cover all discussion of matters concerning the public. Three years later, in *Gertz v. Robert Welch, Inc.* (1974), the Court held that the First Amendment barred all presumed and punitive damages in the absence of a showing of actual malice, regardless of the plaintiff's status as a public figure or whether the speech in question was of public or general concern, citing a need to avoid self-censorship by news media.

Setting aside the imprecision of the Court's conception of public figure, a full consideration of the checking value would change the standards for exceptions to the defamation standards the Court formulated. First, the *Times* privilege would apply only to public officials, where it would be absolute. When it comes to public figures, the protection would be qualified, subject to an actual disregard for the truth standard. For all others, the negligence standard would apply. The implication of such a change would be to shift the focus from the identity of the subject of speech and place it on the content of the speech itself. While the Court has shown deference to newsgathering but has not accorded organizations engaged in such activity a full measure of First Amendment protection (Blasi, 1977).

In *Branzberg v. Hayes* (1972) the majority rejected claims of journalistic privilege and the traditional watchdog function of the press, instead characterizing the press as a private-interest group. The Court opted for a standard that balanced claims of journalistic privilege against the obligation to testify in court proceedings. Dissenting opinions stated that effective self-government depends on the free flow of information to the public.

In *Pell v. Procunier* (1974) the Court rejected challenges to prison restrictions on prearranged interviews. The Court rejected the idea that the government has an affirmative duty to support newsgathering efforts. In his dissent, Justice Douglas asserted that the First Amendment envisioned an investigative role for the press. He also echoed dissent in *Hayes* for the necessity of an unimpeded flow of information in effective self-government and asserted the public's right to hear.

The checking value's emphasis on disseminating information argues for full First Amendment protection for newsgathering. A good-faith standard for balancing interests would be too easy for the government to abuse, as would the ability to subpoena journalists, though this does not suppose a testimonial privilege (Blasi, 1977). On the other hand, protection for confidential sources, as well as whistleblowers, would enable the dissemination of information to which the public would otherwise have no access (Hindman, 1992).

A special problem relating to the reporter's privilege is whether it should apply to relationships with sources that violate legitimate regulations against communicating with journalists, or disseminating sensitive information, such as classified material or information which damages a defendant's right to a fair trial. In these cases, the balance between the reporter's privilege and these regulations should weigh in favor of the dissemination of information (*New York Times* v. United States, 1971). The checking value recognizes that time, place, and manner restrictions can serve legitimate regulatory interests. However, the mere fact that a source is under the authority or control of the government should not be enough to preclude a reporter-source relationship (Hindman, 1992).

Under the checking value, disseminating information about the behavior of public officials is the primary activity envisioned by the First Amendment. As such, restrictions on such dissemination, whether they affect the quality or quantity of information, or both, should not be matters of government preference or prerogative. Such intervention would likely serve to worsen existing distortions in the marketplace of ideas, making the search for truth that much more difficult (Hindman, 1992). Information relevant to official misconduct should take precedence over other interests (*New York Times* v. Sullivan, 1964), such as confidentiality or efficiency. Journalists may have access to records, such as financial documents, even though such access may come with costs or risks. A distinction between journalistic claims to official information and claims to so-called vivid transmission– photographs, video, tape recording, or televising – of information is necessary. The initial stages of newsgathering are the most critical with regards to the checking value, as they carry the greatest First Amendment weight, though it would be acceptable to prohibit unethical newsgathering practices (Blasi, 1977).

The checking value has also been present in U.S. Supreme Court decisions regarding access to mass media channels. In *Red Lion Broadcasting Co. v. FCC* (1969) the central issue was a challenge to provisions of the fairness doctrine, which the Court upheld. Though the FCC later set aside the rule, the Court rejected the idea that broadcasters were entitled to the same measure of autonomy as other information disseminators. The Court asserted that broadcasters were proxies for the public, rejecting the idea of government control of stations.

In *Columbia Broadcasting System v. Democratic National Committee* (1973), the Court rejected claims by a national political party and a group of business interests who

challenged the ability of broadcast licensees to refuse to sell airtime for political advertisements. The Court held that broadcasters' policies regarding the sale of airtime were not governmental actions subject to First Amendment scrutiny. The Court recognized the need for autonomy on the part of news gathering and disseminating organizations.

In *Miami Herald Publishing Co. v. Tornillo* (1974), the Court upheld the newspaper's appeal of a state law requiring newspapers to set aside space for replies from public officials about whom the newspapers published critical editorials. The Court held that the principle against the government compelling newspapers to print certain content was a basic, unassailable First Amendment principle.

In each case, the checking value is present in the Court's decisions upholding journalistic autonomy. These decisions suggest that the Court regarded a close relationship between journalists and the government to be undesirable. Not only would such a relationship increase the potential for government control of information, but an adversarial relationship was important to the function of the news media and should not be compromised. The news media formed, at least, a symbolic counter force to the government (Blasi, 1977).

The mass communication system is a limited and important resource to such a degree that how it is used is of constitutional concern. Justice Black summed it up in his opinion in *New York Times Co. v. United States* (1971), writing that the government's power to censor the press was abolished so that press would be free to report on the activities of the government, as a central duty of the press was to prevent government deception.

C. Edwin Baker: The liberty theory

C. Edwin Baker (1947 – 2009) joined the faculty at the University of Pennsylvania, where he taught both law and communication, after teaching at two other universities. In his most enduring work, Human Liberty and Freedom of Speech (1989), he proposed what he called the liberty theory. He argued that the primary justification for free expression is the protection of individual liberty rather than the marketplace of ideas rationale central to much U.S. Supreme Court free speech jurisprudence (Hudson, n.d.).

While other theories of the First Amendment propose multiple values furthered by free expression, the Liberty Theory proposes that the two key First Amendment values are individual self-fulfillment and the ability for individuals to participate in societal change. A two-pronged idea is foundational to this conception of free expression under the First Amendment. The first prong is the idea that an individual has the right to use speech to work to realize one's potential. The second is that an individual has the right to influence or interact with others in ways that correspond to the individual's values (Baker, 1989). This is a departure from and critique of the prevailing marketplace of ideas paradigm that has shaped legal conceptions of free speech (*Miller v. California*, 1973; *Paris Adult Theatre I v. Slaton*, 1973; *New York Times v. Sullivan*, 1964) while also acknowledging that a complete or stable categorization of the uses of speech is impossible (Baker, 1989).

The marketplace of ideas proposes that truth, or at least the best ideas, will emerge through debate free from governmental interference (Greenawalt, 1989). This conception of the best environment for expression rests on some fundamental assumptions. One is that the truth is objective, and therefore, discoverable, and that the

free exchange of ideas will inevitably bring the truth to the surface (Milton, 1927/1644; Rorty, 1981). Another is that individuals are basically rational, able to sift through the different messages that compete for legitimacy, and therefore recognize true ideas (Redish, 1981 – 1982b). A third assumption is that the discovery of truth is not only achievable but desirable. Truth would provide the best basis for action which would advance human interests (Mill, 2003/1859).

These assumptions are flawed, however. First, truth is not wholly objective. Humans understand the truth in part, and also create it as well as discover it. Even in the hard sciences, acceptance of some ideas over others reflects the value or pragmatic judgments of the scientists (Kuhn, 1996; Thorpe, 2001). Individuals, given their variety of perspectives and interests, see the world from different angles, and construct knowledge accordingly. In this way, humans create truth as well as find it (Berger & Luckmann, 1966).

So, free expression will produce different truths, or different conceptions of a truth, and the classic theory does not explain why the truth emerging from free debate is best. This also undercuts the assumption that individuals are basically rational. That is, individuals are able to sift and evaluate different messages, and to correctly perceive reality. To be so, individual perceptions of the world must be free from influence by personal history or position. Individuals with different histories or positions will possess different perceptions and understandings of the same world. Debate would not bridge those differences. Also, if the discovery of truth would provide the best basis for action, as humanity discovers more truth, the diversity of opinion and practice should become more narrow over time. Cultural pluralism should eventually disappear. But individuals'

real interests do conflict and compete, and, if truth is not objective, then intractable conflicts would follow (Baker, 1989).

Still, the marketplace contributes to human action by offering a diversity of ideas and opinions. Suppressing speech distorts and delays the adoption of valuable ideas and perspectives, but free speech will eventually lead to new perspectives. Given human fallibility, a society is better off with free speech than without it (Baker, 1989). However, these depend on the form and quality of the messages, the mechanisms by which people hear and process these messages, and on peoples' interests and experiences. It also depends on equal access to the marketplace, as unequal access would favor those groups who occupy at present dominant societal positions (Hoffe, 2013; Koller, 2013).

The marketplace of ideas is aspirational: It describes what this society would like to be. As such, people should try to create the conditions under which the exchange of ideas would be authoritative and work to advance all the individual and group interests equally. So, while it is necessary to abandon the foundational assumptions of the marketplace model, society should accept its vision for the scope of free speech. Even so, some problems remain. The marketplace model supplies a goal for speech, but no guidelines on how to achieve that goal when conditions for doing so do not exist. Also, this aspirational ideal is not specific and the scope of protection for speech under it may differ from the scope of protection given to speech under current conceptions of the marketplace model (Baker, 1989).

One modification to the marketplace of ideas model was the political speech theory. Earlier theorists proposed that the purpose of the First Amendment was to provide absolute protection for political speech, which could include any speech that aids in self-

government (Meiklejohn, 1965).

One problem with this focus is that what counts as political speech may be construed as widely or as narrowly as one wants. This makes claims of self-government as the primary value of free speech difficult, if not impossible, to defend (Redish, 1981 – 1982b; Scanlon, 2011). But the political speech theory has had influence and appeal. The argument that free speech is essential to democracy actually leads to two different versions of the theory. The first version supports that claim with the argument that free speech is necessary for the public to find political truth, or at least to reach sound and desired outcomes (Greenawalt, 1989). This version only duplicates the marketplace of ideas model, though only for the political realm. As such, it has the same flaws and is subject to the same critiques as the marketplace model (Baker, 1989).

The second version of political speech theory proposes that since free speech is part of the very definition of self-government, it is implicit in democratic self-government. This conception does not assume that speech will produce some theorized result but focuses instead on the process of decision-making. Free speech is a necessary element in the process of self-governance (Meiklejohn, 1961; Post, 2011).

That conception of democracy rests on a three-part argument. First, that people have the opportunity to and will engage in choosing policies. The second is that governors hear and choose from all viewpoints. The third is that these are available only through free political speech. But that conception of democracy fails. Even accepting the first argument, it fails on the second. Governors never have all access to or consider all possible viewpoints. Having all possible information in hand before acting is impossible (Baker, 1989).

However, liberty, not process, was both means and end for the founders (*Whitney v. California*, 1927). Liberty implies democracy as the process for making and implementing policy decisions as one of the primary activities of a free people (Post, 2011). So, restrictions on speech outside the political realm would be no more acceptable than restrictions inside the political realm (Redish, 1981 – 1982a).

However, there are three types of speech properly subject to legal restrictions. One is speech involved in the actual or attempted taking of, or injury to, another individual's property, or an injury to another person. The second is speech given by but not chosen by the speaker. In this case, the speech would not be a manifestation of the speaker's individual values. Thirdly, speech designed to coerce another, or to interfere with another's autonomy, would not enjoy protection (Baker, 1989).

Protection of action

Given that the First Amendment does not necessarily protect all speech raises the possibility that it could protect some nonspeech (Schauer, 2015). One difficulty in doing so is the lack of criteria for identifying nonverbal behavior deserving such protection. To protect such nonverbal behavior, one would need to show that it is expressive activity and furthers key First Amendment values and promotes those values in a manner similar to the way protected speech does. One would further need to demonstrate that protection is essential in order to realize those values (Baker, 1989).

An expansive attempt at a unified First Amendment theory made an attempt to identify the proper line of demarcation between protected and nonprotected activity by distinguishing between expression and action (Emerson, 1970). But there are difficulties in making that distinction. Much conduct could conceivably fall into both categories.

Speech often seeks to do something (Austin, 1962), and nonverbal behaviors attempt to express some idea or sentiment. And, since both verbal and nonverbal behavior can advance First Amendment values, the distinction between them can be unclear (Schauer, 2015).

The relevant question is how the conduct in question advances important First Amendment values. Neither law nor custom, however, give adequate guidance in distinguishing expression from action. Developing the principles necessary for doing so requires making a distinction between allocation rules and general prohibitions (Baker, 1989).

Allocation rules, made necessary by scarce resources, are those that restrict an individual's liberty by giving another either decision making authority or an opportunity that the individual wants for him- or herself. These rules do not eliminate decision making authority, they locate it. Nor do they limit liberty, provided this decision-making authority is treated the same no matter which party wields it. There are two First Amendment restrictions on the state choice of allocation rules (Baker, 1989). One prohibits the state from giving a party an original right to decide what another party must do, say, or not say, except in rare and limited contexts (*New York Times v. Sullivan*, 1964; *Planned Parenthood v. Danforth*, 1976).The other restriction recognizes that the state may be obliged to observe neutrality criteria in making allocations that allow private parties to express themselves or promote their opportunities (*Kovacs v. Cooper*, 1949; *Chicago Police Department v. Mosley*, 1972). The state may also be required to provide some minimum level of access for expressive opportunities (Emerson, 1970).

General prohibitions, those that prohibit opportunity or decision-making authority

to all parties, pose a larger problem for liberty. There may be no logical necessity for these rules. For example, in deciding that no one can engage in a particular activity, one can find a party who gets to decide whether or not to engage in that activity. These prohibitions can enable majorities to control minorities by simply disregarding minority preferences. General prohibitions also can profoundly limit the possibility of participating in social or political change by banning novel activities or those that do not enjoy majority support. In doing so, these prohibitions also may unnecessarily restrict expressive activities, imposing severe limits on opportunities for self-realization (Baker, 1989).

The complexity of the right to free speech is evident in the variety of major theories discussed in this chapter. Arising from that complexity is the lack of a single, unified theory of free speech (Han, 2015). While the development of theory has been primarily an area of academic concern, the value of theory is not limited to that sphere.

The theories discussed above have been important in helping form the foundation for the Supreme Court's approach to free speech cases. These theories have, to varying degrees, provided the Court with prescriptive or predictive guidance in deciding cases (Han, 2015). Those decisions set precedent, which informs further Court decision making concerning disputes involving speech and become part of the body of free speech doctrine (Schauer, 1986).

The Court's decisions have a direct effect on how individuals conceive and exercise their right to free speech, as those decisions identify the boundaries of that right. Individuals then exercise the right in recognition of those boundaries or suffer legal sanction if they cross a line the Court has drawn.

CHAPTER 3

LANDMARK U.S. SUPREME COURT CASES

Absolutists may read the First Amendment as a total ban on limiting speech, but laws that do so are common. Perjury, blackmail, fraud, and speech integral to other criminal actions are examples of speech that falls outside the boundary of First Amendment protection (Shiffrin & Choper, 2006).

However, speech interacts with many other rights and values, often in complex ways. This makes any simple formula for determining the scope of speech rights a practical impossibility. In addition, the U.S. Supreme Court has not approached constitutional questions regarding speech through the lens of any general, unified First Amendment theory, instead developing principles on a case-by-case basis. The resulting precedent is complex and sometimes contradictory (Shiffrin & Choper, 2006). One thread has run through much of this jurisprudence, however. In his dissent in *Abrams v. United States* (1919), Justice Holmes introduced the enduring "marketplace of ideas" metaphor into the Court's thinking about free speech issues (Blasi, 2005).

This chapter discusses the major cases through which the Court developed and enumerated the principles that shape the right of freedom of speech.

Advocacy of Illegal Action: Clear and Present Danger

Schenk v. United States (1919)

Charles Schenk was convicted of violating provisions of the Espionage Act, including causing insubordination in the military, interference with military recruitment and enlistment efforts, and unlawful use of the mail system. Schenk, the general secretary of the Socialist Party, printed and distributed approximately 15,000 leaflets to men who

had been accepted for military service. The leaflets claimed the draft violated the Thirteenth Amendment, claiming that conscription was despotism and a crime against humanity perpetrated in the interests of the Wall Street elite. The leaflets exhorted readers to assert their rights and petition for the repeal of the Act. It also attacked the legitimacy of the war (*Schenk v. United States, 1919)*.

The Court found against Schenk. It held that while Schenk's actions may be generally permissible in peacetime, and the contents of the leaflets ordinarily protected by the First Amendment, under the current circumstances they were not. In Justice Holmes's famous formulation, the circumstances of every act determine its character. The leaflets in questions were akin to a man causing a panic by shouting "fire" in a crowded theater when there is no fire. Intended to obstruct the war effort, the content of Schenk's leaflets presented a what Justice Holmes called a clear and present danger to cause "the substantive evils which Congress has a right to prevent" (*Schenk v. United States,* 1919, p. 52*)*.

The clear and present danger test drew a line between protected and unprotected speech. In his opinion, Holmes also introduced the element of proximity. Speech failed the clear and present danger test when it was the proximate cause of an injurious consequence or was performed with the tendency and intent to cause such a consequence, whether or not it succeeded (*Schenk v. United States, 1919)*. The Court adopted the clear and present danger test, applying it in subsequent cases, including *Debs v. United States (1919), Abrams v. United States (1919), Dennis v. United States (1951)*. It stood as the dividing line between protected and unprotected speech until 1969, when the Court drew a new line.

Advocacy of Illegal Action: Incitement

Brandenburg v. Ohio (1969)

Brandenburg, a Ku Klux Klan leader in Ohio, was convicted of violating the Ohio Criminal Syndicalism statute, which forbade the advocacy of violence, sabotage, or other unlawful means of effecting political change. The statute also prohibited the voluntary assembling with any group that taught such criminal syndicalism. (*Brandenburg v. Ohio, 1969).*

At an outdoor Ku Klux Klan rally, attended only by members of the organization and a news crew the group invited, Brandenburg spoke to the group. In his speech, he said that while the organization was not revengent, or given to force, but if the government continued infringe on the rights of whites it might become necessary to use force against the government (*Brandenburg v. Ohio, 1969).*

The Court overturned Brandenburg's conviction. The Court held that the Constitution does not allow states to prohibit advocacy of the use of force or other illegal means except where it is intended to incite imminent illegal action and is likely produce that action. The Court drew a distinction between the what it called mere advocacy present in this case and the actual preparation of a group for violence or inciting such violence. The Court found that Ohio's criminal syndication statute violated provisions of both the First and Fourteenth amendments (*Brandenburg v. Ohio, 1969).*

An Exception: Fighting Words

The Court carved out an exception to First Amendment speech protections in this case, which found the Jehovah's Witnesses at the center of the fight over public proselytizing.

Chaplinsky v. New Hampshire (1942)

Chaplinsky, a Witness, was distributing literature on a public street in Rochester, New Hampshire. Citizens complained to the city marshal, that, in addition to distributing literature, Chaplinsky was denouncing all religions as rackets. The marshal warned Chaplinsky that the crowd was growing hostile, which eventually attacked Chaplinsky. He was taken to the police station. Though some of the exchange between the two was in dispute, along the way Chaplinsky called the city marshal a fascist and a racketeer. A court convicted Chaplinsky of violating a New Hampshire statute that outlawed calling another person an offensive name or any offensive word while that person was lawfully in a public place (*Chaplinsky v. New Hampshire*, 1942).

The Court upheld the New Hampshire statute, finding that Chaplinsky's epithets constituted so-called fighting words that were intended to injure or to incite an immediate breach of the peace. As such, his speech was not due First Amendment protection (*Chaplinsky v. New Hampshire*, 1942).

The Court took as its task in the case to determine the constitutionality of the state statute in question, disregarding the circumstances of the exchange between Chaplinsky and the city marshal. But the decision formulated a two-pronged test: an intent to injure and an intent to incite an immediate, violent response (Peters, 1999). However, the Court never again applied the injury prong (Peters, 1999), which the state statute did not address in the first place (Caine, 2004).

In its decision the Court also created categories of speech that lay outside the bounds of First Amendment protection (Caine, 2004), which had the effect of making jurisprudence a good deal more subjective (Wirenius, 1995).

The first case after *Chaplinsky* to apply the fighting words doctrine, 1949's *Terminiello v. City of Chicago*, did not make the doctrine any clearer. Subsequent court decisions addressed the fighting words doctrine in other social contexts, leading to a narrowing of the doctrine (Peters, 1999). Some, however, find the doctrine hopelessly vague and potentially chilling concerning speech (Caine, 2004; Wirenius, 1995). Depending on the social contexts of subsequent cases, the Court at times favored order over liberty and at other times favored liberty over order, as if they are conflicting values. In any case, the doctrine is unclear (Hanson et al., 2009).

Prior Restraint

The concept of prior restraint is applied primarily to institutional media. The American understanding of press freedom is a direct descendant of English common law, which conceived freedom of the press as freedom from governmental ability to censor materials before publication (Levy, 1985). Two landmark cases, *Near v. Minnesota* and *New York Times Co. v. United States*, firmly established this concept in U.S. Supreme Court jurisprudence.

Near v. Minnesota (1931)

A Minnesota law made it a nuisance to regularly produce periodicals that published defamatory material. The law allowed the state to censor such a periodical in advance of publication and enjoin the publishers from future violations. A defendant would have to prove that the published material was true and justify the purpose for publication. Minnesotan Jay Near published *The Saturday Press* in Minneapolis, and in several issues of the publication asserted that, among other things, a Jewish gangster controlled gambling in the city, the chief of police had illicit relationships with gangsters

and participated in graft, and other city officials were derelict in their duties.

A court enjoined Near from publishing subsequent issues, and Near countered that the due process clause of the Fourteenth Amendment protected him. The court found against Near, but the U.S. Supreme Court found that, while press freedom is not absolute, prior restraint of publication, even of material that may be libelous after publication, was unconstitutional (*Near v. Minnesota*, 1931).

The case was important in establishing prior restraint as integral to Supreme Court jurisprudence regarding the First Amendment. However, the Court did not define the concept of prior restraint or explain why certain injunctions against publication could fit within the concept (Meyerson, 2001). The decision was also important because it made protections of press freedom binding at the state level through the due process clause of the Fourteenth Amendment (Pilgrim, 1991).

New York Times Co. v. United States (1971)

The New York Times and the Washington Post both began publishing a series of news stories based on information taken from what became known as the "Pentagon papers," a classified study of the U.S. involvement in the Vietnam War. The Nixon administration, invoking national security, sought to stop the newspapers from publishing the articles (*New York Times Co. v. United States*, 1971). Among the administration's claims was that publication would slow troop withdrawals, increasing the risk of death for a longer period of time than necessary (Rudenstine, 1990 – 1991), and damage to diplomatic efforts to end the war (Sims, 1993). A lower court found in favor of the government, but subsequent appellate courts reversed their decision. A divided U.S. Supreme Court affirmed the appellate courts' decisions, finding that the government had

a heavy presumption against the validity of prior restraint and, in this case, did not meet it. Justices Black and Douglas argued that security was a vague word and was insufficient grounds for limiting First Amendment press rights. Justice Brennan held that, to justify prior restraint, the harm the administration claimed must be inevitable, but it was not (Rudenstine, 1990 – 1991).

Absolutists on the Court felt that the First Amendment established an absolute prohibition against restrictions on press freedom. They were joined by justices who felt that, while extraordinary circumstances could justify some press restrictions, publication of this material did not compromise national security (*New York Times Co. v. United States*, 1971).

Licensure and Permits

A classic form of prior restraint, English licensing laws required publishers to acquire licenses in advance in order to print or sell any printed material. Even though there may be conceivable circumstances under which such licenses may be permissible, in general the Court has rejected them as impermissible.

Moreover, licensing regimes not only affect organizations such as newspapers, but they also can place severe limits on individual rights to speech.

Lovell v. City of Griffin (1938)

A court convicted Alma Lovell, a Jehovah's Witness, of violating an ordinance requiring anyone distributing any kind of literature, either free or for sale, to first get a permit from the city manager. The U.S. Supreme Court overturned the conviction. Freedom of the press, the Court said, is aimed at the authority granting the license, as this would enable the control of the flow of information through licensure. That the ordinance

was aimed at distribution was not enough to save it, since publication without distribution has little value (*Lovell v. City of Griffin*, 1938). The Court also found the ordinance defective on other grounds: It was not limited in its application, not limited to maintaining public order, nor was it strictly limited to promoting a particular state interest (Korff, 2010).

Subsequent cases, such as *Schneider v. State of New Jersey (Town of Irvington)* (1939), *Cantwell v. Connecticut* (1940), *Murdock v. Pennsylvania* (1943), *Kunz v. New York* (1951), and *Watchtower Bible and Tract Society of New York v. Village of Stratton* (2002) cemented the impermissibility of such discretionary permit or licensure regimes (Corvino, 1982; Lusty, 2004). Through these cases, the Court also affirmed the government's right to regulate the time, place, and manner of expressive activities pursuant to compelling government interests (Corvino, 1982).

Time, Place, and Manner Restrictions

Not all regulations concerning speech are out of bounds. In a case involving a religious sect and the Minnesota State Fair, the Court did affirm the government's authority to impose some limitations on when and where some speech occurs. The case, *Heffron v. International Society for Krishna Consciousness, Inc.* (1981), illustrates the Court's application of time, place, and manner restrictions. While the case concerns an organized religious group, the principles affirmed in the case also apply to individuals in the public sphere.

Heffron v. International Society for Krishna Consciousness, Inc. (1981)

The Minnesota Agricultural Society, which operated the state fair, implemented a rule that required any individual, group, or vendor distributing any goods, including

literature, to do so from a fixed location in the fairgrounds. The rule did, however, allow such vendors to roam the fairgrounds and engage patrons in conversations. The locations were assigned on a first-come, first-served basis, and the rule applied to all organizations and individuals without regard to status or to the content of the goods or the speech they wished to propagate (*Heffron v. International Society for Krishna Consciousness, Inc.*,1981).

One effect of the agricultural society's rule was the suppression of sankirtan, a ritualized practice that required Krishna adherents to publicly distribute literature and solicit donations. The organization sued on the grounds that the rule violated their First Amendment rights, and a state court found for the Krishnas. However, the U.S. Supreme Court reversed that decision, holding that the agricultural society's rule was a reasonable time, place, and manner restriction that furthered its interest in maintaining order and safety within the crowded fairgrounds (*Heffron v. International Society for Krishna Consciousness, Inc.*, 1981).

A reasonable time, place, and manner restriction must meet the following criteria: it must not be based on the content of the speech subject to the restriction, it must serve a significant government interest, balanced against harm to the subject of the restriction, and it must be the least restrictive means available to achieve that interest. In *Heffron*, the Court considered sales, solicitation of funds, and distribution of literature as one activity rather than three. At least one justice dissented, indicating that distribution of literature should have been considered a separate activity and that the state's rule should have been more narrowly constructed (Corvino, 1982).

In a 1972 case, *Grayned v. City of Rockford*, the Court had established a three-

pronged test: The nature of the public place must be considered in light of the type of speech occurring there; if compatible, determine what governmental interest is served by the proposed regulation; if legitimate, determine if the regulation is narrowly tailored so there is minimal restriction of speech (*Grayned v. City of Rockford*, 1972).

In *Heffron* the Court, in deciding the case on the second prong alone, departed from this test. The Court also introduced, the idea of alternative forums as a deciding criterion, a potential departure from the standard the Court used before this case (Anstine, 1982).

As a rule, the Court has distinguished between speech and free exercise rights. But in *Heffron*, the Court effectively treated them as if they were the same. Considering the three activities in which the Krishnas engaged, sale of literature, distribution of literature, and solicitation of donations, was a mistake by the Court, as one justice concluded. Also, recognizing sankirtan as a religious ritual or practice for the Krishnas would have subjected the agricultural society's rule to greater scrutiny (Turovsky, 1983).

Test Oaths and Flag Salutes

In earlier decisions the Court distinguished belief from behavior, holding that while the government could regulate behavior, the First Amendment forbade the government from compelling or regulating religious belief (*Reynolds v. United States,* 1878). The Court did allow test oaths, however, as a condition of voting (*Davis v. Beason*, 1890*).*

But those oaths proved problematic, and the Court changed its stance on them in *Girouard v. United States* (1946), affirming its position in subsequent cases, such as *Torcaso v. Watkins* (1961) and *Wooley v. Maynard* (1977).

Girouard v. United States (1946)

Girouard, a Canadian applying for U.S. citizenship, acknowledged on his application an understanding of his willingness to defend the U.S. Constitution and the nation's laws from all enemies, foreign and domestic. However, because of his beliefs as a Seventh Day Adventist, Girouard also indicated on the application his unwillingness to take up arms in that defense, though he did indicate a willingness to serve in the military in a noncombatant role (*Girouard v. United States,* 1946). At that time about 10,000 Seventh Day Adventists were doing so (Hartman et al., 2004).

A district court approved his application but an appellate court denied it. The Supreme Court reversed, holding that the Naturalization Act did not require an alien to agree to bear arms, and doing so would require the Court to read into the act. The Court also noted that holding an alien to that standard was not plausible, since a refusal to bear arms would not disqualify someone from Congress or other public office. Congress later amended the naturalization oath to allow for nonmilitary work important to national interests or noncombatant service if otherwise required by law (*Girouard v. United States,* 1946). *Girouard* also supported the contention that some exceptions to generally applicable government proscriptions can be appropriate (Hartman at al., 2004).

The U.S. Supreme Court has also found itself considering a different kind of oath, saluting the American flag. In a 1940 case, *Minersville School District v. Gobitis,* the Court upheld the practice of requiring school children to participate in a daily flag salute and pledge of allegiance. Three years later, in *West Virginia State Board of Education v. Barnette*, the Court reconsidered their decision.

West Virginia State Board of Education v. Barnette (1943)

The Barnettes were children of Jehovah's Witnesses. The school expelled them for their refusal to participate in the mandatory pledge of allegiance that began each school day and their parents were prosecuted for failing to compel them to do so. The Barnettes joined with other plaintiffs and sued the school district, claiming the flag salute statute violated their First Amendment free speech and free exercise rights and the Fourteenth Amendment due process and equal protection provisions. The Court found for the plaintiffs on both the free speech and free exercise grounds (Leiter & Mersky, 2012; *West Virginia State Board of Education v. Barnette*, 1943).

While the case prohibited mandatory flag salutes, it also created a potential problem for future First Amendment jurisprudence. In one of the more famous phrases to come from a decision, the Court stated that a bedrock principle of our constitutional rights was the proposition that government could not define orthodoxy or compel citizens to confess their allegiance to that orthodoxy (*West Virginia State Board of Education v. Barnette*, 1943). But some argue that it is impossible for government never to do so. At times, the argument goes, the government will at least tacitly endorse some values over others. Therefore, the central issue should be whether or not citizens are free from the coercion to confess agreement to those values (Smith, 2003).

Defamation

Laws prohibiting speech that subjected individuals to derision or reputational damage go back to ancient Athens. English common law prohibiting such defamatory speech formed the basis for American law on the subject, as well (Tedford & Herbeck, 2009).

The Court created a new standard in cases such as *New York Times Co. v. Sullivan* (1964) and *Curtis Publishing Co. v. Butts* (1966), making a distinction between private persons and those in the public eye. Through these cases the Court established a higher bar for public officials and public figures to clear in winning defamation judgments against publishers, effectively expanding the press's latitude in covering them.

New York Times Co. v. Sullivan (1964)

Sullivan was one of three Commissioners of Montgomery, Alabama, who claimed he was defamed in an advertisement in the New York Times. The full-page ad included statements, some of which were false, critical of police actions directed against civil rights demonstrators. Sullivan was not named in the ad, but claimed it defamed him because his duties included supervising the police department. The trial court found the ad libelous per se, injury implied without actual damages, and that malice was presumed, so the jury could award compensatory damages. The trial judge did not instruct the jury that they had to find actual intent to harm or recklessness in order to award punitive damages, or that they should differentiate between compensatory and punitive damages in a verdict for the respondent (*New York Times Co. v. Sullivan*, 1964).

The U.S. Supreme Court overturned the decision, finding that a state, under the First and Fourteenth Amendments, cannot award damages to a public official for defamation without proving actual malice – that publisher of the statements knew they were false or acted with reckless disregard for their truth or falsity. The Court also found that speech appearing in a paid advertisement was due First Amendment protection (*New York Times Co. v. Sullivan*, 1964). The case was an important moment not only in First Amendment jurisprudence but also in coverage of the civil rights movement. The paper

reported on events in Alabama but published in New York. The state court's decision could have ended national coverage of the civil rights movement. The U.S. Supreme Court's decision, and its application of the actual malice rule, allowed vital news coverage to continue (Savage, 2013 – 2014).

Curtis Publishing Co. v. Butts (1966)

This case combined two cases with different facts. In the first, *Curtis Publishing Co. v. Butts* (1966), University of Georgia head football coach Wallace Butts sued the Saturday Evening Post for libel when the magazine published an article alleging that Butts and University of Alabama football coach Paul "Bear" Bryant conspired to fix a game. The jury found for Butts, awarding him both compensatory and punitive damages. Citing *New York Times Co. v. Sullivan*, the defendant moved for a new trial but the court denied the motion because the plaintiff was not a public official. The second case, *Associated Press v. Walker*, concerned news reports that Edwin Walker, a private citizen and political activist, had led rioting on the University of Mississippi campus over the efforts of a young black man, James Meredith, to enroll. Walker sued for libel, and the trial court awarded him compensatory, but not punitive, damages (*Curtis Publishing Co. v. Butts*, 1966).

The U.S. Supreme Court found that both Butts and Walker were public figures and had the same standards for libel as did public officials under the *New York Times v. Sullivan* decision. The Court found that Butts met the standard, and upheld the lower courts' denial of a retrial, but Walker did not, so the Court denied plaintiff's claims to damages (*Curtis Publishing Co. v. Butts*, 1966). With this decision the Court effectively expanded the definition of public official to include those who have direct influence on

public policy and those who do not (Schauer, 1984). The Court recognized the influence non-political public figures can have on public opinion and on the ordering of society generally ascribed to the political process (Daniels, 1984).

The Court further clarified the actual malice standard established in *Sullivan* by further differentiating between public and private figures in subsequent cases, such as the 1974 case *Gertz v. Robert Welch, Inc.* (Robertson, 1976), and by carving out an exception for parody in *Hustler Magazine, Inc. v. Falwell* (1988).

While these foundational cases involved traditional print publications, in today's internet age, anyone can publish material for public consumption. The following case is instructive, given that the material in question was published by a private organization, not a traditional news outlet.

Gertz v. Robert Welch, Inc. (1974)

Elmer Gertz, an attorney, represented a family suing a Chicago police officer convicted of the murder of the family's son. The respondent's magazine, American Opinion, an outlet of the John Birch Society, published an article alleging the officer's trial was part of a Communist conspiracy to discredit the police. The article also falsely claimed that Gertz framed the officer and had a criminal record (*Gertz v. Robert Welch, Inc.*, 1974).

Gertz sued for libel. The jury found in his favor, but the District Court applied the actual malice standard established in *New York Times, Co. v. Sullivan* without regard to Gertz's status as a public or private figure. The court found that Gertz had not proven that the magazine had known the allegations in the article were false or demonstrated a reckless disregard for their truth or falsity and vacated the jury verdict and an appellate

court upheld the decision (*Gertz v. Robert Welch, Inc.*, 1974).

The U.S. Supreme Court reversed, holding that the actual malice standard only applied to public officials or public figures, and found that Gertz was neither. As a private person, Gertz had fewer effective means of countering the kind of defamatory statements made in the magazine article in question and was more vulnerable to injury (*Gertz v. Robert Welch, Inc.*, 1974).

In doing so, the Court clarified the press privilege it created with the *Sullivan* decision (Kosseff, 2011; Robertson, 1976), effectively creating a new standard for potential defamation of private individuals. Unlike public figures, private persons did not have to prove knowing or reckless falsity, only fault. However, plaintiffs who won judgments based on any standard less than recklessness could only recover damages for actual injury. With regard to private persons, states could set their own standards of liability, so long as they did not impose liability without fault (Robertson, 1976).

Hustler Magazine, Inc. v. Falwell (1988)

The magazine published an ad parody which portrayed Falwell as having had an incestuous sexual encounter with his mother in an outhouse. He sued the magazine for libel, invasion of privacy, and intentional infliction of emotional distress. The trial jury found against him on the libel claim, holding that it was unreasonable to believe the parody depicted actual events. They found for Falwell on the emotional distress claim and awarded damages. The Supreme Court overturned the award, holding that Falwell was a public figure, and a false statement made with actual malice was absent (*Hustler Magazine, Inc. v. Falwell*, 1988). In doing so, the Court affirmed its commitment to the actual malice standard and set limits on the tort of intentional infliction of emotional

distress (Laguzza, 1988).

The Court asserted that First Amendment protection of speech, even offensive speech intended to inflict distress, outweighs protecting public figures from emotional distress. Further, restraining such speech would affect political and social discourse by allowing juries to impose liability based on their own subjective tastes, which is inconsistent with the First Amendment (*Hustler Magazine, Inc. v. Falwell*, 1988).

Public v. Nonpublic Spaces

Public property, for the purposes of expressive activities, fall into one of three categories: public forums, limited public forums, and nonpublic forums.

Public forums are spaces that have been devoted to public assembly and speech activities, either through tradition or government designation. The U.S. Supreme Court has cited public parks, streets and sidewalks, as classic examples. Regulating speech such spaces requires a compelling governmental interest, and any regulation must be narrowly tailored to achieve that interest (Chemerinsky, 2001).

Limited public forums are spaces government voluntarily and affirmatively opens for public use as places for expressive activity, and nonpublic forums are spaces that are not, by tradition or designation, affirmatively opened by government for expressive activity (Chemerinsky, 2001).

The Court initially rejected claims to use of government property for expressive activity (*Davis v. Massachusetts,* 1897*).* In fact, prior to 1939, the Court had not articulated any doctrine regarding speech in public places (Pfohl, 1993). The Court changed course in *Hague v. Committee for Industrial Organizing (1939),* a case involving union activity in New Jersey, citing a long tradition of using streets and public parks for

public assembly and discussion of matters of public importance.

Subsequent cases, such as *Thornhill v. Alabama* (1940) and *Police Department of the City of Chicago v. Mosley* (1972), have implications for individuals involved in union activities.

Thornhill v. Alabama (1940)

Thornhill violated a state law prohibiting picketing by joining a picket line protesting his former employer. He was arrested and fined.

The Court found the law invalid on its face, holding that labor relations were not matters solely of local concern, and free discussion of those matters was important to government policy. The state also claimed that Thornhill could express his views elsewhere, but the Court said that public streets were a proper and natural forum for expression, and that the argument that there are other venues available for speech does not justify improper restrictions on such activity (*Thornhill v. Alabama,* 1940).

The Court further articulated the three categories of public spaces in *Perry Education Association v. Perry Local Educators' Association* (1983).

Not every public space is a public forum, however. As a matter of either tradition or declaration, some public property is not open to expressive activities. The government may close these spaces to speech, as long as such restriction is reasonable and viewpoint neutral, reserving them for their intended purposes (Chemerinsky, 2001).

Examples of such spaces are areas around jails and other government facilities (*Adderley v. Florida* (1966), *Greer v. Spock* (1976), *United States v. Kokinda* (1990). Other such spaces include public transit systems and airports (*Lehman v. City of Shaker Heights* (1974), companion cases *Lee v. International Society for Krishna Consciousness,*

Inc. (1992) and *International Society for Krishna Consciousness, Inc. v Lee* (1992); and public broadcasting stations (*Arkansas Educational Television Commission v. Forbes, 523 U.S. 666, 1998).*

Religious Expression in Public Spaces

There have been many cases involving public expressions of religion, including the landmark school prayer decisions in *Engel v. Vitale* (1962) and *School District of Abington Township, Pennsylvania v. Schempp* (1963). There have been subsequent cases as well where the rights to speech and free exercise intersected, from moments of silence at the start of the school day (*Wallace v. Jaffree*, 1985) to prayer at public school graduation ceremonies (*Lee v. Weisman*, 1992) or football games (*Santa Fe Independent School District v. Doe*, 2000). Some involved prayer to begin government meetings (*Marsh v. Chambers*, 1983), or wearing religious apparel in the military (*Goldman v. Weinberger*, 1986).

While all of those cases involved speech in some form, the U.S. Supreme Court found such public expressions of religion violated the Establishment Clause of the First Amendment, rather than the right to free expression. For example, in *Santa Fe Independent School District v. Doe* (2000), the school argued that the prayers were private speech. The Court disagreed, holding that they were public speech, authorized by government policy and delivered with government approval, thereby constituting a government endorsement of religion (*Santa Fe Independent School District v. Doe*, 2000).

But a difficult case, *Snyder v. Phelps* (2011), turned on the distinction between public and private speech and was raised First Amendment questions of free speech

rather than free exercise.

Snyder v. Phelps (2011)

Westboro Baptist Church, led by Fred Phelps, had picketed military funerals to declare their belief that God is punishing America for its tolerance of homosexuality. The church went to Maryland to picket the funeral of Matthew Snyder, a soldier killed in Iraq. The church notified authorities of their intent to protest and followed the instructions they were given, which included picketing on public land approximately 1,000 feet from the church where the funeral was held. During the picketing, which was peaceful, they held up signs that read "Thank God for Dead Soldiers," "God Hates You," "Gods Hates Fags," "You're Going to Hell," "Priests Rape Boys," and other signs in that vein (*Snyder v. Phelps*, 2011).

Matthew Snyder's father saw the tops of the picket signs while driving to the funeral but did not see the content of the signs until he saw a news story broadcast later that evening. He sued the church for intentional infliction of emotional distress, defamation, publicity given to private life, intrusion upon seclusion, and civil conspiracy (*Snyder v. Phelps*, 2011).

A state court awarded Snyder millions in compensatory and punitive damages for the emotional distress claim, but an appellate court overturned the award. The appellate court held that the church's speech was due First Amendment protection because it was on matters of public, rather than private, concern, it was not provably false, and it was delivered through hyperbole. The U.S. Supreme Court upheld the appellate decision (*Snyder v.* Phelps, 2011).

The Court noted that speech on public matters was the preeminent First

Amendment value. Though what constitutes speech on matters of public concern was not well defined, the Court said that speech that can be that related to any matter of concern to the community would merit such protection. Further, the Court held that the character of the speech in question was irrelevant to whether or not it was of public concern (*Snyder v. Phelps*, 2011).

CHAPTER 4

METHOD

The goal of this study was to explore this question: How do elite news media sources describe free speech? To do so, the researcher analyzed editorial and op-ed content from three leading newspapers in the U.S.: *The New York Times*, the *Washington Post*, and the *Wall Street Journal*. These newspapers were chosen because each is in the top 10 in circulation (Agility, 2021) and is consistently among the most influential news sources in the U.S. (Bercovici, 2011; Columbia University, 2018).

The *Times* has reported some of this nation's most important stories since its founding in 1851. It reported on John Brown's ill-fated raid, took down the corrupt New York City administration of William "Boss" Tweed, and broke the news of the Titanic sinking. The paper later led an editorial effort to defeat Franklin Roosevelt's plan to pack the U.S. Supreme Court. Through two World Wars, the Civil Rights movement, the Korean and Vietnam wars, from the turmoil of the 1960s to today, the *Times* became the nation's newspaper of record and gained international acclaim (The New York Times: History).

The *Times* also played a central role in two landmark First Amendment cases. One, *The New York Times Co. v. Sullivan* (1964), established libel standards concerning reporting on public officials. The other, *The New York Times Co. v. United States* (1971), defeated the Nixon administration's efforts to block publication of what became known as the "Pentagon Papers" (The New York Times: History). The paper also found itself entangled in a controversy involving the federal government when it published stories detailing a National Security Agency warrantless wiretapping operation (Risen &

Lichtblau, 2005).

The *Post*, founded in 1877, had long thought of itself as a local newspaper, and covered the Washington, D.C. area as such. Given its location in the nation's capital, sometimes that local news involved issues of national or international import (Cabe & Lundberg, 2014).

After Philip Graham, and later, his wife Katherine, assumed the role of publisher, the newspaper started to break stories that grew the *Post's* reputation well beyond Washington. The paper published excerpts of the Pentagon Papers, joining the landmark 1971 First Amendment case that upheld the right of the paper to do so. Then, the following year, the *Post* began reporting on the Watergate scandal, which led to President Nixon's resignation and earned the paper a Pulitzer Prize and international acclaim. The paper had also developed expertise in reporting on national security issues. In 2013, it broke a big story with national security implications when it published details of a National Security Agency program that mined cell phone and internet data generated by millions of Americans, earning the *Post* another Pulitzer Prize (Cabe & Lundberg, 2014).

The *Journal* grew to have the largest circulation of any daily newspaper in the country (Agility, 2021). The premier business publication in the country, the *Journal* covered the rises, declines, and changes in both domestic and international industries since its founding in 1889 (Wall Street Journal: About Us). Over time, the paper also expanded its reach and reporting, branching out from financial reporting to cover a wide range of news. News Corp., owned by Rupert Murdoch, attempted to purchase the *Journal* in what became a contentious transaction. Some members of the Bancroft family, which had owned the paper for several decades, questioned Murdoch's journalistic

practices and insisted on an independent panel to protect the newspaper. The two sides completed the sale in 2007 (Tofel, 2011).

To conduct this study, the researcher examined editorials and op-ed columns. They would best convey the attitudes concerning the subject and would be important barometers of the attitudes and opinions circulating in society at large (Achugar, 2004).

To identify and select relevant material, the researcher used the Factiva database to retrieve editorial and opinion columns for all three newspapers, *The New York Times*, the *Washington Post*, and the *Wall Street Journal*. The researcher used the search terms "freedom of speech," "free speech," "freedom of expression," and "free expression."

This study focuses on the past decade, so material from three years was selected. The first, 2011, also saw a landmark U.S. Supreme Court decision in *Snyder v. Phelps* where the Court upheld the right of a group to protest at military funerals. The second year selected, 2015, was near the midway point of the decade. During this year, the attacks on the French magazine *Charlie Hebdo* occurred, as did protests stemming from the death of Freddie Gray in Baltimore while in police custody, and free speech controversies on the campuses of the University of Missouri, Yale and Duke. The third year selected, 2020, was the last year of the decade and saw protests across the nation after the death of George Floyd while in the custody of Minneapolis police. Shortly thereafter, Twitter and Facebook censured a sitting U.S. president, touching off debate about free speech and social media.

In each of those years, the researcher selected the two months in which each paper published the highest number of editorials and opinion columns, which covered a total of 18 months. Since each column addressed speech in a particular situation or context, this

allowed for a wide range of contexts in which to examine how the editorial content described freedom of speech while also allowing for collecting a sufficient amount of material. This search yielded a total of 232 items: 72 from the *Times*, 84 from the *Post*, and 76 from the *Journal*. These articles are listed in an appendix at the end of this study.

The researcher conducted a thematic analysis across the data set, with each editorial or opinion column serving as a unit of analysis. The researcher engaged in an initial active reading of the data (Braun & Clarke, 2006). Using NVIVO qualitative data analysis software to organize and collate data, the researcher then followed the following steps to systematically analyze the data and identify themes that would indicate how elite media contribute to constructing conceptions of freedom of speech:

- The researcher highlighted words or phrases that would indicate how each editorial or opinion column represented freedom of speech. Those words or phrases were initial *codes*, or the basic elements of the raw data that can be "assessed in a meaningful way regarding the phenomenon" (Braun & Clarke, 2006, pp. 77 – 101). These codes could then form the basis of themes.
- The codes were listed, then examined to identify shared meanings among codes. As those shared meanings were identified, codes were grouped with like codes into categories that could indicate themes. The number of articles in each publication containing each theme was noted.
- Categories containing sufficient numbers of supporting codes relevant to the phenomenon under study were identified as themes. Those themes were then examined and related themes were combined.
- Themes were defined and labeled to convey the primary meanings of each.

For each editorial or opinion column the researcher took care to work through the specified steps, giving each equal time and attention. Themes were reexamined for conciseness and precision in communicating the primary meanings of each. Credibility of the findings is established through the researcher's prolonged engagement with and persistent observation of the data (Schwandt et al., 2007, p. 18). Also, the researcher paid special attention to reflexivity, examining the potential effects his background and prior knowledge could have on the reading of the texts.

CHAPTER 5

FINDINGS

This study analyzed the editorial and op-ed content of *The New York Times*, the *Washington Post*, and the *Wall Street Journal*. To adequately cover the study's time frame, editorials and op-eds from three years, 2011 (first year of the decade), 2015 (middle of the decade), and 2020 (last year of the decade) are included. There was a plethora of things to write about, both at home and abroad. Some were big events, some small. The following examples are a small slice of the material the study examined, but each raised questions and generated discussion about the nature or value of freedom of speech.

In 2011, a landmark Supreme Court decision upheld a religious group's right to picket military funerals (*Snyder v. Phelps*, 2011). One Court decision upheld the right of video game makers to market games with violent content to minors (Henninger, 2011) and another struck down an Arizona law setting up public financing of elections (Editorial, 2011h) both on free speech grounds. A viral video made by a UCLA student who criticized Asian students for using cellphones in the library showed the power of the internet (Editorial, 2011b), as did the firing of a New Jersey emergency technician after he posted a photo of a murdered woman to his Facebook account (Dwyer, 2011).

In January 2015, gunmen killed several people at the French magazine *Charlie Hebdo*, known for provocative articles and irreverent humor, sparking international outcry (Editorial, 2015e); opinion writers defended the magazine (Marcus, 2015), asserted the value of even irreverent speech (Brooks, 2015), and appealed to the need for restraint and civility (Gerson, 2015). Some opinion writers increased the pressure on the

National Football League's Washington franchise to drop the "Redskins" nickname, which some have long considered offensive (Gay, 2020). The resignation of Reddit's CEO in the face of online harassment again called the ethics of internet speech into question (Pao, 2015). Among other international events, U.S. reengagement with Cuba (Krauze, 2015) the Chinese government's crackdown on speech (Xuecun, 2015), and a military coup in Thailand (Editorial, 2015k) spurred calls for the U.S. government to exert greater pressure on other countries to protect and expand speech rights.

In 2020, the death of George Floyd during an arrest sparked widespread protests. In the face of that unrest, opinion writers defended protest as legitimate speech and an integral part of the American tradition, decrying attempts by some authorities to punish such speech (Editorial, 2020a). Social media platforms Facebook and Twitter removed President Trump's accounts for posts they deemed misleading (Fung, 2021; Isaac & Conger, 2021). Some rebuked these moves as censorship of unpopular views, some wrote that this hurt the public interest, calling into question the role of social media in the public discourse (Parker, 2020). China's suppression of Hong Kong (Editorial, 2020e) spurred calls for the U.S. to continue to apply pressure to other countries to make freedom of speech a core value (Valladares, 2015) while others used moves by China and other countries to suppress speech as cautionary example to urge the U.S. to protect speech at home (Lane, 2015).

There are many more events and incidents, both international and local in scope, that opinion writers used to promote freedom of speech as a general principle or to advocate for the primacy of certain values in shaping free speech rights. By examining editorial material from 2011, 2015, and 2020, this study adequately covers the decade in

question, including any changes in the way these elite media outlets discuss freedom of speech.

Analysis of the editorial and op-ed content of the *Times*, the *Post*, and the *Journal* revealed that each theme presented below appeared in all three newspapers in the time period studied. Those themes are:

- Free speech is anathema to authoritarianism.
- Freedom of speech does have limits.
- Freedom of speech is a defining characteristic of a democracy.
- Freedom of speech must allow for dissent and debate.
- Freedom of speech must include protecting speech that offends others.
- Speech can be non-verbal.
- Freedom of speech produces benefits for society.

Free speech is anathema to authoritarianism.

Editorial content in all three newspapers contained the most prevalent theme, which highlighted the tendency of authoritarian regimes around the world to suppress speech. Therefore, a government that suppresses the speech rights of its citizens is oppressive, and the society it governs is not free. This also serves to contrast these regimes with democratic ones, which equate free speech protections with freedom and are central to their governing structures and values.

Central Asia

In a *Post* column, Jeffrey Gedmin wrote that the "strongman" Ilham Aliyev ruled Azerbaijan "like a mafia boss" who attempted to control independent news media. Despite diplomatic efforts to convince him otherwise, Gedmin wrote, "Aliyev wasn't

convinced then. Today, he's showing brazen contempt for free speech" (2015).

The *Times'* Mariyam Shiuna (2015) wrote of the Maldives' "desperate battle" to cling to democracy. "Our courts are prosecuting critics" and "government-aligned thugs are widely suspected of physical attacks on protestors and opposition figures." Her country, she wrote, had been a place "where free expression and political participation were a figment of the imagination" and that without "space for dissent," the Maldives was in danger of becoming a dictatorship once again.

Sabeen Mahmud, the director of an arts center in Pakistan, was gunned down outside the center. The apparent reason, according to a *Times* opinion piece by Raza Rumi (2015), was for "defying state censorship." Ms. Mahmud also championed social media, "one of Pakistan's last remaining domains of free expression." However, Raza wrote, a government cybercrime law "would curtail digital freedoms" and endanger social media access.

China

A *Journal* editorial (2011e) indicated increasing restrictions on the ability of Chinese Christians to meet, in a reversal of what had been a loosening of such restrictions by the Communist government: "As Easter approached this year, Beijing's crackdown on all forms of dissent included a renewed assault on the right of Christians to worship freely." This, despite the Chinese government's insistence that its intent was to promote societal harmony, would compel those "who were once content to live quietly with the Party's restrictions on free expression are now compelled to speak out."

Chinese President Xi launched an anticorruption campaign in 2015 whose stated aim was to purge the ruling party of corrupt officials. Murong Xuecun (2015) expressed

skepticism about Xi's real goal. "A leader who stamps on freedom of expression, basks in the praise of a sycophantic media and fills jails with honest dissenters has no interest in democracy. He is just another dictator." Daniel Bell (2015), a teacher at a Chinese university, wrote that "the censorship regime has intensified" leading to "even more curbs that usual on political publications, no matter how academic." Later that month, Ho Pin (2015) addressed the arrest and conviction of an activist for leaking information to the press, writing that her "real crime" was "offending the authorities by speaking out against government policies." Despite Xi's pledge to make the system more transparent, this arrest showed that "nothing has changed under a dictator who cannot abide dissenting views."

Editorial writers also took aim at China's moves to control access to the internet. A *Post* editorial about China's call for greater government control over internet access stated that "authoritarian governments" such as China "repress online expression within their borders" (2015c). A *Journal* column from later that year stated that China's goal was to "end free speech the Internet globally" (Crovitz, 2015). Another *Journal* column asserted that "Beijing's illiberal rulers" learned to use technology to tighten the government's grip on the country "by controlling political speech" among its millions of people, increasing internet access but "shrinking the space for political speech online" (Walker, 2015).

A *Post* editorial wrote that China "has been so successful in squelching expression" that the country's president "has nowhere to go but outward: stretching his country's censorious arm across oceans as if the whole world were his autocracy" (2020b). The next month, a *Post* editorial stated China's approach was "intended to

constrict free expression and communication" (2020f). In the *Journal*, Jason Loftus (2020) wrote about the Chinese government's use of the social media platform WeChat for surveilling dissidents by collecting user information and messages. He wrote that China "has suppressed free speech by banning YouTube, Facebook, Twitter" and other U.S. social media sites. As for Americans potentially being subject to that surveillance through WeChat, Loftus called it "an affront to free speech."

China passed a national security law in 2020 aimed at Hong Kong. A *Times* column stated that the law would "mark the end of free expression" and other individual liberties, and that "when it comes to free speech, this law will remodel Hong Kong so that it becomes like the rest of China" (Lai, 2020). A *Post* editorial stated that, given "China's use of coercive repression on the mainland, free speech and rule of law will be on the run" (2020d). Another *Post* editorial stated that Hong Kong, "a bastion of free speech and rule of law…has been smothered" by a law that "will criminalize dissent" and bring the territory "under the same authoritarian boot as the mainland" (2020e).

The *Times'* Bret Stephens wrote that the new law was "effectively putting an end to the right of peaceful protest" (2020) and Ian Johnson wrote of "the incessant crackdown on free speech" (2020). In the *Journal*, David Rifkin and Anastasia Lin wrote that the new law was "designed to suppress dissent in the territory," as part of China's attempts "to suppress authentic Chinese voices critical of its human-rights abuses" (2020).

Cuba

In the *Times* column "The end of anti-Americanism" Enrique Krauze (2015) wrote of the problems facing re-establishment of diplomatic relations between the United

States and the "repressive and dictatorial Cuban regime." One of those problems was the detention of bloggers "trying to expand the range of free speech."

In the *Post,* Charles Krauthammer (2015) wrote that the U.S. attempt to engage Cuba was a one-sided deal in which the U.S. "brought back nothing on democratization…no free speech." A *Post* editorial stated that the diplomatic deal left the Castro regime "free to continue stifling dissent" (2015a). In the *Journal* op-ed titled "Obama's new Cuban partner, my old jailers," Armando Vallardes (2015) wrote that, in Cuba, to ask for one's basic rights was to risk one's own life. "I saw countless friends tortured and executed for protesting a government that still crushes the people of Cuba under its boot," Vallardes wrote. He also wrote that the U.S. secretary of state "failed to make the simplest of requests for the people of Cuba: freedom of speech…."

Middle East

In "Freedom, beyond 140 characters" Jeffrey Ghannam (2011) wrote that, across the Middle East, Arab leaders "long recognized the threat posed by the internet" and most attempted to control online activities. "From Morocco to Bahrain, scores of activists and ordinary citizens have been arrested and sentenced to prison for their online activities and writings."

In her column in the *Times,* Mona Eltahawy (2015) wrote of the trial and conviction in Egypt of a 21-year-old for "saying on Facebook that he was an atheist." She also wrote of the conviction of a Coptic Christian for "'ridiculing' the Quran." That same year, in the *Journal,* Matthew Kaminski wrote that the U.S. should use its financial leverage to make sure "the brass respect freedom of speech and press."

In the opinion piece "History contradicts the dream of Iranian moderation" Reuel

Marc Gerecht (2015) wrote that the nuclear accord between the U.S. and Iran would not soften Iranian militancy. Instead, Iran's leadership learned "how dissent can get out of control" and that "free speech has contracted" since its president, Rouhani, took office.

In Turkey, Prime Minister Erdogan "has become more authoritarian and thin-skinned," according to a *Times* editorial, which asserted that the country should replace its current constitution with a "fully democratic charter" the provided strong backing for basic human rights, "including free speech" (2011g). A later *Post* column detailed an attempt by Turkish citizens to march in support of rights for gay, lesbian, bisexual and transgender people. The government "attacked them with water cannons and rubber pellets" (Hiatt, 2015).

Southeast Asia

On the Myanmar government's claim, it was moving from a military dictatorship to a democracy, Wendy Law-Yone (2015) wrote in the *Post*, the "jury is still out." Reform efforts "have been marred by a return to repression, coercion, surveillance, and other dark features of the old regime. Freedom of speech is once again imperiled" due to harassment of independent journalists and crackdowns on peaceful student protests.

Charles Lane (2015) wrote in a *Post* column of the "Stalinist dictatorship" of North Korea's cyberattack against the studio that released the satirical film "The Interview." North Korea also issued threats against the makers of "a silly film that dared to violate the cult of personality surrounding Kim Jong Un."

The *Post* editorial "The Philippines slide toward autocracy" (2020c) detailed some of the steps Rodrigo Duterte, the country's "autocratic-minded" president, has taken toward "dismantling the Philippine's three-decade-old democracy." Among them

was convicting Maria Ressa, the country's most prominent journalist, using a libel law passed after the publication of the offending article. "The verdict, said the National Union of Journalists of the Philippines, 'basically kills freedom of speech and of the press.'"

South Korea has also shown authoritarian tendencies. A *Times* column (Koo, 2015) detailed the country's "regression from a much-touted model of democracy into a land of fast-dwindling freedom" as evidenced by the president's "special zeal for suppressing challenges to her and her policies, jumping to label speech and activities opposing the official agenda as jongbuk or 'pro-North Korea' and thus criminal." International human rights organizations downgraded internet and press freedoms and called on the government "to stop undermining freedom of expression, particularly in the arenas of politics and journalism."

In "Refugees in harm's way," a *Post* editorial stated that after a 2014 military coup installed a dictatorship in place of a democracy, Thailand "bade farewell to free expression" (2015j).

Russia

A *Times* column discussed the arrest, in the wake of the attacks on the French magazine *Charlie Hebdo*, of a protester in Moscow holding a sign that said, "I am Charlie." A few days later, authorities ordered a St. Petersburg news agency to remove a cover of an edition of *Charlie Hebdo* from its website, warning the agency that reprinting the cartoon of the Prophet Muhammad could be a criminal offense. "Mr. Putin's Russia is not a friendly place for irreverent humor," wrote the author. The Russian president banned a satirical television show that mocked government officials and his government "criminalized insulting one's religious sensibilities" (Khodarkovsky, 2015).

Freedom of Speech has Limits

Another theme present in all three newspapers is that the right to free speech is not absolute. Though among the most important of rights, speech does have boundaries, which are necessary to the functioning of a pluralistic society. The editorial content in each newspaper recognizes boundaries that fit into two broad categories: Those drawn by the legal system and those formed through social conventions or personal values. While legal limits should be broad, the values of civility and propriety are necessary to a cohesive, well-functioning society.

Limits Drawn by the Legal System

A *Times* column about mask mandates sums up the idea of legal boundaries to speech. In it, the author wrote that speech, like all other liberties the Constitution protects, "is not absolute. All constitutional rights are subject to the government's authority to protect the health, safety and welfare of the community" (Friedman, 2020). An earlier *Times* editorial quoted a Supreme Court opinion by Justice Breyer that the state could "provide private individuals with necessary protection" from verbal attacks (2011a).

In the *Post* column "Has free speech ever been free?" the author contended that despite the language of the First Amendment, "speech has never been absolutely free. Every democracy must identify where the needs of the collective or of injured individuals justify limits on speech" (Cole, 2015). A *Journal* column called on the U.S. to strengthen its surveillance capabilities to protect against terrorist attacks, asserting that national security interests were a legitimate limit on free speech (Bennett, 2015). A *Times* piece called on the U.S. government to ban access to an online magazine published by al-Qaeda. The author pointed to the First Amendment, which bars government from making

laws "abridging the freedom of speech." But, the author points out, "we have adopted many laws abridging speech" in a "substantial" list of cases, adding the online magazine in question to that list by asserting "it is criminal incitement that has produced lawless action" (London, 2015).

Times columnist Ross Douthat (2020) struck a bit of a different tone in a piece bemoaning the prevalence of the Supreme Court and the diminishing of Congress in settling disputes, writing the boundaries "of free expression are policed by John Roberts."

Two *Post* pieces discussed the possibility of further restricting so-called "hate speech." Jonathan Turley wrote that, if some had their way, such laws "could now be justified as protecting the dignity rights of groups and balancing the 'danger' of free speech" (2015). Another column cited one law professor's call for state governments to adopt "hate speech statutes" and to create a "private cause of action for the emotional damage caused by hate speech" which would allow victims to "pursue legal remedies just as they would for physical injuries" (Bobelian, 2020).

Limits Formed through Social Conventions or Personal Values

Some limits on speech come from a shared sense of propriety or restraint. The *Times* column (Dwyer, 2011) "A victim, her picture and Facebook" discussed an incident in which a crime scene technician posted a photo of a murder victim on Facebook. While the matter was eventually resolved, the victim's sister was still left with a question. "Everyone is all about technology," she said. "What about morals?"

In the wake of the *Charlie Hebdo* attack in Paris, *Post* columnist Michael Gerson wrote that while democratic values require protecting blasphemy, "it does not exhaust those values. Civility is also an important democratic virtue." Civility requires a measure

of self-restraint, but that "is not self-censorship. It is respect" (2015). *Post* columnist Ruth Marcus wrote that while the magazine *Charlie Hebdo* should be able print whatever it wanted without violence or government interference, "that is different from saying we should admire the magazine for it" (2015).

Four *Post* editorials took issue with *Charlie Hebdo's* provocations of Muslims. One stated that, while the free speech ideal allowed the magazine to lampoon the prophet Muhammad, civilized discourse should prevent it (2015g). Another *Post* editorial objected to content intended to "gratuitously provoke" marginalized groups, such as the French Muslim community (2015d). Still another piece wondered if we have taken freedom of speech too far and called for more "reserve" in exercising the right. "When did freedom of expression become a freedom to provoke or offend" (2015c)? And another editorial noted that, since the magazine targeted a group unpopular in the West, commentators defended its free speech rights. But, the editorial asserted, if a U.S. publication mocked Jews or Blacks in the same manner, it would face boycotts. Taking satirical aim at a marginalized group, such as French Muslims, was "a gross abuse of a worthy principle, and there is nothing admirable or praiseworthy about it" (2015f). *Post* columnist Jonathan Turley quoted French president Jacques Chirac, who advocated avoiding speech that hurts the religious convictions of others, summed up the sentiments expressed in these other *Post* editorials thusly: "Freedom of expression should be exercised in a spirit of responsibility" (2015).

The *Times* column "Your free speech, and mine" quoted Pope Francis, who said that when it comes to speech and religion, one "cannot insult the faith of others. You cannot make fun of the faith of others" (Egan, 2015). In "I am not *Charlie Hebdo*," *Times*

columnist David Brooks found value in the work of satirists and provocateurs. However, he wrote that we should make room for them while maintaining standards of civility. To Brooks, social mechanisms were preferable to rules. “Social manners are more malleable and supple than laws and codes,” he wrote. “Most societies have successfully maintained standards of civility and respect while keeping open avenues for those who are funny, uncivil and offensive” (2015). A *Times* column by Michelle Goldberg expressed that sentiment succinctly, stating that “culture has boundaries. Every community has boundaries” (2020).

After the 2015 death of Freddie Gray, while in the custody of Baltimore police, protests broke out there and in other cities, including Washington, D.C. In the *Post* column “This is justice?” the author recounted being in a car, surrounded by protesters, who “harassed and threatened” them. To the author, this crossed a line. “Respect and tolerance are paramount” to creating strong communities, she wrote, but tolerating “the kind of behavior whose intent is to incite fear” undermines them. “The protesters should be reminded that respect is a two-way street,” she wrote. “It must be given to be received” (Yaussi, 2015).

Some pieces addressed protests on college campuses over free speech incidents. At Yale, students protested after a faculty member wrote an email challenging the administration’s warning to students about wearing potentially culturally insensitive Halloween costumes. In her email, the faculty member encouraged students’ rights to choose their own costumes, encouraging them not to give up their rights to expression (Kimball, 2015). In the *Journal*, Peter Berkowitz referred to a 1975 report about free speech. The report acknowledged the need to avoid speech that caused “shock, hurt, and

anger" but, instead of regulations or codes, "secondary social and ethical responsibilities must be left to the informal processes of suasion, example, and argument" (2011). Another *Journal* column (2015a) discussed protests at Dartmouth, where protesters "stormed the library and spewed profanities at students as racial oppressors because they preferred to study." The author's remedy was to "expel the rampagers for violating the college's code of conduct."

A *Post* column by Ellen Pao (2015), the recently resigned chief executive of the website Reddit, lamented the "harassment of people for their views, experiences, appearances or demographic backgrounds" growing on the internet. A key challenge for web platforms, according to Pao, is balancing free speech with privacy and protection from harassment.

Some columns cited community standards as a way of establishing boundaries for acceptable speech. In the *Journal*, a column about a Supreme Court decision upholding violent video games as a form of free expression suggested "reviving and legitimizing the idea of community standards" as a starting point for drawing lines between acceptable and unacceptable speech (Henninger, 2011). In another *Journal* column, Jason Gay (2020) pushed Washington, D.C.'s professional football team to change the name of its mascot, citing offense to Native American and other communities. "This isn't some cynical argument about the freedom of expression," Gay wrote. "It's got to go. It should have been gone a long time ago." A *Post* editorial echoing that sentiment also singled out the franchise's owner, Daniel Snyder, writing that "common decency hasn't swayed Mr. Snyder, not to use a name that is clearly insulting." The editorial also appealed to a specific community, the National Football League, asking if anyone in the league was

"thinking about the impact to the league's beleaguered image" (2015j)?

Freedom of Speech is a Defining Characteristic of a Democracy

All three newspapers associated freedom of speech with freedom generally and identified it specifically with democratic government. Freedom of speech is essential to the ability of the people to govern themselves. What's more, the very notion of freedom rests in large part on the ability of people to express their opinions and ideas. Undue limits on speech are tantamount to a loss of freedom and a weakened democracy.

A *New York Times* editorial about the video of a UCLA student making disparaging remarks about Asian students found potential discipline against the student unjustified. Speech codes could be useful against harassment, but "they should not be used to abridge the principle of free speech," which would be a threat "to a strong democracy" (2011b). In a *Times* column, Gabriel Sassoon noted that "Americans are so committed to free speech," and that this "bedrock principle" is the "lifeblood of a vibrant democracy" (2015). In "End of Anti-Americanism?" the author contended reestablishing diplomatic relations with Cuba decades after breaking those ties over the Communist Castro regime's rise to power, the U.S. regained the moral authority needed "to uphold the democratic values that led to its foundation." Chief among those values was "freedom of expression," which would also be critical for success in Cuba (Krauze, 2015).

In the *Times* column "Teaching 'Western values' in China," Daniel Bell wrote about teaching works that "declared the debates about political ideology ended with the triumph of liberal democracy. Students say what's on their minds, as they would in any Western university" (2015). Se-woong Koo wrote that "South Korea's abrupt regression from a much-touted model of democracy into a land of fast-dwindling freedom" was a

caution against the prevalence of surveillance and that "we must be able to keep talking freely, even when there are those who would prefer our silence and blind submission" (2015).

In response to the 2015 terrorist attacks in France nearly four million people gathered in public spaces in solidarity with the victims. A *Times* column stated that this as a reaffirmation of "republican values" (Kauffmann, 2015), and Roger Cohen wrote in a subsequent piece that France and the U.S., while flawed republics, had succeeded "in spreading the ideas of liberty, free expression and the rule of law" around the world (2020).

A *Times* editorial published in the wake of George Floyd's death supporting the rights of those engaging in public protests in the face of what it called contempt from police and community leaders stated that the United States "is founded on freedom of speech" (2020a). A subsequent *Times* column that took aim at then-president Trump and presidential lying asserting that past presidents knew that lying had limits enforced by the "truth-finding institutions and principles that are essential to a democracy -- the free press, free speech, constitutional checks and balances, legitimate independent investigations" (Tomasky, 2020). *Times* columnist David Brooks lamented that many on both the political right and left "have lost faith in the institutions of free speech and open debate – the basic liberal order" (2020).

Editorials and opinion pieces in the *Post* also connected free speech with democracy. Kathleen Parker quoted then-president Obama that a core set of American values was embedded "in our democratic practices, in our belief in free speech and equality" and, though imperfect, were exceptional (2011).

Another column quoted a Virginia candidate for U.S. Senate commenting on a new Egyptian constitution that one of the pillars of a successful free society was freedom of religion. “The second pillar is freedom of expression,” which was included in the First Amendment of the U.S. constitution (Kamen, 2011). Another author asserted that the new Egypt would pose some challenges to the U.S., but those would come “from the very values of participatory government and free speech that free societies so cherish” (Miller, 2011).

A *Post* editorial published after attacks on the French magazine *Charlie Hebdo* advised Muslims living in France to accept the “fundamental Western values of pluralism and free speech” (2015f). In another *Post* column about those attacks, author Jonathan Turley cited freedom of speech as “the very touchstone of Western civilization and civil liberties” (2015). Charles Lane wrote that the U.S. and other Western democracies should defend political provocateurs, writing that “if freedom means anything, it means freedom of expression” (2015). Michael Gerson observed that the great democracies, including the U.S. and France, “stand for a set of values, including a commitment to free expression” (2015).

In the *Post* column “What ‘Founding Fathers’ means,” Andrew Schocket referred to freedom of speech as one of the “cornerstones of American civic life” (2015). A review of a memoir by humanist Michael Shermer stated the book cites “free speech as the cornerstone of democracy,” the right from which all others emanate. The review’s author also quoted Fredrick Douglass: “No right was deemed by the fathers of the government as more sacred than the right of speech” (Bobelian, 2020).

The *Post* took aim at regimes that were clamping down on free speech rights. The

editorial “China crushes democracy in Hong Kong” lamented that Hong Kong, “a bastion of free speech…has been smothered” by a new national security law that would extinguish “the flame of Hong Kong’s democratic ideals” (2020e). Another editorial opposing that national security law lamented that freedom in the colony was shrinking, but an upcoming election would show whether Hong Kong would “passively surrender the rule of law, free expression, and the promise of full democracy” promised by the Chinese (2020h). A *Post* editorial decrying Azerbaijan’s crackdown on civil rights asserted that a functioning democracy guarantees free speech rights and that the president’s use of force to silence his critics “is the opposite of democracy” (2020i).

In “The corporate boycott of Facebook is illiberal” columnist Joe Lonsdale urged CEOs of American businesses to defend “the noble institution of free speech” but that, instead, many “are selling out a sacred American liberty” by participating in a boycott of advertising as a means of virtue signaling (2020).

The *Journal* columnist Peggy Noonan cast the *Charlie Hebdo* attack as, in part, a clash of Islamic culture with “the rough Western culture of free speech” (2015). An Israeli author likened the U.S. and Israel, writing that “liberty, free speech and human rights are pillars of our democracies” (Bennett, 2015).

Journal editorial writers addressed speech on college campuses. “The rise of the college crybullies” quoted Yale faculty member Erika Christakis, who asserted that free speech was a hallmark of a free society. Another editorial stated that elite colleges were turning out students “who seem to have no idea why America’s Founders risked extreme discomfort – that is, death – for the right to speak freely” (Kimball, 2015).

In “To America, from a worried European friend” the author called free speech

the “lifeblood of democracy and human betterment” (Schwammenthal, 2020). In a piece supporting a North American trade agreement, the authors wrote that while North American democracies were still “works in progress,” they provided citizens the ability to “exercise their rights to freedom of expression” (McMaster & Tortolero, 2020). A column about government response to the coronavirus pandemic wrote that in the U.S. “liberty and free expression are as fundamental as air and water” and that politicians were inconsistent in respecting “this core American tenet” (Ladapo, 2020).

Freedom of Speech Must Include Protecting Speech that Offends Others

Opinion pieces and editorials in all three newspapers included the theme that meaningful free speech rights must include protection for speech that others find offensive. Otherwise, limiting expression because some find it offensive inhibits the search for solutions, participation in the democratic process inherent to self-government, and leads to a societal stagnation.

As Clyde Haberman wrote in the *Times* about an anti-abortion billboard that caused some controversy, “Since when is the American concept of free speech confined to opinions that are nice and safe and unlikely to cause a ripple” (2011)? A *Times* editorial about the U.S. Supreme Court’s decision in *Snyder v. Phelps* (2011) to uphold a group’s right to protest at military funerals echoed that sentiment, stating that the Court “provided an admirable reminder of how broad the protection of free speech is under the Constitution's First Amendment, including hurtful and hateful speech” (2011a). Another *Times* editorial discussed a U.C.L.A. student’s video on which she disparaged Asian students. The piece quoted Eugene Volokh, a First Amendment scholar at the university, who pointed out the necessity of protecting “some worthless, even hurtful, opinion”

(2011b).

In "I am not *Charlie Hebdo*," *Times* columnist David Brooks asserted that while society needs some measure of civility, provocateurs can serve a valuable public purpose by saying "necessary things no one else is saying" and that it is important "to be legally tolerant toward offensive voices" (2015). In another column about the *Charlie Hebdo* attack, David Carr wrote that "the bleeding edge" of debate over free speech often involves distasteful and offensive material, but that "defending free speech means defending knuckleheads and visionaries alike" (2015). The *Times* column "Your free speech, and mine addressed Pope Francis's admonition in the wake of the *Charlie Hebdo* attacks that one could not make fun of another's religious faith. "In fact, you can," Timothy Egan wrote. While it may be in poor taste, Egan wrote, "an enlightened society should be able to take the punch of satire and ridicule, even coarse satire and savage ridicule" (2015).

A column about an anti-Semitic French comedian defended the provocateur, stating that social change cannot happen without offense. "To talk of freedom of expression for everyone but bigots is to hollow out the principle," Kenan Malik wrote (2015). Gabriel Sassoon echoed that idea in a subsequent *Times* column, writing that "free speech means nothing if it only protects speech we find innocuous" (2015).

Pieces in the *Post* expressed similar sentiments. In a piece about free speech controversies in France and North Korea, columnist Charles Lane wrote, "If freedom means anything, it means freedom of expression - to include expression that some might find irresponsible, offensive or even blasphemous" (2015). About the possibility of restrictions on speech that offends religion, Michael Gerson asserted that "permitting

legal space for blasphemy is inherent to free expression and to freedom of religion, which also means freedom for the rudely irreligious" (2015).

Post columnist Eugene Robinson, in a piece about the *Charlie Hebdo* attack, wrote that for freedom of expression to be any more than a mere slogan, "the right to speak freely must encompass the right to offend, without fear or favor" (2015). E.J. Dionne agreed, writing that, in the face of violence, "we robustly defend those who would use their rights to give offense" (2015). In "free speech fuzziness," *Post* columnist Ruth Marcus, with an eye toward the need for civility, supported *Charlie Hebdo's* right "to print whatever offensive product it wants, without fear of either violence or government interference" (2015). A *Post* column discussing extremists, including those behind the *Charlie Hebdo* attack in France and white nationalists in the U.S., asserted that "no matter how detrimental they might be, white nationalists were entitled to speak freely as long as they refrained from inciting violence" (Bobelian, 2020).

Kathleen Parker disagreed with the *Times* editorial board's apology for running a column by Republican Senator Tom Cotton in which he advocated sending military troops into American cities to suppress protests. In her *Post* column, Parker wrote that, in the wake of that apology, "free speech collapsed from embarrassment. Heaven forbid an opinion on a newspaper's op-ed page should offend someone" (2020). Another *Post* column took aim at corporations boycotting Facebook over its content moderation policies, writing, "Speech is often ugly. But a crown virtue of U.S. society is our commitment to free speech, including what some call hate speech" (Lonsdale, 2020).

The *Journal* addressed a complaint filed by students and recent graduates of Yale University that some campus speech created a hostile environment for women. "The U.S.

Supreme Court's First Amendment jurisprudence reaffirms John Milton and John Stuart Mill's hard lesson that one cost of liberty is the toleration of foolish and odious speech," Peter Berkowitz wrote (2011). He also praised a Supreme Court decision that struck down a law banning the sale or rental of violent video games to minors, calling it a free speech victory. "It's good to have both conservatives and liberals affirming that the First Amendment's vigor is measured by the objectionable speech that it protects," he wrote (Berkowitz, 2011).

Freedom of Speech Must Allow for Dissent and Debate

Opinion pieces in all three newspapers contained the theme that freedom of speech necessarily allows for dissent, whether it is disagreement with fellow citizens or those in authority, including one's own government. Free speech also would include allowing for views that many might consider outside the mainstream. Otherwise, only a narrow range of views and ideas is available, hampering the effectiveness of public discussion in yielding solutions to problems, making it difficult for some to participate in the self-governing process essential to democracy, or entrenching the dominance of those who have the means to promote their views.

As an example, a *Times* column criticized the removal by New York City officials of a billboard critical of abortion. In the piece, the author quoted a civil liberties attorney who observed that, when it comes to popular or noncontroversial opinions, free speech is an easy principle to support. "The real test," he wrote, "is when you disagree with the content of the speech and you still defend the right of someone to articulate the message" (Haberman, 2011). A *Times* column about civility and freedom of speech cited the landmark U.S. Supreme Court decision in *New York Times Co. v. Sullivan* (1964), in

which the Court formulated the still-current doctrine for publication involving public officials. The column cited part of Justice Brennan's opinion discussing the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open" (Dooling, 2011). A *Times* editorial published shortly after the Court's decision in *Snyder v. Phelps* (2011) to uphold the right of a church group to picket military funerals stated the Court found that "even deeply flawed ideas must be defended because they are part of the public debate on which this country depends" (2011a).

In a *Times* editorial about a UCLA student facing potential discipline for a YouTube video in which she mocked Asian students, the editorial stated that it was necessary to protect opinions, even some that were offensive or hurtful, "to assure worthwhile debate" (2011b). A subsequent editorial discussed a law barring American courts from recognizing defamation judgments issued by foreign courts that were not consistent with the First Amendment. In it, the editorial quoted the legislation's sponsor, who said that disagreement on matters, even with the government, was necessary to U.S. democracy: "It is essential to the health of our democracy that people should be free to debate issues and challenge authority" (2011c). A *Times* column calling for greater protections for whistleblowers also cited challenges to authority as a central purpose of free speech, citing Supreme Court justice William O. Douglas, who wrote: "The dominant purpose of the First Amendment was to prohibit the widespread practice of government suppression of embarrassing information" (Kohn, 2011).

A *Times* piece discussing the potential biting nature of art as speech observed that the ability to tolerate disagreement was a positive feature of the American concept of free

speech relative to other nations, writing that "it speaks well of our own relatively flexible system that it can accommodate criticism and dissent without lopping anyone's hands off" (Kreider, 2015). Another column, published in the wake of the attacks on the French magazine *Charlie Hebdo* addressed the role of disagreement in free speech, writing that "it is only through freedom of expression that we can articulate our disagreements" and challenge ideas. The piece also pointed out that those disagreements could play in providing a check on official power. "To accept that certain things cannot be said is to accept that certain forms of power cannot be challenged," the author wrote (Malik, 2015).

In a column calling for the U.S. government to block dissemination of an online magazine published by Al Qaeda on the grounds that it incited violence, the author pointed out that criticism of those in power was part of the Constitution's original intent: "The idea behind the First Amendment, wrote the founders, was that the citizens be free to criticize their government" (London, 2015). A *Times* column about presidential falsehoods echoed that idea, stating that free speech was one of the democratic principles whose purpose was "to hold the opposition in check when the other side is in power" (Tomasky, 2020).

A *Times* column, "Reading Orwell for the Fourth," asserted that an expansive concept of free speech allowing for disagreement was essential for a healthy culture. "That's the idea that people who cannot speak freely will not be able to think clearly, and that no society can long flourish when contrarians are treated as heretics" (Stephens, 2020). *Times* columnist David Brooks wrote that "we have to have the open exchange of views" necessary to deal with today's complex world and that "no one vantage point can grasp reality or devise solutions" (2020). Another column in the *Times* asserted that

anyone offering a public opinion should expect disagreement: “Anyone venturing ideas in public should be prepared to endure negative reviews and pushback” (Goldberg, 2020). In the *Times* column “Aristotle is a jerk, but we shouldn’t cancel him,” the author wrote that “what makes speech truly free is the possibility of disagreement” (Callard, 2020).

In a *Post* editorial about a public assembly in the aftermath of the *Charlie Hebdo* attacks, the author argued for the value of free speech, quoting the French philosopher Voltaire: “I disapprove of what you say, but I will defend to the death your right to say it” (2015f). In a *Post* column about how calls for censorship in the wake of the *Charlie Hebdo* attacks could turn into violence, Asra Q. Nomani wrote that it would be “harder to radicalize in a climate that welcomed debate” about religion (2015).

Columnist Kathleen Parker took issue with social media bans of the U.S. president, writing that “suppressing someone’s thoughts, especially the president’s, leads to a suppression of public debate” (2020). Another *Post* column took issue with those bans and potential corporate boycotts of Facebook. The author observed that “tolerance for others’ expression” was a bedrock principle of American culture: “This country has traditionally stood with dissenters and devil’s advocates” (Lonsdale, 2020). A *Post* editorial expressing concern over suppression of speech by the president of Azerbaijan stated that dissent, “including the right to criticize the president,” was a necessary element of free speech (2020j). A column by a Princeton professor who had been the target of protests wrote that dissent was necessary for answering some of the most serious questions facing the United States. “Now is the time to debate with renewed vigor existential questions of what counts as justice and how to fashion an equitable society. . . . But the stifling of dissent is impeding the search for answers and driving people who

disagree still further apart" (Katz, 2020).

A *Journal* column about resuming diplomatic relations with Cuba also named dissent as a central feature of free speech. One of the rights Cubans wanted, according to the author, was "the right to criticize your government leaders" publicly without fear of punishment (Valladares, 2015). Another *Journal* column observed that free speech meant "people can still find a place to express dissent" (Baker, 2020).

Journal columns argued that, in some quarters, allowing dissent was an impediment to the pursuit of power. In "How free speech dies," the columnist argued that full-blown censorship often began with public intellectuals who would "define virtue and justice, and unleash the mob to denounce and condemn the unrepentant" (O'Grady, 2020). A *Journal* editorial that took aim at college campuses stated the progressive activists of today seek to suppress speech with which they disagree as an exercise in power: "They believe that free-speech protection is a quaint obstacle to getting what they want, which is control" (2015l).

The CEO of Goya lamented what he saw as a diminishing space available for disagreement. In a *Journal* column, the author cited some of the hostile responses Robert Unanue received for a political endorsement he made: "One of the most important things we've lost as a country is respect for differing opinions," Unanue said (Varadarajan, 2020).

Speech Can Be Non-verbal

All three papers contained the theme that the scope of what counts as speech is broader than mere verbal expressions. Therefore, free speech rights should extend beyond the verbal to a broader range of expressive conduct. Some actions, including but not

limited to conduct such as donating to a political campaign, displaying a piece of artwork in a public place, or burning a flag, are also forms of speech. Christopher Scalia, writing in the *Journal*, summed up that idea when he wrote that "the freedom of speech protects more than vocal utterances" (2020).

One of the expressive activities due such protection is contributions to political candidates. A *Times* editorial supporting an Arizona law that would have set up a public financing mechanism in state elections contended those funds "expand and promote political speech, carrying out a central purpose of the First Amendment" and "more public financing means more political speech" (2011d). A subsequent *Times* editorial lamenting the U.S. Supreme Court decision that invalidated the Arizona public financing law cited the Court's opinion that the public financing mechanism imposed a burden "on the free speech rights of candidates and independent groups." The editorial disagreed with the Court, arguing that the Court actually struck down "a limit on the right of wealthy candidates and independent groups to speak louder than others" (2011h).

In a *Times* column, the author wrote that while most free speech is inconsequential, "the only 'free speech' that has any effect in a stable, well-run plutocracy is the kind protected by *Buckley vs. Valeo* in the form of campaign contributions" (Kreider, 2015). Another *Times* column noted that "under Chief Justice John G. Roberts Jr., the court has taken an expansive view of the First Amendment. In *Citizens United* it equated campaign contributions with protected speech" (2015h).

In the *Post*, an editorial about a case involving Florida ethics rules barring judicial candidates from soliciting contributions noted that the Supreme Court would not give states unfettered discretion to regulate judicial elections "owing to concerns about stifling

free speech" (2015i). A *Post* editorial about campaign finance regulations observed that the Court's decision in *Citizens United v. Federal Election Commission* (2010) overturned "decades of restrictions on corporate money in politics by saying that the money represented free speech" (2015h).

The *Journal* column "Political privacy should be a civil right" opposed an Obama-era piece of legislation, the Disclose Act, which would have "muzzled political speech by prohibiting federal contractors from making contributions to federal candidates or parties" (Marston & Yoo, 2011). A *Journal* editorial opposing the Disclose Act stated that it was designed to keep companies from "exercising the rights recognized in *Citizens United,*" which "blew a huge hole in the architecture of campaign finance limits that had increasingly restricted political speech" (2011f). Another *Journal* editorial praised the dismantling of Wisconsin's Government Accountability Board, which had promoted an investigation of conservative nonprofit groups and campaign contributions, which the editorial called "one of the most extensive assaults on free speech in the state's history" (2015m).

Another expressive activity due protection is public protest. As the *Times* editorial "In America, protest is patriotic" put it, "The nation is founded on the freedom of speech – and particularly the right to gather in protest of against the government" (2020a).

In a *Post* column about protests in the nation's capital, the author observed "people exercise their freedoms" and "people gathered to express their concern, dismay and anger" over incidents involving police and unarmed Black men (Yaussi, 2015). In the *Post* column "The rise of the mystery police" author Garrett Graff (2020) decried the use of anonymous law enforcement officers in unmarked vehicles the federal government

deployed during some of the protests in the aftermath of George Floyd's death. There is a difference, he wrote, between specific undercover operations and "anonymous federal forces ringing the White House and providing 'security' at constitutionally protected gatherings. In a democracy, after all, it's the police who are meant to answer to the protesters - not the other way around." In another *Post* column critical of deploying federal forces in unmarked vehicles to Portland, Oregon, a site of intense protests, author Ruth Marcus (2020) wrote that those agents "aren't targeting protesters who engaged in violence; they appear to be sweeping up random people who have exercised their rights under the First Amendment."

A *Journal* column about campus protests cited a past president of the University of Notre Dame who recognized "the validity of protest" as long as it was non-violent (McGurn, 2015). Another *Journal* column by Armando Valladares, a Cuban dissident, discussed attempts by the Obama administration to develop relations with Cuba. The author urged the Obama administration to press for human rights concessions, writing that Cubans had sacrificed much for rights that Americans have long enjoyed. Among them is "the right to protest without wondering if your friends will be carted off, never to be seen or heard from again" (2015).

Not all protests involve people gathering in the streets. In the *Times* column "If our masks could speak" Thomas Friedman wondered how the U.S. turned a public health measure into "a freedom-of-speech issue and cultural marker" (2020). A *Post* column about parents pulling their children out of state-mandated standardized testing quoted a law school professor who called opting out "an expression of parents' viewpoints that education needs to change" (Kamenetz, 2015).

A column in the *Post*, "Another 'Bush v. Gore'?," discussed a California case involving union dues. The supporters of a teacher seeking to opt out of paying dues to a teachers' union argued that the case "is about the free-speech rights of public employees who don't want to support the union that represents them" (Myerson, 2015). A *Post* column about the issue of flag burning called it "a repugnant but constitutionally protected act of free speech" (Tumulty, 2020).

The *Journal* column about the removal of a mural from the lobby of the state of Maine's labor department over claims it was pro-labor union propaganda cited plaintiffs who sued to have the mural restored on the grounds its removal violated their free-speech rights and was a "tremendous act of censorship" (Finley, 2011).

Two *Journal* columns discussed a Supreme Court decision upholding the right of minors to purchase video games with violent content. "The fast and the spurious" cited the Court's opinion that "obliterating realistic images of people are a protected form of 'free speech'" (Henninger, 2011), which author Peter Berkowitz called a "victory for free speech" (2011).

Freedom of Speech Produces Benefits for Society

A minor theme appearing in all three newspapers is that an expansive right of freedom of speech has benefits for society as a whole, not just for the individual. The benefits cited included preventing violence, protecting the common good, discovering truth, finding better solutions to societal problems, and more.

A piece in the *Times*, "Curbing that pesky rude tone," questioned whether the current conception of civility made public discourse better, stating that "unbridled free speech functions as a kind of 'safety valve,' allowing frustrated and alienated citizens to

blow off steam instead of engaging in violent revolution" (Dooling, 2011). In the column "Teaching 'Western values' in China," the author discussed his teaching at a Chinese university. When it comes to political reform, he wrote that the more his students were not allowed to talk about it, the more their disenchantment would grow, "and that spells trouble for the long term. Openness, in my view, can only benefit the system" (Bell, 2015).

Another *Times* column stated that "there are no wrong ideas, and free speech is indispensable to the disclosure of truth" (London, 2015). A *Times* editorial about protests in Minnesota in the wake of George Floyd's death stated that it was vital that law enforcement, in addition to protecting life and property, also protect free speech. Then, the editorial stated, "to hear what's being said. That's where the healing may begin" (2020a).

In a *Washington Post* editorial supporting the ouster of a theater's artistic director, the piece asserted it was vital that all viewpoints receive expression. Otherwise, even artistic expression of ideas "can quickly become propaganda" (2015b). In a *Post* column discussing a book by Michael Shermer, a self-described scientific humanist, the piece's author cites Shermer's conviction that free speech is a cornerstone of knowledge. To overcome the human tendency toward error, it is necessary to test propositions in the marketplace of ideas, participating in the "uninhibited exchange of ideas" which lead to knowledge (Bobelian, 2020). Another *Post* column, "Don't be afraid of cancel culture," echoed that sentiment. Von Drehle (2020) wrote that the real test of what we call "cancel culture" is whether or not it brings better ideas. To the author, free speech "brings us better solutions."

A *Journal* column, “From Missouri to Paris,” discussed what it saw as a more restrictive free speech climate on college campuses. The United States’ founders knew the value of an uninhibited exchange of views, giving it constitutional protection. “They knew that the moral claim for free speech is that it protects the common good” (Henninger, 2015). Another *Journal* column, by a Princeton professor, stated that free speech was vital in addressing the issues facing the country. Rather than easing those issues, “suppressing speech only makes worse the many problems the U.S. faces” (Katz, 2020).

Suppressing speech also has a detrimental effect on scientific inquiry, according to another *Journal* column. Ideology stifles scientific progress, according to the author, whether it was racism in the 19th century or McCarthyism in the 20th century. The author called on leaders in the scientific community to “publicly stand up not only for free speech in science,” but also to resist the demands of political factions (Krauss, 2020). Lastly, two *Journal* editorials asserted the value of free speech to the political process. In “Bonfire of the liberals,” the editorial stated that “society benefits when both its left and right coalitions accept basic free-speech principles” (2020g). In “Twitter’s censorship method,” the editorial discussed the 2020 congressional hearings regarding disinformation on social media platforms, stating “robust political exchange is in the interest of all Americans, regardless of their party” (2020j).

CHAPTER 6

DISCUSSION

Freedom of speech in the United States has been a contested concept since the nation's founding. While the First Amendment enumerates a right to speech, it does not define that right, only limiting the power of the state to do so.

Through the lens of social constructionism, this study examined the role of media in the construction of the concept freedom of speech in the popular mind by analyzing opinion columns, including editorials and op-eds, as they are both a significant influence on public opinion (Golan, 2006; McCombs et al., 2011) and an indicator of various strains of thought within it (Achugar, 2004, pp. 291-320). These opinion pieces appeared over the past decade in three of the country's leading newspapers: *The New York Times*, the *Washington Post*, and the *Wall Street Journal*, which are important in shaping policies and in setting the broader agenda for other news outlets (Billeaudeaux et al., 2003; Dimitrova & Stromback, 2008). The goal was to explore how news media describe freedom of speech.

News media play an important role in socially constructing reality through affirming the realness of the world we encounter (Burger & Luckman, 1966). They transmit messages about that world, giving coherence to information (Gamson et al., 1992), and defining events and issues (Entman, 1993).

In doing these things, news media also play a key role in promoting and maintaining values (Gans, 1979), demarcating the acceptable from the unacceptable and defining what is mainstream thought and what deviates from it (Shoemaker & Reese, 2013). The opinion pages are a prime place for newspapers to articulate and advance

ideological positions about any number of subjects. In doing so, they play a key role in shaping their audiences' understandings of issues (McNair, 2000).

Analysis of the sample of editorial content identified seven themes relevant to the goal of the study:

- Free speech is anathema to authoritarianism.
- Freedom of speech does have limits.
- Freedom of speech is a defining characteristic of a democracy.
- Freedom of speech must allow for dissent and debate.
- Freedom of speech must include protecting speech that offends others.
- Speech can be non-verbal.
- Freedom of speech produces benefits for society.

Taken together, the themes identified in the sample of editorial content indicate these newspapers, *The New York Times*, the *Wall Street Journal*, and the *Washington Post*, do just that. They promote a consistent set of values that views freedom of speech as a public good central to a self-governing democracy. As such, speech should have expansive legal protections. While this media discourse acknowledges some legitimate limits, those are few. Instead, limits on speech should be determined by an individual's sense of propriety rather than additional legal restrictions. In promoting this particular set of values, elite media fulfill their role in defining and maintaining ideological boundary lines concerning the concept of freedom of speech (Ha, 2017).

Perhaps as important, the values these newspapers promote are shaped and influenced by ideas not necessarily made explicit in the editorial content itself, but which are consistent with First Amendment jurisprudence and modern free speech theory.

Descended from Enlightenment advocacy for free speech rights, the values promoted through the opinion content in these newspapers promote the ideas that freedom of expression is necessary for effective self-government and that such freedom acts as a bulwark against abuse of official power. They are also shaped by the enduring marketplace of ideas metaphor, and the Greek principle of parrhesia, or the ability to express one's own thoughts with candor. However, there are also inherent tensions within the broad concept of freedom of speech, some of which have shifted over time. The media discourse examined here reflects some of that shift, but overlooks other tensions.

The expansive view of speech rights evident in the media discourse is in line with the U.S. Supreme Court's approach. This is exemplified by cases such as *Lovell v. City of Griffin* (1938), which struck down permit and licensure requirements, and *Terminiello v. Chicago* (1949), which allowed incendiary speech. *Brandenburg v. Ohio* (1969) allowed for advocacy for a broad range of ideas, some of which one might consider dangerous, as long as a speaker does not incite listeners to commit imminent lawless acts. In *Snyder v. Phelps* (2011), the Court allowed coarse speech many could consider offensive if it concerned issues of concern to the general public. The Court also expanded speech protections to non-verbal, but symbolic acts, through cases such as *Texas v. Johnson* (1989), which upheld the right to burn an American flag as a form of protest, and *Buckley v. Valeo* (1976), which struck down some limits on campaign contributions. These cases, and many others, demonstrate the Court's tendency to draw the broadest possible boundary lines around the speech it finds worthy of protection.

The theorists who looked to develop coherent approaches to developing and applying principles of free expression also promoted an expansive view of speech rights.

Such rights were necessary to secure the attainment and spread of truth (Chafee, 1941) that was vital to self-government in a free society (Meiklejohn, 1948). More so, suppressing speech was an affront to human dignity, inhibited the advancement of knowledge, and stunted the development of a stable and enduring society (Emerson, 1970). Expansive free speech rights also were vital to providing a check on government power (Blasi, 1977) and to protecting individual liberty (Baker, 1989).

These ideas also reflect some disagreements about the primary purposes of free speech and where to draw boundary lines. The media discourse examined in this study largely ignores those disagreements. It does, however, promote a couple of the ideas about the value of free speech promoted by 20th-century theory. One is the necessity of free speech to self-government, which is a common thread running through the different formulations of free speech theory.

Opinion columns called freedom of speech a cornerstone of civic life (Schocket, 2015), the very foundation of the United States (*The New York Times*, 2020a), and the right that forms the foundation of all others (Bobelian, 2020).

Others called speech "the lifeblood of a vibrant democracy" (Sassoon, 2015) and a "pillar" of a successful free society (Kamen, 2011). Free speech is one of the "very values of participatory government" that "free societies so cherish" (Miller, 2011). One piece cautioned that abridging speech would be a threat to a "strong democracy" (*The New York Times*, 2011b).

The essential role of free speech in effective self-government is central to the earliest formulations of free speech theory. Subsequent iterations developed other important functions and espoused other values for free speech and the First Amendment,

but all built upon the idea that speech is foundational to democratic self-government. Given that this is one of the oldest and most enduring ideas about the role of free speech in a free society, it is perhaps not surprising that media commentary recognizes and promotes freedom of expression as a fundamental element of a democratic society.

Another is the function of free speech as a check on government power. Some opinion content took aim at autocratic leaders around the world. One editorial summed it up thusly: "'You can't say that!' is all too often the response of those in power to having that power challenged. To accept that certain things cannot be said is to accept that certain forms of power cannot be challenged" (Malik, 2015). Another, about China's President Xi, put it this way: "A leader who stamps on freedom of expression, basks in the praise of a sycophantic media and fills jails with honest dissenters has no interest in democracy. He is just another dictator" (Xuecun, 2015). Of reestablishing diplomatic relations with a "repressive and dictatorial Cuban regime," an opinion piece identified one problem as the detention of bloggers "trying to expand the range of free speech" (Krauze, 2015).

In the media discourse examined for this study, these two ideas, that free speech is essential for democratic self-government and acts as a bulwark against the abuse of governmental power, are a bit like two sides of the same coin. Democratic self-government depends in part on keeping government from assuming too much power and using it to suppress the rights of individual citizens. Otherwise, a democracy slides toward authoritarianism. One function of the press is to promote democracy by exposing abuses of power. Given this, the prominence of these two themes should not be surprising. Instead, they suggest that these ideas still hold a great deal of power to shape

elite media's thinking about the role of free speech in our society, not that such thinking promotes a traditional view of such.

Enlightenment philosophers and free speech advocates also influenced the American conception of free expression. As a group they argued forcefully for individuals' right to freely express their thoughts; there were differences in where they drew lines of what was permissible. One point of tension, in particular, concerned criticism of the government. The conservative position held that the state had a legitimate interest in suppressing speech critical of it, while others argued that the ability to speak against the state was necessary to ensure good government and prevent tyranny (Levy, 1985).

There were echoes of this tension in early U.S. Supreme Court decisions in cases that punished criticism of the military draft (*Schenck v. United States*,1919) or advocating communist ideas (*Dennis v. United States*, 1951). The Court moved away from these positions in subsequent decisions protecting advocacy of force against the government (*Brandenburg v. Ohio*, 1969), press rights to publish material critical of government actions and actors (*New York Times Co. v. Sullivan*, 1964; *New York Times Co. v. United States*, 1971), the right to protest (*Texas v. Johnson*, 1989), to name a few.

The media discourse analyzed for this study reflected the resolution of this point of tension concerning free speech and potential injury to the state. "The idea behind the First Amendment, wrote the founders, was that the citizens be free to criticize their government" (London, 2015). Another stated that the freedom to "challenge authority" was essential to the health of our democracy (*The New York Times*, 2011c). However, a new point of tension has developed. This one is not between free speech and offense to

the state, but between the freedom to speak and offense to other groups and individuals.

Parrhesia and Isegoria

Embedded in the American concept of freedom of speech are two principles ultimately inherited from ancient Athens: *Isegoria* and *parrhesia.* Both loosely translate as freedom of speech. The older of the two, isegoria, was primarily concerned with equality in public speech. It referred to the right of every male citizen in good standing to address the Assembly. As such, it was primarily political in nature. Parrhesia was primarily about liberty in speech, the freedom to express one's thoughts with frankness. It could apply to both social and political contexts (Wehan, 2008).

When it comes to parrhesia, adoption of the principle is evident. As examples, look to one columnist's defense of the "rough Western culture of free speech" (Noonan, 2015). As another put it, "If freedom means anything, it means free expression – to include expression that some might find irresponsible, offensive or even blasphemous" (Lane, 2015). Another wrote that "an enlightened society should be able to take the punch of satire and ridicule, even coarse satire and savage ridicule" (Egan, 2015). Lastly, one writer voiced support for "John Milton and John Stuart Mill's hard lesson that one cost of liberty is the toleration of foolish and odious speech" (Berkowitz, 2011).

Here, these defenders of this rough culture of free speech recognize that even speech that most find patently offensive may have some use to broader society, and thus deserves protection. However, it does not have to necessarily be. This advocacy of parrhesia also defends speech simply because it exists. Echoing Baker's Liberty Theory (1989), the weightiest concern is individual autonomy.

However, there is an aspect of parrhesia not addressed by this body of opinion writers. The principle of parrhesia included not only the right to express one's thoughts with frankness, but it also assumed an acceptance of the consequences of doing so, whether inside or outside the political sphere. In ancient Athens, crowds sometimes shouted down unpopular speakers (Bejan, 2021). While these opinion writers uniformly opposed greater legal limits, they left largely unaddressed the appropriateness of social sanctions on those whose frank speech crosses lines of social decorum. Rather, they appeal only to one's personal sense of taste or civility. However, there is another struggle here, which this media discourse largely leaves unexamined. Many battles today involve clashes between two ancient Greek concepts of free speech. One can see this in the protests that arose after George Floyd's death, in the skirmishes over social media platforms moderating content and even removing some users, or in the conflicts over acceptable speech played out on college campuses. Those clashes are really a result of the inherent tension between the classical principles of parrhesia and isegoria and a newer form of isegoria that arose through the work of feminist and critical race theorists in the 1980s (Bejan, 2021).

As for the classic formulation of isegoria, its influence on the body of opinion columnists is evident. As examples, one columnist declared that the United States "has traditionally stood with dissenters and devil's advocates" (Lonsdale, 2020). Another asserted that widespread censorship often began with those who would "define virtue and justice and unleash the mob to denounce and condemn the unrepentant" (O'Grady, 2020). Yet another wrote that "we have to have the open exchange of views" necessary to deal with today's complex world and that "no one vantage point can grasp reality or devise

solutions" (Brooks, 2020). Yet another wrote that now "is the time to debate with renewed vigor existential questions of what counts as justice and how to fashion an equitable society . . . . But the stifling of dissent is impeding the search for answers and driving people who disagree still further apart" (Katz, 2020).

However, there is more than one conception of isegoria. The classic liberal doctrine, set forth by John Stuart Mill, holds that free speech was grounded in freedom of conscience. While one can speak one's mind, others are free to ignore it or to offer counter arguments. The only duty of the listener is to forego interfering with or punishing the speaker (Mill, 2003). He recognized that some speech had the potential to harm. However, as the right of expression was inextricably bound to freedom of conscience, it was absolute and exempt from the harm principle at the heart of his ideas. Equality here is achieved through equal opportunities for expression (Bejan, 2021).

As technological advances provided more ways to communicate ideas, the other conception of isegoria arose as a critique of the classic liberal doctrine. Feminist and critical race theorists argued that pornography and racist speech caused real harms to people (MacKinnon, 1993; Matsuda, 1993). This conception of isegoria includes a relational aspect in that it not only carries a right to express oneself, but also an implicit right to be heard and an obligation to listen to others. The classic liberal principle of noninterference is insufficient (Bejan, 2021). Speech, such as pornography or racist expression, stigmatizes and marginalizes its targets, and damages their social standing (Langton, 2012). This effectively creates a social underclass unable to gain a hearing in the public square. In this view, silencing certain voices to protect free expression for all is permissible (Bejan, 2021). Proponents of this view would accept formal regulations of

speech deemed offensive. As an example, there is an appetite on college campuses for speech codes to regulate so-called hate speech to protect historically marginalized groups (Knight Foundation, 2019). This is in keeping with the more modern conception of *isegoria*.

The media discourse analyzed for this study omits this new conception. Hate speech as such is not a topic of the opinion content. When the material does discuss speech that some groups found offensive, as in the aftermath of the attacks on the French magazine *Charlie Hebdo* or on a college campus, the writers almost uniformly favor the rights of the speaker and reiterate the need to protect such speech. While they recognize that legal limits on speech do exist, the opinion columnists do not advocate for more legislation. Instead, they appeal to the individual's own sense of propriety or civility as a check on speech.

In this body of discourse, free speech is primarily about individual liberty. This is in keeping with the American conception of democracy as liberty (Belavusau, 2010), of which free speech is a crucial element. This promotion of parrhesia and the classical conception of isegoria also demonstrate that the elite media are acting to maintain a traditional, expansive view of speech rights. This should not be surprising. Press rights are also bound up with larger conceptions of free speech rights. An expansive, traditional view of speech not only serves the interests of broader society, but also of news media. Accepting legal limits on speech some deem offensive or damaging opens the door to potentially greater limits on press rights.

Marketplace of Ideas

John Milton supplied the basis for one of the most enduring metaphors in

American free speech thought, that of the marketplace of ideas. He contended that in an open contest of ideas, truth would triumph over falsehood (Milton, 1644). Justice Holmes refined the idea a bit further in his dissent in *Abrams v. United States* (1919), contending that truth was what found acceptance in the marketplace. The promotion of parrhesia and classical isegoria demonstrate the enduring influence this metaphor and its power to shape current discourse. Much of that discourse advocates for the position that speech should enjoy the broadest protection possible because it enables the uninhibited debates a democracy needs to function properly or produces other benefits for society.

As one writer put it, "unbridled free speech functions as a kind of 'safety valve,' allowing frustrated and alienated citizens to blow off steam instead of engaging in violent revolution" (Dooling, 2011). Another wrote that "Openness, in my view, can only benefit the system" (Bell, 2015). Another column stated that "there are no wrong ideas, and free speech is indispensable to the disclosure of truth" (London, 2015).

This must include space for dissent, both from authority and from other speakers, and must allow for speech that others may find offensive. In the end, allowing for this range of speech produces benefits for society unattainable otherwise. The truth, or at least the best ideas, will emerge from speech unfettered by interference from government.

That is the essence of the marketplace of ideas conception of free speech. However, this conception rests on some assumptions that are worth noting here. One is that the truth is objective, which means we can discover it. Unfettered debate will inevitably bring the best ideas to the surface. Another assumption is that individuals are rational, able to consider competing ideas, and capable of recognizing the true ones (Greenawalt, 1989). A third assumption is that not only is the discovery of truth possible,

but also it is desirable, as this would be the basis for action that would promote human interests (Baker, 1989).

In my view there are other assumptions underpinning the marketplace of ideas conception that Baker did not address. One, I believe, is that the truth, whether objective or constructed, makes into the marketplace of competition in the first place. Another is that at least one of the ideas battling for acceptance is, in fact, a good one. That there are many competing ideas does not mean that any one of them would be beneficial for society. Yet another assumption is all interested parties have the range of access to the marketplace of ideas necessary to hear and assess them.

It is also worth noting the potential flaws in those assumptions. One is that the truth is not entirely objective. We discover it, but we also create it, constructing knowledge shaped by a variety of experiences and perspectives. There may be many conceptions of truth. Another is that humans are not entirely rational. If that were so, individuals would be able to correctly sort through different and competing messages and correctly perceive reality, independent of the influences of position or personal history. However, different individuals, with different experiences or positions, can perceive the same world differently. It is not a given that open debate would resolve those differences. Also, as humanity discovers more truth, the range of opinion and practice should narrow. However, competing interests can, and do, conflict. What's more, for the marketplace to function as its advocates envision, access to it must be equal. Otherwise, the marketplace becomes a reflection of the views of those in socially dominant positions who have access to it (Baker, 1989). The themes present in the media discourse analyzed for this project suggest acceptance of the assumptions underpinning the marketplace of ideas

metaphor with little attention to the potential flaws of those assumptions.

Recent events illustrate at least some of those flaws. The rise and endurance of the QAnon conspiracy theory, which asserts that a Satanic cabal of pedophiles in government (primarily Democrats), business, and media elites would face a day of reckoning that would see them tried and executed (Wendling, 2021) is one example. Another is enduring skepticism concerning both the existence of the virus that causes COVID-19 as well as the efficacy of the vaccines that can mitigate its effects (Scheitle & Corcoran, 2021).

The proliferation of media outlets through cable and satellite television and radio, as well as the internet, have made the marketplace of ideas larger. It is now also more competitive and noisier. In the ocean of information now available to individuals, narratives and counternarratives, as well as misinformation and disinformation, abound. As the above examples demonstrate, there is no guarantee that individuals will be able to sort through the falsehoods and errors, nor that they will necessarily even try. Whether truth is objective or constructed, there is no guarantee that it will rise to the top.

Another important aspect of the marketplace of ideas, and one largely unaddressed by the media discourse analyzed for this study, is access to it. First Amendment law in the 1960s and 1970s developed largely around questions concerning media access (Stein, 2006). The values this discourse communicates about free speech, as evidenced by the themes present in that content, do not reflect concerns about access.

On the surface, the proliferation of media channels and the ubiquity of the internet may make questions of access seem less important. However, the explosion of cable and satellite television and radio channels has provided media owners and advertisers more outlets for disseminating content to the public, not expanded members of the public's

ability to communicate with each other. This inequality in access to communication channels (Greenawalt, 1989) should give one some pause in assuming the efficiency and effectiveness of the marketplace of ideas.

The internet held far more promise for that. Reminiscent of the days of the pamphleteers, anyone could set up a website and disseminate whatever content they chose. For those not inclined to set up and maintain a website, social media platforms would allow similar opportunities. However, there are still open questions as to whether the internet has, or can, live up to its promise of speech for all.

One is that the body of law concerning communication through computer networks such as the internet is still largely undeveloped. This has left the public with opportunities to speak, but without real rights. Without that protection, changes in policy or industry structure could greatly diminish the public's ability to communicate (Stein, 2006). The rise and dominance of Google and social media platforms such as Meta and Twitter, as well as debates about net neutrality, make that plausible.

Another is that the sheer noisiness of the marketplace of ideas makes it that much harder for any voice to cut through the clutter. The internet is much like a crowded arena in which everyone is shouting at the same time. No voice stands out or has a claim to others' attention. Also, the multitude of websites and platforms allows users to choose the voices they hear, shutting out those they wish to avoid. This effectively fragments the marketplace of ideas into smaller, competing spheres. This, in turn, enables individuals to largely avoid the marketplace that John Milton and others envisioned and makes truth's struggle to overcome falsehoods much more difficult.

Still, the metaphor of the marketplace of ideas has endured. Even with its weaknesses, it is a useful conception of the scope of freedom of expression. The marketplace approach allows for a range of ideas that can lead to new perspectives and potential solutions to problems that would not be available otherwise. Open competition among ideas is preferable to control by an authority.

Conclusion

The concept of freedom of speech has been, and is still, contested and under construction. While the law is an essential component of that, this study examines another important agent of the construction of what we think of as freedom of speech. As media play a major role in constructing social reality (Berger & Luckman, 1966), one should not overlook the impact they have on it.

This study begins a program of research, but it does have some limitations. While the newspapers it examines are important barometers and influencers of public opinion (Achugar, 2004; Golan, 2006; McCombs et al., 2011), it draws material from three years in the past decade. Because editorials and op-ed pieces are often specific responses to particular events, examining such content from other years in the decade may show some variation in the themes present in the material, or at least some variation in the prevalence of the themes identified in this study. A similar effect may result from examining editorial content from other newspapers, which carry editorial pieces not present in the body of editorial content the three newspapers examined in this study.

Magazines, such as *Politico*, *Vox*, *Townhall*, and others are offered both in print and on the internet. Many of these are more openly partisan than the newspapers I examined. That could be fertile ground for study. Cable television news programming

would be another. Unlike the traditional broadcast networks, cable programming devotes substantial time to editorial content.

Also, this study does not examine social media, which has become an important way for non-elites, as well as elites, to communicate their thoughts and opinions on a variety of subjects. This contributes an important element of constructing the concept of the right of freedom of speech in the popular mind.

Future research could address these limitations. It should include examining material from the aforementioned magazine and cable television sources, as well as various social media platforms, such as Twitter, Reddit, and YouTube. With millions of contributors and world-wide reach, these platforms and others are now an important avenue for disseminating ideas. While Facebook is still among the world's largest social media platforms, it is increasingly difficult to gather data from its pages, even those considered public (Mir & Doctorow, 2021).

Future research should also examine editorial material from pre-social media eras when newspapers and other publications were still central to disseminating news and other information. One such era would include the 1960s and early-to-mid-1970s, an era of great social change in this country. This period saw the Free Speech movement at the University of California at Berkeley, the civil rights movement, the Vietnam War, Watergate, and other paradigm-shifting events. Examining this period of tumult and others could provide insight into how or whether public discussions of freedom of speech may have changed, if at all.

Other research should examine views concerning freedom of speech from those who are not part of elite media. In-depth interviews, focus groups, and surveys would be

useful in probing attitudes about freedom of speech in various societal subgroups. Given their various histories in the United States, racial, ethnic, and gender minorities may have different ideas about the utility and boundaries of freedom of speech than those in elite media. Differences in generational membership, political or sexual orientation, and religious affiliation may also give rise to different ways of defining freedom of speech and its boundaries than one would find in elite media.

This study, while limited in some ways, provides insight into how elite media institutions contribute to constructing the concept of freedom of speech in the popular mind. The editorial content reflects a traditional, classical approach to free speech that positions it as essential to the idea of freedom itself. It reinforces the U.S. Supreme Court's expansive approach to protecting a wide range of speech, even that speech which some find offensive or hurtful. It also promotes the idea of speech as essential to self-government and as a way to stem official power, two ideas promoted by modern free speech theory.

Through its defense of speech that may offend others and the need to protect debate and dissent, as well as ignoring feminist and race theorist critiques, the editorial content also shows a definite preference for the ancient Greek value of parrhesia, or the ability to express one's own ideas with frankness. It also reflects the enduring and profound influence of the marketplace of ideas conception of speech. However, though it should, it pays no attention to the potential flaws in the marketplace approach.

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Tumulty, K. (2020, July 2). Biden and Trump used to agree on flag burning. Do they still? *The Washington Post*, p. A19.

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Valladares, A. (2015, Aug. 21). Obama's new partners, my old jailers. *The Wall Street Journal*, p. A13.

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Xuecun, M. (2015, Jan. 17). China's selective crackdown. *The New York Times*, p. A17.

Yaussi, S. (2015, Jan. 4). This is justice? *The Washington Post*, p. C4.

APPENDIX

The articles analyzed for this study were selected from *The New York Times*, the *Wall Street Journal*, and the *Washington Post*. They are grouped by year and arranged alphabetically by author and date.

The New York Times

2011

Bueno DeMesquita, B., & Smith, A. (2011, June 10). How tyrants endure.

Dooling, R. (2011, March 1). Curbing that pesky rude tone.

Dwyer, J. (2011, March 30). A victim, her picture and Facebook.

Editorial. (2011, March 3). Even hurtful speech.

Editorial. (2011, March 18). The U.C.L.A. video.

Editorial. (2011, March 23). Libel tourism, R.I.P.?

Editorial. (2011, March 25). Egypt's unfinished revolution.

Editorial. (2011, March 26). Arizona's boon to free speech.

Editorial. (2011, June 19). Internet piracy and how to stop it: A Senate bill has commendable goals, but needs some work before it can be law.

Editorial. (2011, June 14). Reading Turkey's vote.

Editorial. (2011, June 24). Drug marketing and free speech.

Editorial. (2011, June 28). The First Amendment upside down: The Supreme Court's campaign finance ruling is a loss for fair and open electoral politics.

Fried, C., & Sloan, C. (2011, March 26). Free speech worth paying for.

Haberman, C. (2011, March 1). Where freedom of expression runs headlong into the

impulse to censor.

Kohn, S.M. (2011, June 13). The whistle-blowers of 1777.

Stewart, K. (2011, June 12). Separation of church and school.

Zimmerman, J. (2011, June 4). When teachers talk out of school.

2015

Anam, T. (2015, April 4). Save Bangladesh's bloggers.

Bell, D. (2015, April 17). Teaching "Western values" in China.

Benali, A. (2015, Jan. 14). From teenage angst to jihad.

Brettschneider, C., & Tebbe, N. (2015, Jan. 10). A license to say anything?

Brooks, D. (2015, Jan. 9). I am not *Charlie Hebdo*.

Bruni, F. (2015, April 22). Hollywood trumps Harvard.

Carr, D. (2015, Jan. 15). To buy, and speak, freely.

Cohen, R. (2015, April 17). The French republic resolute.

Cohen, R. (2015, April 21). Muslims and Jews on the Seine.

Collins, G. (2015, April 30). When good news is no news.

Druckerman, P. (2015, Jan. 15). Just another Parisian.

Editorial. (2015, Jan. 19). *Charlie Hebdo* and free expression.

Egan, T. (2015, Jan. 16). Your free speech, and mine.

Eltahawy, E. (2015, Jan. 28). Egypt's war on atheism.

Friedman, T. (2015, Jan. 28). Czar Putin's next moves.

Gifford, B. (2015, April 26). Dr. Oz is no wizard, but no quack, either.

Greenhouse, L. (2015, Jan. 22). Off the hook?

Kaminski, M. E. (2015, April 14). Don't keep trade talks secret.

Kauffmann, S. (2015, April 3). Who owns France's republican values?

Khodarkovsky, M. (2015, Jan. 23). Chechnya and *Charlie Hebdo*.

Koo, S. (2015, April 3). Seoul's invasion of privacy.

Krauze, E. (2015, Jan. 8). End of anti-Americanism?

Kreider, T. (2015, Jan. 11). When art is dangerous (or not).

Lear, N. (2015, April 7). Is PBS neglecting its mission?

London, M. (2015, Jan. 24). Why tolerate terrorist publications?

Malik, K. (2015, Jan. 17). Don't limit free speech in France.

Pin, H. (2015, April 29). Witness to China's blatant injustice.

Rumi, R. (2015, April 30). A martyr for free speech.

Sassoon, G. (2015, Jan. 21). Australia's overdue reform.

Sherman, J. (2015, April 24). Open up the court.

Shiuna, M. (2015, April 22). A nation's dying democracy.

Toumani, M. (2015, April 19). Armenians shouldn't let genocide define us.

Wilkerson, I. (2015, Jan. 11). When will the North face its racism?

Xuecun, M. (2015, Jan. 17). China's selective crackdown.

2020

Amar, A. R. (2020, July 15). Justices shrug off politics.

Bensinger, G. (2020, July 8). Facebook flunks new audit on civil rights, hate speech and voter suppression.

Brooks, D. (2020, July 10). 2 cheers for liberalism! (Or maybe 1 ½).

Callard, A. (2020, July 23). Aristotle is a jerk, but we shouldn't cancel him.

Cohen, R. (2020, July 11). The most dangerous phase of Trump's rule.

Cohen, R. (2020, July 20). The tenacity of the Franco-American ideal.

Douthat, R. (2020, June 21). The tempting of Neil Gorsuch.

Editorial. (2020, June 3). In America, protest is patriotic.

Editorial. (2020, July 18). Take a legal ploy away from the bullies.

Friedman, T. (2020, June 3). America, we break it, it's gone.

Friedman, T. (2020, July 29) If our masks could speak.

Goldberg, M. (2020, July 19). Do progressives have a free speech problem?

Halpern, J. (2020, June 20). An 11-year-old designs a better government.

Johnson, I. (2020, July 19). Real-life costs of a geopolitical meltdown.

Lai, J. (2020, June 1). Do my tweets threaten China?

Rice, S. E. (2020, July 22). Take the next step toward racial justice.

Smith, B. (2020, June 22). Zuckerberg and Trump: Uneasy ties.

Smith, B. (2020, July 13). News sites risk wrath of autocrats.

Stephens, B. (2020, June 13). What *The Times* got wrong.

Stephens, B. (2020, July 4). Reading Orwell for the Fourth.

Tomasky, M. (2020, June 12). Why does Trump lie?

The Wall Street Journal

2011

Bawer, B. (2011, July 25). Inside the mind of the Oslo murderer.

Berkowitz, P. (2011, April 18). Is Yale University sexist?

Berkowitz, P. (2011, July 1). Clarence Thomas, Plato and "Grand Theft Auto."

Bordewich, F. (2011, April 9). How America's Civil War changed the world.

Dan, W. (2011, April 12). China's party of princelings.

Editorial. (2011, April 1). Wisconsin unions get ugly.

Editorial. (2011, April 6). The message of Al Weiwei.

Editorial. (2011, April 23. Caesar in Beijing.

Editorial. (2011, April 23). The White House wants a list.

Editorial. (2011, July 8). Not so grrrrreat!

Finley, A. (2011, July 9). Cross country: How bad art killed good labor reforms.

Henninger, D. (2011, July 7). The fast and the spurious.

Herbold, R. J. (2011, July 9). China vs. American: Which is the developing country?

Kaminski, M. (2011, July 26). The Arab Spring is still alive.

Marston, D., & Yoo, J. (2011, April 27). Political privacy should be a civil right.

Silverglate, H. A. (2011, July 15). Yes means yes – except on campus.

2015

Bennett, N. (2015, Nov. 19). Islamic State understands on thing: Force.

Crovitz, L. G. (2015, Aug. 3). Information age: Ted Cruz's fight to protect the open internet.

Crovitz, L. G. (2015, Aug. 17). Information age: Obamanet heads to court.

Crovitz, L. G. (2015, Aug. 24). Information age: Plotting against the internet.

Crovitz, L. G. (2015, Aug. 31). Information age: Hiding on the internet.

Crovitz, L. G. (2015, Nov. 2). Information age: China censors your internet.

Crovitz, L. G. (2015, Nov. 23). Information age: Chicago school of free speech.

Crovitz, L. G. (2015, Nov. 30). Information age: Obamanet goes to court.

Editorial. (2015, Aug. 15). A free-speech clinic for the FDA.

Editorial. (2015, Aug. 29). Censoring a business.

Editorial. (2015, Nov. 5). Show us your donors.

Editorial. (2015, Nov. 10). Yale's little Robespierres.

Editorial. (2015, Nov. 11). Bonfire of the academy.

Editorial. (2015, Nov. 12). An adult on campus.

Editorial. (2015, Nov. 13). Sisi arrests the press.

Editorial. (2015, Nov. 20). Goodbye, speech police.

Editorial. (2015, Nov. 23). A campus mayhem syllabus.

Editorial. (2015, Nov. 28). The new campus dissenters.

Feith, D. (2015, Aug. 18). The bare flagpoles of Havana.

Gattuso, J. L. (2015, Aug. 12). Europe's latest export: Internet censorship.

Gerecht, R. M. (2015, Aug. 1). History contradicts the dream of Iranian moderation.

Henninger, D. (2015, Nov. 19). From Missouri to Paris.

Kesler, C. R. (2015, Nov. 18). When the college madness came to my campus.

Kimball, R. (2015, Nov. 14). The rise of the college crybullies.

Langone, K. (2015, Nov. 23). New York's shameless attorney general.

McGurn, W. (2015, Nov. 17). Main Street: The craven cry for "civility."

Noonan, P. (2015, Nov. 21). Declarations: Uncertain leadership in perilous times.

Valladares, A. (2015, Aug. 21). Obama's new Cuban partners, my old jailers.

Walker, C. (2015, Aug. 4). The West's failure of imagination.

2020

Baker, G. (2020, July 14). Free expression: Democracy dies in darkness, but don't blame Trump.

Baker, G. (2020, July 21) Free expression: The news media becomes fluent in newspeak.

Baker, G. (2020, July 28). Free expression: Biden may want to forget about the Russia investigation.

Baker, G. (2020, Oct. 6). Free expression: Outside Walter Reed, a misinformation epidemic.

Baker, G. (2020, Oct. 13). Free expression: Sen. Dumpty of Wonderland votes nay on Amy Coney Barrett.

Baker, G. (2020, Oct. 20). Free expression: Amy Coney Barrett and the dogma that didn't bark.

Baker, G. (2020, Oct. 27). Free expression: Media watchdogs aren't supposed to guard Biden.

Dubreuil, L. (2020, Oct. 26). Islamism converges with cancel culture.

Editorial. (2020, July 9). Bonfire of the liberals.

Editorial. (2020, July 10). Hating Clarence Thomas.

Editorial. (2020, July 20). The Left's rights distortions.

Editorial. (2020, July 27). Rendering unto Caesar's Palace.

Editorial. (2020, Oct. 27). Justice Barrett joins the court.

Editorial. (2020, Oct. 29). Twitter's censorship method.

Gay, J. (2020, July 7). Hail to the sadness machine! – Washington's NFL team is finally exploring a name change. Here's a suggestion.

Gillen, B. (2020, Oct. 8). The cancel mob comes back for more.

Hatch, O. (2020, July 28). Higher ed and the fragmentation of America.

Katz, J. T. (2020, July 27). I survived cancellation at Princeton.

Krauss, L. (2020, July 13). The ideological corruption of science.

Ladapo, J. A. (2020, July 2). The coronavirus credibility gap.

Loftus, J. (2020, Oct. 15). WeChat threatens free speech.

McMaster, H. R., & Tortolero, P. (2020, July 7). The North American trade dividend.

Noonan, P. (2020, Oct. 31). Declarations: Raucous 2016 gives way to subdued 2020.

O'Grady, M. A. (2020, Oct. 26). How free speech dies.

Rivkin, D. B. & Lin, A. (2020, July 14). A way to curb Chinese intimidation.

Scalia, C. (2020, Oct. 12). Get ready for a flood of falsehoods about originalism.

Schwammenthal, D. (2020, July 29). To America, from a worried European friend.

Turley, J. (2020, Oct. 16). Amy Coney Barrett opens up.

Varadarajan, T. (2020, July 11). The weekend interview with Glenn Loury: A challenger of the woke "company policy."

Varadarajan, T. (2020, July 18). The weekend interview with Robert Unanue: Goya's CEO softly stands his ground.

Varadarajan, T. (2020, Oct. 17). The weekend interview with Fred Siegel: An ex-liberal reluctantly supports Trump.

The Washington Post

2011

Adam, K. (2011, Feb. 25). Assange's extradition ordered.

Editorial. (2011, Jan. 9). Why Salman Rushdie's book was burned.

Farhi, P. (2011, Jan. 28). NPR firing prompts review of leadership.

Ghannam, J. (2011, Feb. 20). Freedom, beyond 140 characters.

Kamen, A. (2011, Feb. 18). Constitution? That's his middle name!

McMurtry, L. (2011, Jan. 20). A border city's heritage.

Miller, A. D. (2011, Feb. 6). Having dealt with the Israelis.

Parker, K. (2011, Jan. 30). Exceptional by omission.

2015

Cole, D. (2015, July 5). Has free speech ever been free?

Dionne, E. J. (2015, Jan. 12). Degrees of opportunity.

Editorial. (2015, Jan. 2). The repression continues.

Editorial. (2015, Jan. 3). Theater J had every right to oust its artistic director.

Editorial. (2015, Jan. 5). Protect the internet.

Editorial. (2015, Jan. 6). Good reasons to open up Cuba.

Editorial. (2015, Jan. 8). The final word.

Editorial. (2015, Jan. 11). The attack on *Charlie Hebdo*.

Editorial. (2015, Jan. 11). The right response.

Editorial. (2015, Jan. 13). The aftermath of the Paris attacks.

Editorial. (2015, Jan. 14). France's free-expression hypocrisy.

Editorial. (2015, Jan. 17). A more elevated type of discourse.

Editorial. (2015, Jan. 17). Abusing the right to free speech.

Editorial. (2015, Jan. 18). Showing solidarity with France.

Editorial. (2015, Jan. 21). Undisclosed consequences.

Editorial. (2015, Jan. 22). An electoral quandary.

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VITA

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