

1989

Free Speech and Modern Republican Government.

Murray Dry

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

Dry, Murray, "Free Speech and Modern Republican Government." (1989). *Constitutional Commentary*. 796.
<https://scholarship.law.umn.edu/concomm/796>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

FREE SPEECH AND MODERN REPUBLICAN GOVERNMENT*

*Murray Dry***

The title of this essay reflects the importance we attach to freedom of speech, both for its own sake and for the sake of free government. As we understand free government today, its foundation lies in individual rights rather than a selfless dedication to the community, and that is why I chose the term modern republican government. My discussion draws largely on Supreme Court decisions concerning freedom of speech. It will, however, turn from constitutional law to political philosophy because of the inherent relationship between thought and political life.¹

That relationship became evident during the very year of the Court's first free speech decision, when in a dissent Holmes wrote:

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

This argument sounds more like John Stuart Mill's *On Liberty* than the Declaration of Independence, or the founders' Constitution. When Jefferson wrote that "the opinions of men are not the object of civil government, nor under its jurisdiction," he was referring to opinions regarding religion.³ Mill is the one who wrote that "truth, in the great practical concerns of life, is so much a question of the reconciling and combining of opposites," and further, that since "the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that

* I would like to thank my colleague, Eve Adler, for her comments on an earlier draft of this essay, and Daniel Northrop, my research assistant during the summer of 1989, for assisting me in the final revisions.

** Professor of Political Science, Middlebury College, Middlebury, Vermont.

1. See Cropsey, *POLITICAL PHILOSOPHY AND THE ISSUES OF POLITICS* (1977).

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

3. Thomas Jefferson, *A Bill For Establishing Religious Freedom* (1779), *THE PORTABLE THOMAS JEFFERSON* 251-52 (M. Peterson ed. 1975). This particular clause, which Jefferson wrote in 1779, was deleted by the Virginia legislature when it was adopted in 1786.

the remainder of the truth has any chance of being supplied.”⁴

An inquiry into the philosophic sources of our free speech doctrines will clarify our understanding of the relationship between the founders’ understanding of freedom and our own.⁵ In addition, it may provide us with a basis for improving our approach to first amendment questions. I will begin with an overview of our constitutional doctrines concerning free speech, focusing on the justifications for free speech protection and the resulting judicial tests or devices for protecting it. In Part II, I will turn to the American founders’ views on freedom of speech. Because direct evidence regarding the meaning and importance of freedom of speech for the founders is scanty, and because the judicial arguments draw on more than is made explicit, I will turn in Part III to the philosophic foundations of our Constitution, focusing on Locke and Spinoza. I will conclude by suggesting some changes in the Supreme Court’s treatment of free speech.

I

Professor Gerald Gunther introduces the voluminous material on free speech, which comprises thirty percent of his casebook,⁶ with two questions: (1) “What justifies special solicitude for free speech values?”; and (2) “[W]hat judicial techniques serve best to manifest that judicial solicitude?” Let us consider how he illustrates the answers that different Justices have given to these questions.

Gunther identifies three different justifications for free speech protection:

1. to promote individual self-expression and self-realization;
2. to serve a system of representative democracy and self-government;
3. to serve to promote the search for knowledge and “truth” in the “marketplace of ideas.”

Consider first Justice Brandeis’s famous concurring opinion in *Whitney v. California*, a criminal syndicalism case.⁷ Brandeis’s cele-

4. J. MILL, ON LIBERTY 46, 50 (Norton ed. 1975).

5. Mill’s importance for our understanding of freedom of speech suggests that constitutional interpretation cannot simply be described in terms of historical legal research or logical analysis. The debate has been cast in recent times in terms of interpretivism, or a jurisprudence of original intention, versus non-interpretivism, or a jurisprudence of contemporary ratification. If the choice is between historical study to determine what the founders said in order to decide, with nothing else, a contemporary issue, versus a constitutional law that pays no attention to the founding principles, we are in trouble.

6. G. GUNTHER, CONSTITUTIONAL LAW (11th ed. 1985).

7. Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a

bration of liberty supports both the self-realization goal and the self-government goal, and, to some extent, the marketplace of ideas approach to truth. He agrees that the development of human faculties was the object of the government established by our founders, and that our republican form required an alert citizenry rather than an inert people. Fear of punishment breeds repression and hate, which menaces stable government, and speech liberates men from irrational fears. After referring to, without explaining, "the wide difference between advocacy and incitement," Brandeis continues: "In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."

Both Holmes in *Abrams* and Brandeis in *Whitney* seem to have thought that the individuals and organizations involved in the criminal cases are misguided but harmless, and that it was an abuse of government authority to imprison them. (Whitney was a member of the Left Wing Socialists, but she did not herself vote for the use of violence as part of the party program.) But suppose the organization was stronger? Is there never anything to worry about?

Brandeis expresses confidence that if the speech falls short of incitement to violence, speech can counteract speech and "political truth," which must mean political freedom and sound policy, will win out. Holmes expressed a similar view in *Abrams*, but now consider his dissent in *Gitlow*, a criminal syndicalism case similar to *Whitney*, decided two years earlier in 1925.

means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed. Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of free speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.

Whitney v. California, 274 U.S. 357, 375-76 (1927).

It is said that this [Left Wing Socialist] manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.⁸

No wonder that Gunther did not include this passage among his "Hall of Fame" of memorable first amendment pronouncements, but it is instructive. While Holmes claims there is no danger in the instant case, his general position is that if people choose to destroy their free government as a result of being persuaded to join the cause of the Communist Revolution, so be it. Hence, Holmes advocates free speech for its own sake, regardless of its consequences for free government.

Holmes's *Gitlow* opinion is unusual for its skepticism, but a more moderate formulation of the same skepticism comes from Justice Robert H. Jackson, in the second flag salute case. Writing an opinion for a six-to-three majority invalidating a required pledge of allegiance and salute to the flag as a condition of public school attendance in West Virginia, Jackson wrote: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."⁹

Perhaps Jackson did not mean that there were no orthodoxies, only that they could not be prescribed. He did suggest that cultivating patriotism through required civics courses would be constitutional. But if it is worthwhile to learn about and appreciate the principles of American government, why did he suggest that the only fixed star of our Constitution was negative?

Finally, there is *New York Times Co. v. Sullivan*, in which the Supreme Court brought the states' treatment of libel law under the rubric of the first amendment, at least as applied to public officials. To protect political speech critical of government officials, and newspapers reporting such criticism, the Supreme Court adopted the now famous rule that for a public official to win a libel judgment he must show that he was libelled with malice, with "reckless disregard for the truth." Writing for the Court, Justice Brennan de-

8. 268 U.S. 652, 673 (1925).

9. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

scribed our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."¹⁰

Our examples have illustrated the three different justifications for free speech mentioned by Gunther. Two of the justifications (self-expression and the marketplace rationale) reflect more faith in the automatic self-correcting devices of free speech and free government than we would associate with the founders. The self-government rationale was clearly manifest in the *Times* case.

The so-called categorical approach to speech reflects the extensiveness of the demands that can be made in the name of self-expression and self-realization as well as the tolerance that the marketplace of ideas approach requires. For example, the reigning *Miller* test for obscenity effectively permits the outlawing of only hard core pornography since any work containing "serious literary, artistic, political, or scientific value" is protected, regardless of its appeal to the prurient interest of the average person and regardless of its patently offensive character.¹¹ Libertarians are not happy with the test as it stands, but its permissiveness is confirmed by the fact that when the Supreme Court upheld a New York law banning the distribution of material depicting children engaged in sexual conduct, it acknowledged that the films were not legally obscene. The potential harm to children, as subjects of pornographic material, was held to justify the law.¹² So child pornography is another category of exclusion from first amendment protection, but it confirms the limits of the *Miller* test for obscenity.

II

The first amendment does not describe a simple absolute. In contrast to the language for religion—no law respecting an establishment, for example—the speech language refers to no law "abridging" freedom of speech. Since "abridge" means to shorten or curtail, one needs to know what the existing state of freedom of speech was that must not be curtailed. Professor Leonard Levy is the leading constitutional authority on the meaning of free speech (and free press, which was not considered separate from the free speech clause). As he observes, the Americans were well aware of the existing English common law rule on freedom of freedom of

10. 376 U.S. 254, 270 (1964).

11. *Miller v. California*, 413 U.S. 15, 24 (1973).

12. *New York v. Ferber*, 458 U.S. 747, 758 (1982).

speech and press; it was found in Blackstone's *Commentaries on the Laws of England* and guaranteed a freedom to publish without first obtaining a license. It did not protect the publisher or the writer from criminal or civil action for libel, including seditious libel as well as private libel.¹³ Contrary to Zechariah Chafee, who argued that the framers of the first amendment intended "to wipe out the common law of sedition, and make further prosecutions for criticisms of the government, without any incitement to law-breaking, forever impossible in the United States of America," Levy argues that "the immediate history of the drafting and adoption of the First Amendment's freedom of speech and press clause does not suggest an intent to institute broad reform."¹⁴ As Levy reviews the evidence, the Anti-Federalists were mainly interested in "states' rights, not civil rights," and "no one [of the Anti-Federalists] had come to grips with any of the real problems connected with the freedom of the press."¹⁵

The most recent controversy over Levy's interpretation concerns his assertion that in response to the Sedition Act of 1798, the Jeffersonians, including Madison, did in fact originate a broad libertarian theory of freedom of speech, meaning a theory that repudiated seditious libel¹⁶ as inconsistent with that freedom in republican government. The Sedition Act punished malicious writing, utterances, or publications which might excite the people against the government or government officials or stir up sedition. As Levy points out, it was an improvement on the existing common law, since truth and good motive could be used as a defense and those issues went to the jury, whereas previously truth was said to aggravate the libel.¹⁷

Professor Walter Berns, who has written extensively on the first amendment, and has discussed the first edition of Levy's book in three different places, applauds Levy for his full and fair exami-

13. L. LEVY, *EMERGENCE OF A FREE PRESS* 12-13 (1985). This is a substantial revision of Levy's earlier work, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION* (1960). In his preface to the recent work, Levy explains his changed title by noting that "the American experience with a free press was as broad as the theoretical inheritance was narrow." "To one whose prime concern was law and theory, a legacy of suppression came into focus; to one who looks at newspaper judgments on public men and measures, the revolutionary controversy spurred an expanding legacy of liberty."

14. *Id.* at 220. Levy quotes from Z. CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 21 (1948).

15. *Id.* at 221, 244.

16. Seditious libel is defined as "[A] communication written with the intent to incite the people to change the government otherwise than by lawful means, or to advocate the overthrow of the government by force or violence." *BLACK'S LAW DICTIONARY* 1218 (5th ed. 1979) (citing the Smith Act, 18 U.S.C.A. § 2385).

17. *Id.* at 12.

nation of the historical record, which yields the conclusion that the founders did not intend to repudiate the common law of seditious libel, but he thinks Levy goes too far in attributing to the Jeffersonians an intention to adopt a broad libertarian theory in response to the Sedition Act.¹⁸ According to Berns, "this new 'libertarianism' contains a considerable admixture of the familiar Jeffersonian states' rights theory of the Constitution."¹⁹

The heated historiographic debate between Levy and Berns reveals more agreement than disagreement between these two scholars. Berns acknowledges that the leading Republicans, including Madison, Albert Gallatin, Gorge Hay, St. George Tucker, and Tunis Wortman, presented more extensive arguments in support of freedom of speech and press in response to the Federalists' Sedition Act, but he claims that these men were not full-fledged "libertarians" in the modern sense (which is also Levy's) because they did not believe that in the realm of politics truth was relative and, consequently, they allowed the states to punish libel.²⁰ Levy, on the other hand, acknowledges that the Republicans permitted the prosecution of libel in the state courts, but he insists that while they sometimes referred to state prosecutions, the Republicans in fact meant libel against private reputations, not seditious libel, and that Madison eventually concluded that only private suits should be entertained to protect the reputation of public officials against such libel.²¹

With so much attention paid to the historical question concerning the state of freedom of speech and press in America from 1789 to 1801, it is possible to overlook the question from political philosophy: what is the sound understanding of that freedom? Berns defends an approach to freedom of speech and press which places restrictions on that freedom, on the grounds that the maintenance of free government requires it. Levy finally reveals his support for the modern, expanded view of freedom of speech in his conclusion, where he describes the framers' "genius for studied imprecision."

Detailed codes, which become obsolete with a change in the particular circum-

18. W. BERNs, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* ch. 3 (1976) (esp. pp. 101-19). See also Berns, *Freedom of the Press and the Alien and Sedition Acts: A Reappraisal*, SUP. CT. REV. 109; and Berns, *Free Speech and Free Government*, THE POLITICAL SCIENCE REVIEWER, 217-41.

19. W. BURNs, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY*, 112.

20. *Id.* at 112-119. See also Berns, *Freedom of the Press and the Alien and Sedition Acts: A Reappraisal*, SUP. CT. REV. 135-142 (1970).

21. LEVY, *EMERGENCE*, *supra* note 13 at 325-31.

stances for which they were adopted, are avoided by men trained in the common law. They tend rather to formulate principles that are expansive and comprehensive in character. The principles and not their Framers' understanding and application of them are meant to endure. The Constitution, designed by an eighteenth-century rural society, serves as well today as ever because an antiquarian historicism that would freeze its original meaning has not guided its interpretation and was not intended to.²²

I take it that by "antiquarian historicism" Levy means respecting old opinions, that is, interpreting the first amendment's freedom of speech clause as it was understood at the time of the founding. There may be a good reason for our not limiting our understanding of freedom of speech to the practice at the end of the eighteenth century, but we need to know what it is. Levy does not give any reasons for his preference for the "libertarian" theory. That is unsatisfactory because, on his own account, even the first advocates of the new theory saw the need for protecting the reputations of public officials, albeit apparently not through criminal law.²³

There is virtually no discussion of freedom of speech in the debates surrounding the framing and ratification of the federal Constitution. That is why I have relied on Levy's account of the status of the common law on seditious libel to determine what the Anti-Federalists meant by proposing an amendment guaranteeing freedom of speech and what the framers of the Bill of Rights meant by passing what became the first amendment.

It is instructive that so extensive a debate on the meaning of republican government took place without any debate on the meaning of freedom of speech. There is a connection, however, between the first amendment and the Anti-Federalist position on republican government. Professor Herbert Storing, who showed how the Bill

22. *Id.* at 348.

23. There is one other interpretation of "abridge" which we should note. Professor George Anastaplo draws on the Declaration to argue that "abridge" should not be understood in reference to the English common law, but to the state of nature. Furthermore, he argues that American colonists' resistance to Great Britain, which eventuated in revolution, illustrates the intentions of the first amendment:

[T]he patriots were not willing to rely upon the judgment or opinion of constituted authority, even though it was an authority to which they and their fathers had long acknowledged allegiance. The principle they acted upon seemed to be that the American citizen should be left free to criticize his government, even in the most decisive manner, when he believes that the government acts improperly.

G. ANASTAPLO, *THE CONSTITUTIONALIST*, 109 (1971). To argue that the first amendment constitutionalized the right of revolution is remarkable, not only in light of the historical study that Levy provided, but also in light of the distinction which John Locke made, and which the Americans drew on in the Declaration, between legitimate governmental power and the people's natural, or pre-political power. And since the "abridging" extends also to freedom of the press and petitioning the government, how could these be referred to the state of nature?

of Rights was a Federalist production necessitated by the Anti-Federalists, put the point this way:

There is still in our Bill of Rights an echo of the earlier declarations of natural rights and maxims of well constituted free governments. This is especially true of the First Amendment, which might be described as a statement in matter-of-fact legal form of the great end of free government, to secure the private sphere, and the great means for preserving such a government, to foster an alert and enlightened citizenry. In the form of a protection of civil liberties, then, the First Amendment echoes the great principles of natural liberty and free government that play so large a role in the state bills of rights.²⁴

To get a fuller account of the principles of modern republican government and their relation to freedom of speech, I want to consider Locke and Spinoza on religion and its relation to government, as well as Spinoza's argument for liberal democracy and freedom of speech. This is because the argument for freedom of religion had implications for, and in part resembled, the argument for freedom of speech, especially freedom of the press. My sources are Locke's *Letter Concerning Toleration* and Spinoza's *Theologico-Political Treatise*.

III

Seventeenth-century philosophers were confronted with the fact of Christianity, which as practiced threatened their freedom to philosophize. The practical intention of their writings was to free philosophy from the confinement of Biblical religion. Spinoza did this by distinguishing between the sphere of philosophy and the sphere of faith. "[F]rom the Bible itself we learn, without the smallest difficulty or ambiguity, that its cardinal precept is: To love God above all things, and one's neighbor as one's self."²⁵ Since scripture "does not aim at imparting scientific knowledge, . . . it demands from men nothing but obedience, and censures obstinacy, not ignorance."²⁶ To separate faith from philosophy, Spinoza had to explain prophecy in terms of the imagination of the individual prophet and the needs of his audience, rather than the prophet's divine knowledge. Spinoza's circumspect discussion of miracles suggests that the events in question either have a natural explanation or did

24. H. Storing, *The Constitution and the Bill of Rights*, ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 32, 48 (M. Judd Harmon ed. 1978). Note that Storing identified the importance of written declarations of rights, as a source of restraint on government, with the Anti-Federalists. Furthermore, he understood the first amendment to protect freedom in the private sphere every bit as much as political speech.

25. BENEDICT DE SPINOZA, *THEOLOGICO-POLITICAL TREATISE* XII-172 (Dover edition, Elwes trans. 1670).

26. *Id.* at XII, 176.

not occur.²⁷

In the last five chapters of this work, Spinoza makes a Hobbesian argument for a government based on absolute sovereignty. He reconciles it to the divine law that one love God above all and one's neighbor as one's self, by arguing that "justice . . . and absolutely all the precepts of reason, including love towards one's neighbour, receive the force of laws and ordinances solely through the rights of dominion, that is, . . . solely on the decree of those who possess the right to rule."²⁸ "This conclusion," he argues two pages later, "is supported by experience, for we find traces of Divine justice only in places where just men bear sway; elsewhere the same lot . . . befalls the just and the unjust, the pure and the impure: a state of things which causes Divine Providence to be doubted by many who think that God immediately reigns among men, and directs all nature for their benefit."²⁹

Spinoza wrote with a candor that impressed even Hobbes, who was not known for his caution and tact. He saw the need for religion, we might say, but it was in the service of the worldly aim of comfortable self-preservation. Locke's argument differed from Spinoza's by separating religion from government and relegating the latter to the private sphere. Locke did it by separating the task of government from the task of religion. Government was formed to attend to civil interests, such as "Life, Liberty, Health, and Indolency of Body, and the Possession of outward things, such as Money, Lands, Houses, Furniture and the like."³⁰ Religion was concerned with care of the souls, and government could have nothing to do with this. One can only find salvation through the light of one's own conscience. Churches are free and voluntary societies whose end is the public worship of God.

Locke goes on to discuss the outward form and rites of worship and the doctrines and articles of faith. The former are subject to legitimate regulation. If a religious practice is indifferent from the perspective of civil interests, it is permitted, otherwise not; communion is fine, child sacrifice is not. As for articles of faith, some are speculative, some practical. Concerning the former, Locke borrows from Milton: "For Truth certainly would do well enough, if she were once left to shift for her self."³¹ Later, Mill would extend that principle to all opinions, and that has become a staple of our first amendment doctrine. In Locke, however, it is limited to speculative

27. *Id.* at Chapters I, II, and IV.

28. *Id.* at XIX, 247.

29. *Id.* at XIX, 249.

30. J. LOCKE, A LETTER CONCERNING TOLERATION 26 (Tully ed. 1983).

31. *Id.* at 46.

matters regarding religion. As for practical articles, Locke recognizes some limits: in general, they include restrictions on associations and opinions contrary to "those moral Rules which are necessary to the preservation of Civil Society," and affirmation of the "Being of a God."³² This last, which resembles Spinoza's religious dogmas, seems to require nothing more than a willingness to profess theism.

Both Spinoza and Locke, then, are anxious to keep religion out of the way of philosophers and of a government that busies itself with the worldly objective of securing individual rights. Spinoza provides for a government-controlled religion; Locke argues for separation (except that affirmation of God's being is necessary, to be able to trust someone on the witness stand, as he puts it.) American constitutionalism followed Locke on separation of religion from public life, and went a step further. There is an explicit prohibition in the Constitution, article VI, section 3, against any religious oath for office, and the first amendment prohibits Congress from passing any "law respecting the establishment of religion, or prohibiting the free exercise thereof."

Both Locke's and Spinoza's treatments of religion reveal an important feature of modern republican government. In contrast to ancient democracy, the government's interest in religion, whether it be in the public or the private sphere, is limited to securing individual rights.

I turn now to Spinoza's argument for freedom of speech. Spinoza starts from freedom of thought, claiming that the mind cannot be controlled. Since he already indicated an awareness of the thought-control potential for propaganda, we note that Spinoza's free speech argument begins with something less than a rigorous philosophic argument. Then he argues that because most men do not know when to keep quiet, a moderate government must grant freedom of speech as well as thought. While Spinoza's argument about politics starts from a hard boiled realism that leads to absolute sovereignty, it then proceeds by focusing on what is feasible given human frailty, rather than on what is legitimate (which includes everything the sovereign commands).

In light of this concession to weakness, as well as the fact that Spinoza considers the life of philosophic contemplation as perfectly rational and best, the following argument about the object of government is striking:

[T]he object of government is not to change men from rational beings into beasts or

32. *Id.* at 49.

puppets, but to enable them to develop their minds and bodies in security, and to employ their reason unshackled; neither showing hatred, anger, or deceit, nor watched with the eyes of jealousy and injustice. In fact, the true aim of government is liberty.³³

Earlier, Spinoza described living together secure in one's rights as a rational object that all but fools would agree to. Now, he affirms a more substantial objective, the development of the minds of human beings. This objective lies between true rationality, philosophy, and the limited rationality of self interest, i.e. of comfortable self-preservation.³⁴ We may wonder how much Spinoza truly expected from free government, given the importance he attaches to philosophy and his earlier remarks that the non-philosophic many are governed by imagination rather than knowledge.³⁵

After arguing for a freedom of speech consistent with moderation, which therefore does not extend to sedition or to the denial of government's authority over individuals, Spinoza then claims that free thought and speech are "absolutely necessary for progress in science and the liberal arts: for no man follows such pursuits to advantage unless his judgment be entirely free and unhampered."³⁶ This resembles the current marketplace of ideas argument, although it is not as extensive. But Spinoza must have known, as we do, that scientific progress can be made without a general regime of freedom of speech.

Spinoza's final argument considers the kind of people who will take offense if their freedom of speech is restricted.

It is far from possible to impose uniformity of speech, for the more rulers strive to curtail freedom of speech, the more obstinately are they resisted; not indeed by the avaricious, the flatters, and other numskulls, who think supreme salvation consists in filling their stomachs and gloating over their moneybags, but by those whom good education, sound morality, and virtue have rendered more free. Men, as generally constituted, are most prone to resent the branding as criminal of opinions which they believe to be true, and the proscription as wicked of that which inspires them with piety toward God and man; hence they are ready to forswear the laws and conspire against the authorities, thinking it not shameful but honourable to stir up seditions and perpetuate any sort of crime with this end in view. Such being the constitution of human nature, we see that laws directed against opinions affect the generous-minded rather than the wicked, and are adapted less for coercing criminals than for irritating the upright; so that they cannot be maintained without great peril to the state.³⁷

33. SPINOZA, *supra* note 25, at XX, 259.

34. For this point especially, and for this interpretation of Spinoza in general, I am indebted to Leo Strauss. Unpublished transcription of Spinoza seminar, University of Chicago, 1959.

35. SPINOZA, *supra* note 25, at Chapters I-II.

36. *Id.* at XX, 261.

37. *Id.* at XX, 261-62.

Spinoza goes on to argue that the greatest misfortune for a commonwealth is for "honourable men [to] be sent like criminals into exile, because they hold diverse opinions which they cannot disguise."³⁸ This "low but solid" argument merits our consideration. It strikes me as much more realistic than our contemporary views about the benefits of free speech.

Thus, in Spinoza we have found the link to Justice Brandeis and the self-development and self-expression justification for freedom of speech. Fully aware of the difference between the activity and interest of the philosophers and the non-philosophers, Spinoza nonetheless was the first philosopher to identify political liberty with rationality. Consequently, Spinoza originated an argument that, as Leo Strauss put it, "gives the highest type of man his opportunity equally as it gives the lowest type of man his opportunity."³⁹ The contemporary philosophic version of this position, which reflects Brandeis's position, is Ronald Dworkin's argument that every person has "a right to equal concern and respect."⁴⁰ The subsequent advocates of Spinoza's argument seem to have forgotten the limits of an argument that equates rationality with human freedom. And it is ironic that the best argument for the freedom to develop human faculties turns out to be a prudential concession to human foolishness.

This leads to another question concerning Spinoza's argument for free speech and free government. Assuming that most men are able to appreciate the case for their rights as well as the case for a freedom to develop their minds, how many will develop their minds enough to exercise a proper judgment in exercising their rights? After all, a strong and stable government is necessary to prevent us from falling back into the dangers of the natural condition. How far, in other words, should the argument from the need to recognize the weakness of human beings be extended?

IV

Returning to the Supreme Court's treatment of freedom of speech, I think that the three justifications we began with—self-expression and self-realization, self-government, and the discovery of truth—should be recast along the lines Storing suggested.⁴¹ Freedom of speech is important for private liberty and for fostering an alert and enlightened citizenry. In place of self-development we

38. *Id.* at XX, 263.

39. Strauss, *supra* note 34, at 271.

40. DWORKIN, *TAKING RIGHTS SERIOUSLY* xxi (1977).

41. Storing, *supra* note 24.

find a right to be left alone and to say and do what one wishes. In place of a general concept of "self-government" we find a particular focus on the role of the electorate.

Turning to the proper judicial test for restrictions on speech, I think a strict scrutiny approach is misguided. It places too high a burden on the government to justify what may be reasonable regulations of marginal forms of expression; and it places too much importance on the classification scheme, according to which some forms of expression are "in" and some are "out." Examples of the latter include the definitions of obscenity and "fighting words," and the status of "symbolic expression." Better to return to a rational basis test, but one with "bite," to borrow a phrase of Gunther's from another area of constitutional law. This would foster constitutional protection to symbolic expression, such as burning a draft card or wearing a black armband to protest the war in Vietnam, or burning an American flag to protest a civil rights shooting or a presidential campaign. It is easier to consider such obvious forms of expression of political opinion as covered by the first amendment when the test for a law's validity is not so difficult to satisfy. In addition, if speech is important for self-government, when opinions of citizens on matters of concern to them lead to regulations on certain forms of expression, they too merit consideration. The marketplace approach to expression reflects judicial abdication of judgment concerning the relationship between the reasonableness of the regulation and the significance of the limitation on expression.

The areas of speech protection most in need of reconsideration may well be group libel, obscenity and indecent speech generally. As long as the *Brandenburg* test (incitement to imminent violence) applies to all content-based regulations, that is, to group libel as well as subversive advocacy, the Klu Klux Klan can march and speak as it wants and the Nazi Party can march in uniforms and speak where it wants. Likewise, given the current definition of obscenity and the combination of artistic presentation and graphic depiction of violence and sexuality, any attempt to regulate such material will fail. The Supreme Court recently refused to hear oral argument in a case in which an Indianapolis ordinance prohibiting graphic pornography as discrimination against women was struck down. Here is part of Judge Easterbrook's circuit court opinion:

In *Body Double*, a suspense film directed by Brian DePalma, a woman who has disrobed and presented a sexually explicit display is murdered by an intruder with a drill. The drill runs through the woman's body. The film is sexually explicit and a

murder occurs—yet no one believes that the actress suffered pain or died.⁴²

The statute may have been too broad, but there is something troubling about Judge Easterbrook's matter-of-fact assumption that the world of visual representations has nothing to do with the real world and therefore is of no valid concern to government.

Regulation of indecent expression generally runs up against judicial reluctance to allow any exceptions to the rule of content neutrality. An exception, of sorts, illustrates this point. In *Federal Communications Commissions v. Pacifica*, the Supreme Court upheld the Commission's warning to the radio station concerning its broadcasting of George Carlin's satirical "filthy words" monologue. The FCC received a complaint by a man who claimed he heard the broadcast while driving his young son. The vote was 5-4, and the majority divided over the grounds of the decision. Justice Stevens, continuing the approach he initiated in an earlier case when he first suggested that the content of some speech might justify regulation, likened the words of the monologue to obscenity. Granting that the monologue might be protected in other contexts, such as a night club, Stevens argued that because it contained "patently sexual ad excretory language," it was "not entitled to absolute constitutional protection under all circumstances."⁴³

Stevens's approach to these cases drew a strong reaction from Professor Gunther himself. "What the case comes down to ultimately is a majority support of a prohibition of speech because it is offensive to the audience. [And] that is startlingly bad news." Gunther goes on to suggest that it could lead to the censorship of racial epithets over the airwaves. Why is Gunther so alarmed at this? Has he no confidence in the judiciary's ability to discern when profanity may reasonably be restricted in public discourse? Judges often draw distinctions. And how much is lost if in a given case the line is drawn against such expression?

Our high-toned expectations for freedom of speech have led to our being over-protective of various forms of expression, beyond any limit that the founders, or even John Stuart Mill, thought reasonable. The founders could and did rely on the effects of religion in the private sphere to moderate the exercise of freedom, including expression. Mill allowed any speech connected to a commercial venture to be regulated.⁴⁴ That would take care of pornography,

42. *American Booksellers Association Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985).

43. *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 747 (1977). The earlier case was *Young v. Mini Theatres*, 427 U.S. 50 (1976).

44. MILL, *supra* note 4, at 88.

for example. While we continue to pay lip service to Brandeis's standard, derived ultimately from Spinoza, that freedom generally and free speech in particular permit men to develop their faculties, when it comes to rules for expression, we seem to have lost confidence in our ability to distinguish between a distinctively human faculty and animal desires. A more reasonable approach would note Spinoza's low but solid argument for allowing ample leeway regarding expression, but exercise judgment that supports restraint in public discourse. Some form of moderation in expression reinforces moderation in action, and as robust as it is, our form of government requires this.