NO ROOM FOR ABRIDGMENT: AN ENLIGHTENMENT ERA REAPPRAISAL OF THE FIRST AMENDMENT AND CAMPUS HATE SPEECH

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ABSTRACT

In the late eighteenth century, Enlightenment philosophy advocated seeking truth through unrestricted learning, and this education creates awareness of the delicate balance between autonomy and consideration for all of humanity. This era’s philosophy was put into practice by the formation of the American republic and respective Constitution and Bill of Rights, both of which empower and limit government as well as ensure civil liberties defined by the Enlightenment ideals of autonomy. The First Amendment, created in the Bill of Rights, establishes the freedom of speech, press, and religion; all of which are fundamental to unrestricted learning and self-government. While it seems that the intellectual leaders of the United States concurred with the political philosophy that established the republic, a mistrust of the masses caused Congress appease its fears by occasionally abridging the First Amendment in ways that censor the public, limit learning, and contradict Enlightenment philosophy.

This thesis will examine how the history of the American republic enforces the interpretation of the First Amendment to protect hate speech on public college campuses. In order to illustrate this argument, this study first uses sources of Enlightenment philosophy regarding society, liberty, and speech. The second chapter displays American history and founding documents that created the republic’s social contract and Bill of
Rights. The next two chapters provide commentary by political philosophers and scholars as well as federal court cases that set precedent for the modern courts, which interpret our Constitution and subsequent laws.

As a result, this examination will show that eighteenth century philosophy is embedded in the foundation of the United States such that our modern means of interpretation, the Supreme Court, has consistently reaffirmed Enlightenment idealism in American law. Therefore, the term “freedom of speech” includes most all controversial messages, including “hate speech,” and especially hate speech on college campuses, where education is supposed to be most unrestricted-- exactly as the Enlightenment philosophers envisioned. Thus, we will see how each element of this nation’s foundation colors the history of American public policy and confirms that the view of civil liberty is unwavering and aligned with Enlightenment idealism.
DEDICATION

This thesis is dedicated with much gratitude to those who sparked my interest in public policy and those who supported me in this great endeavor. I would like to thank my thesis mentor at Georgetown University, Professor Terrence Reynolds, and my political science professor at the University of Wisconsin, Donald A. Downs. Of course, I could not complete this project without the guidance of my parents, who taught me always to be a student of life, to question authority, and to engage in civic activity.
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INTRODUCTION

It is our attitude toward free thought and free expression that will determine our fate. There must be no limit on the range of temperate discussion, no limits on thought. No subject must be taboo. No censor must preside at our assemblies.¹

Justice Steven O. Douglas

In the modern era of politics, freedom of speech signifies a society open to ideas, education, and progress, while censorship suggests repression, ignorance, and fear. Because progress requires the free exchange of information, hypothesis, and even error, abridgment of speech is counterintuitive, even if certain ideas seem hateful or dangerous. Thus, the development of the American constitution, which combines Enlightenment ideals of social compromise with individual civil liberties, has no grounds to undermine the modern era’s viewpoint of progress by censoring pure speech.

When evaluating the development of humanity, speech, in conjunction with compromise, demonstrates mankind’s ability to reason and cleverly produce more than merely the daily needs of living. Therefore, we think of the verbal and physical skills of communication as what fundamentally allows for progress, as speech gathers people to rally around these needs in an orderly and efficient manner. In this way, communication is both a human right and a civil liberty—one acknowledged and respected in a community of human beings all struggling for the same goods and enhancement of the quality of life. For the purposes of this thesis, “civil liberty is defined as the rights

allowed in society which the government is prohibited from hindering."² Eventually, this civil liberty would emerge in government ruled collectively by free-speaking people. We know this form of government from the Classical age as “democracy.”³

How democracy has come to dominate the Western world originated with speech; its buds began with the Renaissance and came into full bloom during the Age of Enlightenment. The latter era continues to shape modern government. This period’s philosophy hypothesized that knowing the truth of the world provides opportunity to seek a good life, and acquiring truth comes from selecting the best answers from the free discourse of ideas. In Western democracies today, governments have explicitly embedded the right to free speech as a core political value in their constitutions. By incorporating this value into their written contracts, governments appreciate their origin and endorse the concept that self-government flourishes when there is free speech and all-encompassing education.

In these governments, communication and progress became intertwined and codependent to allow for the pursuit of happiness, collectively and individually. Moreover, the realization of this relationship evolved into maintaining a social order that


reflected the goal of reaching happiness for oneself and enabling this good for others. This is the republican form of democratic government.

At the same time, the Enlightenment’s embrace of speech insists that improving the social order comes from challenging the status quo and authority. By the eighteenth century, the development of widespread literacy, travel, and trade allowed for citizens of all economic backgrounds to acquire experience and knowledge of various cultures and governments. Consequently, contemporary philosophers openly compared forms of governments and voiced the frustrations of living in the repressed conditions of Europe. They determined that the still feudal monarchies violated human rights and maintained an inferior quality of life, as opposed to the proposed alternative of a Neo-Classic form of democracy, which was free from the fears and threats of punishment by the ruling tyrants who were named and criticized. Of course, the monarchies, hearing of these complaints, sought to censor this speech and legislated accordingly, enacting sedition laws to prohibit the free exchange of these ideas.

These political philosophers served as beacons of hope with their published outrage over present conditions and offerings of new systems that would provide a better life. The philosophers mainly disseminated their critiques through literature, passing on their thoughts about the current political struggles to the intellectual leaders. These leaders, in turn, passed on these thoughts to the masses, who would rally and stand for the justice and order they believed to be right, thereby forming a consensus on appropriate ground rules of civil society. These rules grew from consideration of inherent liberty and the agreements, or compromises, needed to live harmoniously in one community.
Philosophers of this time also referred to these ground rules as “ethics”—a code by which everyone should abide. These rules also spurred reformations that brought Western Europe closer to the democracy of the Classical Greek era. Thus, the freedom to speak and engage in discourse created the progression of Western culture from a limited and stifled society to one with an open discussion and an educated constituency. More specifically, freedom of speech and autonomy became codependent ideas necessary for the democracy sought.

While many Enlightenment philosophers focused on the compromise needed in the ground rules for society, one view that became prominent insisted that liberty must not be compromised, lest it lead to a regression of quality and dilution of human achievement. This view attributed progress to unwavering liberty that was allowed because it is aligned with era’s philosophy that man is rational and moral and, therefore, can be autonomous and respectful of other’s autonomy. This ethic is said to be inherent, natural, and duty-based, as every person is aware of a categorical and necessary morality. This uniform goal presents the basis for a social contract, and alongside this basic agreement, such rules were thought to enhance the quality of life and maximize optimal circumstances because of adherence to the dutiful, conservative, moral structure regarding liberty. With both compromise and autonomy in mind, the proponents of this libertarian view believed progress and happiness could be achieved.

This more conservative view of liberty was exemplified by Immanuel Kant from the German principalities, who proposed that ethical creeds are imperative,

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4 Ibid.
uncompromising and crucial to maintaining a community of free individuals. In this sense, there is a duty to behave appropriately because we inherently know the rules are fair, reasonable, and supportive for human well-being. Concerning the essential need for free speech, Kant argued that the individual’s compliance with this innate and reasonable code of ethics will enhance autonomy, for with the security of reason, the freedom to think, speak and act greatly benefits the community. Then, in a social contract, the proper use of these freedoms, and the knowledge of our limits, within the natural and social order, will lend to education and transcendence, resulting in a better, happier life. This concept of a community of free people has played a vital role in the organization of democracy as we know it today, and this enlightened view of man and his capabilities to flourish within the political sphere affirmed the need for unrestricted civil liberties.

Since the Kantian view of liberty held a more conservative stance of the ground rules, this philosophy greatly clashed with the current monarchic regimes and even advocated revolution in order to properly pursue the good life, both for individuals and for the broader society. Further, after revolutions erupted and democracy settled into the Neo-Classic age, this view of civil liberties prompted the founders of democratic governments to ensure that these rights were encapsulated in the documents creating government and order.

In the context of this Enlightenment philosophy, the American founding fathers incorporated the inherent, duty-based view of freedom by ensuring civil liberties through a Bill of Rights. These explicit liberties paralleled the conservative, libertarian philosophy of Kant because they were seen as crucial to any type of democracy. The
view insisted that while most Americans during the creation of the Constitution agreed on
the formation of the union and establishment of a democratic form of government,
equally central to the conversation of the social contract was that the same document
founding the government also ensured the very liberties that had created this political
order.

The centrality of human rights symbolizes a unique part of American public
policy. The term policy refers to the product of structuring conflict and consensus. This
first conflict not only helped shape the Constitution we know today but also planted the
seeds of doubt for posterity when looking to the original intent of the Constitution and
Bill of Rights. Regardless of these founding factions, the Bill of Rights has proven to be
essential, and has been doggedly protected in the Judiciary, created by Article III of the
United States Constitution to interpret law in a light best associated with the
Enlightenment philosophy that prompted the document’s creation.

For the nation’s posterity, the Judicial branch of the United States government
serves as the same beacon once served by the Enlightenment philosophers. The
Constitution and its amendments have been considered vague at times because of the
limited language and room for interpretation. Because posterity only has this plain
language, without a respective dictionary to answer questions not speculated upon by the
founding fathers, many provisions within the various amendments require the Judiciary to
interpret the Constitution with reference to original intent, historic application, and
matters of policy.

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5 Morgan, Law and Politics, 1.
One aspect of the Bill of Rights that has experienced much deliberation in the Judiciary Branch’s Supreme Court is the First Amendment, which includes the freedoms of speech, religion, and association—the ideas that first generated Enlightenment philosophy and democratic government. Cases regarding this civil liberty exemplify the initial struggle between the faction that wanted the inalienable rights attached to the Constitution and the faction that interpreted a stronger and yet more flexible government without requiring this recognition in writing. In its decisions, the Supreme Court has then reflected this struggle, deciding First Amendment questions based on the equivocating history of interpretation of the American Constitution.

History shows that it is in trying times that politicians feared the existence of the Bill of Rights and enacted safeguards to protect the existence of their government, the result being censorship and limited education in exchange for a limited version of peace and order. Later, however, the Court has admitted error in deeming those abridgments valid under the First Amendment. Further, in a number of modern instances, the Supreme Court has separated itself from trends of social fears and reaffirmed the meaning of the First Amendment to perpetuate the Enlightenment’s absolute insistence on free expression, with the exceptions of speech that provoke imminent harm or disturbing conduct.

One modern controversy surrounding the First Amendment involves a newer type of “hate speech,” which refers to words that display bigotry, misogyny, or any bias
against a group of specific identification. This type of speech may include threats to others, but overall, it is signified as “speech” because it relates to ideas and not necessarily action. Unlike speech, action falls into a category where the average member of society, known as "the reasonable person," would truly act upon speech in such a harmful way that could not be prevented. Hate speech tends to be hurtful because society associates these malicious words with crimes that have spurred from the sentiment of the speaker toward the targeted group of people. However, even hate speech can be educational, and as humanity aims to seek the truth, learning about history and different cultures can refute the hateful perspective expressed, ultimately weakening bigoted views.

While exceptions to free speech have rarely been upheld in the Judiciary, the Court occasionally has allowed for the legislature to reflect society’s fear of harmful conduct by placing hate speech under a category exempt from First Amendment protection, as seen in criminal law and university campus speech codes. However, admonishing this speech seems inconsistent with the goals of the founding fathers, who were greatly influenced by the Enlightenment political philosophy, and believed that “hate” speech was exactly what should be protected by the First Amendment. After all, colonial hate speech toward the British government inspired the formation of the very republic they envisioned. Thus, the history of case results in the modern Supreme Court

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tends to show rejection of speech-based legislation and censorship approved by the previous Courts.

In the context of democracy, progress, and the American Constitution, if Enlightenment philosophy aimed to promote reason through education, and insisted on an openness to all ideas, then on what grounds can hate speech, or any form of speech for that matter, justifiably be censored? The adoption of an absolutist view of civil liberties, as seen in the more conservative philosophy of Immanuel Kant, confirms that free speech in the United States’ Constitution has been violated when legislation and judicial interpretation has restricted and restrained certain types of speech. This prevailing libertarian view of the Enlightenment, seen frequently in the Supreme Court, argues that even when society voluntarily compromises liberty in exchange for protection by the government, civil liberties cannot be diminished or else society cannot properly progress and achieve a higher quality of life. Therefore, based on the Enlightenment intentions and the history of legislation and case law reflecting this philosophy, the modern issue of hate speech should fall under the protected category of speech the First Amendment provides.

This paper will investigate the modern abridgements to freedom of speech in America and reappraise the moral justifications, in reference to the Enlightenment, for the subsequent abridgments later seen in hate speech legislation considered valid in America today.

This argument will begin with an analysis of the Enlightenment and its rational view of government and speech, focusing on the two schools of thought that the United
States would eventually adopt: Utilitarianism in government and absolutist ethics for speech and other liberties. The following chapter will explain how the Founding Fathers of America came to adopt the Enlightenment philosophy and embed its ideals in the Constitution and Bill of Rights, both of which support absolute civil liberties and the importance of the rational individual within the community. I will also indicate how the Bill of Rights not only enforces the Kantian categorical imperative, but also has endured the conflicting ideals of government in America.

From the establishment of this philosophy in the United States, the next chapter will tour the background of the First Amendment. This history then will move to examine how the Supreme Court has properly protected the intent of the First Amendment, overturning erroneous speech laws enacted in times of political turmoil that skewed the view of order and liberty. Lastly, I will bring this argument into the modern conflict surrounding hate speech and explore the impact of precedent on this contemporary struggle.

In sum, the First Amendment has withstood fearful times and temporary abridgments because of the overriding and fundamental influence of the Enlightenment philosophy on the framers of the Constitution. If we look to the history of legislation and case law surrounding free speech, the pattern will show that hate speech is not a problem of the First Amendment, but rather a symptom that an abridgment of civil liberties will only make worse, creating more ignorance and violence than initially feared by proponents of censorship.
CHAPTER 1
THE ENLIGHTENMENT: ITS PHILOSOPHERS AND PURPOSE

This chapter will examine some of the various moral and political philosophies of the Enlightenment era. These theories provoked the contemporary Western European societies to realize their potential, encouraged them to revolt, inspired them to use their intellectual resources as a guide to properly execute a democratic experiment proposed by the Enlightenment. From various perspectives of self-government, it will be clear that the American colonies felt it to be their destiny to boldly challenge the British monarchy and pursue their own republic where individuals could appreciate their autonomy and, through liberty, acquire an education based on their search for truth that would help themselves and others in their community.

While a radical departure from traditional thought in the European courts, the Enlightenment introduces the importance of reason and deliberation. Thus, this chapter presents the history of the Enlightenment’s viewpoint from human reasoning to human interaction. I will show both the common goals of this era’s philosophers as well as the subtle yet unique aspects of each thinker’s logic regarding government, liberty, and speech. Each philosophy affected the American republic, and more specifically, we will see how the philosophy of Immanuel Kant provided the foundation for civil liberties as a necessary institution for democratic government. Moreover, the Kantian view of absolute civil liberty will enforce freedom of speech as an essential agent for bringing about the balance of autonomy and communal progress in the political sphere.
**Enlightenment Precedent**

The Renaissance of the fifteenth and sixteenth centuries ignited Europe with the humanist tradition, a philosophy and culture that embraced a more secular, intellectually curious view of the world and how people should relate to each other. Religion and philosophy shared the quest for creating laws based on the intrinsic ideals of aesthetics, goodness, and truth.¹ Humanists emphasized the importance of a community that respected its individuals and ventured that only in this cooperation can progress be achieved.² These earlier centuries only began to understand that cooperation comes from man’s ability to reason and be both self-aware and aware of others.

In the seventeenth and eighteenth century, the Enlightenment developed political philosophers and intellectual leaders who took the premises established in the Renaissance to assess the priority on human life and freedom in the scope of government and society.³ At this point, they were humanists who opposed tyranny and worked to “depose blind faith, combat credulity, and stamp out superstition.”⁴ Instead, these thinkers advocated using the mind and the senses to reason and gauge what is good and possible in the capacity of human faculties.

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² Ibid., 11.

³ Ibid., 10.

These philosophers defined “reason” as the aspiration to acquire good, separating it from harm to oneself and others.\(^5\) It follows from here that man may participate in society, contributing to and enjoying the effort of the community to enhance the quality of life.\(^6\) Thus, while man must use his individual freedom to think and act, the collaboration of humanity in one community fosters a trust among men to live together with both self and public interests in consideration.

Like the Renaissance, the Age of the Enlightenment believed in human progress and followed the lead of science by implementing reason to stabilize and enhance the quality of life. A new, rational culture developed. It has been argued that the Enlightenment began with the scientific foundations of Sir Isaac Newton in his publication of *Mathematical Principles of Natural Philosophy*.\(^7\) The formulas and scientific foundation of this treatise extended to broader discussions of humanity and the nature of reasoning. For example, one premise of Newton’s is that man is an individual with isolated and yet connected rights in the common concept of humanity. Because of this connection, man seeks the good by relying on his natural make-up, and this notion implies a uniformity of desires among mankind which promotes the possibility for cooperation and appreciation for the life and autonomy of others.\(^8\)

\(^5\) Ibid.

\(^6\) Ibid.


\(^8\) Ibid.
Development of the Social Contract

This later era broadened humanism to apply to both the daily interaction of the community and the establishment of social order—government. Enlightenment philosophers grounded the idea of a self-ruling government by the people—democracy—in their trust in humanity to respect and care for itself through a dually inherent and explicitly expressed social contract. However, while most philosophers agree on the definitions of reason and community, each philosophy differs slightly regarding the theory of how best to relate liberty and compromise, looking at both the means and end of moral conduct.

These philosophers did agree that the purpose of social and political order was to achieve the greatest good for each person. According to classical liberal theory of the eighteenth century, “good” refers to the quality of life achieved by individuals in the state of nature most beneficial to mankind’s progress. The era argued that the acquisition of good came from knowing the utility of items and services. Therefore, it was crucial that the social order encouraged and permitted humanity to, as Voltaire phrased it, reason by “seeing things as they are.”

At the time, however, the monarchs of this part of the world ruled with a tight fist, limiting liberties for their subjects, as they feared usurpation of power. Therefore,

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9 John Christman, “Autonomy in Moral and Political Philosophy,” in The Stanford Encyclopedia of Philosophy, ed. Edward N. Zalta, (Summer 2003 Edition), (available at: <http://plato.stanford.edu/entries/autonomy-moral/>) (accessed on June 12, 2010). For the purposes of this argument, liberalism can be defined as that which embraces the good that originates from respecting each individual's autonomy and personal pursuit of good.

because European despots restricted the ability to properly reason, truth was obstructed, and mistrust and resentment for authority developed.

Because of these oppressive times, philosophers deliberated the progress of humanity and noted that the reason discussed during the Enlightenment originated from a necessarily gradual process. Jean-Jacques Rousseau (1712-1778), a French philosopher, assessed the history of humanity and the nature of human progress. He determined that the nature of modern man comes from an evolution from primitive isolation to an agricultural phase, based upon a limitation of resources resulting from a growth in population.11 Man’s nature prompted a need to secure basic needs, and to cooperate with a group of other people seeking the same basic necessities. In turn, the acquisition of optimal benefits required cooperation among all. The reasoning behind this collaboration facilitated a recognition of morality as being a basic social good.

To English philosopher, John Locke (1632-1794), the social contract and incentive to behave arises from the natural limitation on resources. This scarcity provokes fear among individuals that they will not attain basic necessities when in competition, and so, instead of allowing for animal instinct to control, the social contract provides relief from social conflict through the enforcement of private property and respect for others’ good. Locke, like Rousseau, believed in human progress, advancing the idea that it was important during a period of expansion of the human faculties to keep

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11 Ibid., 92.
a “just mean between the indolence of the primitive state and the petulant activity of our egoism.”¹²

Locke saw a moral evil in hoarding basic material goods, but believed that rivalry and competition were necessary in promoting progress.¹³ Locke also concludes that the relationship of morality to reasonable public policy is nothing more than private law expanded to the community. The state is necessary to ensure progress by providing services for the community that will enable individual pursuits and, of course, civil liberties are incorporated into both private and public aspects of this political order because this freedom is an inherent good that will help achieve progress for all.¹⁴

Locke emphasized the importance of private law and public policy as a written representation of consent by individuals. In his *Second Treatise on Civil Government*, he noted:

> Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent, which is done by agreeing with other men to join and unite into a community for their comfortable, safe and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it. This any number of men may do, because it injures not the freedom of the rest; they are left as they were in the liberty of the state of nature. When any number of men has so consented to make one community of

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¹² Ibid. The struggle between primitive instinct and social progress will be seen in the debates revolving around the American Constitution when the Federalist party feared mob rule as a result of too much autonomy and insufficient compromise, while the Anti-Federalists demanded civil liberties promised as a means to a better, more considerate society.

¹³ Ibid., 93.

government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest.\textsuperscript{15}

Therefore, Locke avers that a successful government of the people comes from men being naturally inclined to compromise and to protect certain liberties. He reasons that in reaching goals of individual progress and happiness, public and private law will form a government organically. Locke also asserts that neither one of these aspects by itself completes his concept of right. In terms of government, the consent is voluntary, and government is a tool that consistently depends upon the willingness of the people from every region. Geographic unity and the voluntary aspect of this contract must be ensured as these requirements are what secure peace and property. These principles would later play a very important part in the American colonies breaking away from the British crown.

Rousseau, on the other hand, does not assert that humanity is programmed to collaborate and strike a peaceful balance amongst each other. He did, however, state that social good is naturally and mathematically a sum of individual goods and rational desires. The recognition of this fact leads to a necessary willingness to seek a common relationship in order to balance the discord between nature and reason—man’s inner and outer self.\textsuperscript{16} Therefore, a social contract manifests the community’s need to compromise on non-essential preferences and desires for the sake of maintaining morality and basic social good. Rousseau reasons that over time, society will evolve from its original,


\textsuperscript{16} Anchor, \textit{The Enlightenment Tradition}, 93.
primitive state,\textsuperscript{17} and such an arrangement of compromise will provide for the progress and higher standard of living sought.

Rousseau recognizes that once individuals decide to cooperate and work together, they will achieve what he calls the “general will.” This philosopher believes that even though humanity’s modern state is corrupted and irreparable, man may seek to progress and achieve good. However, there is a constant struggle with the primitive instincts and fear of other like-minded individuals. Ultimately, this struggle, when voiced in the proper reception of a society governed by its own contract, will be heard and answered according to the collaboration and empathy inherent in a community of similar individuals.

\textbf{Utilitarianism}

During the eighteenth century, English philosopher and economist Jeremy Bentham (1748-1832) captured most of the ideals of the Enlightenment, ultimately reducing human reasoning and communal compromise to merely seeking maximum pleasure and minimal pain.\textsuperscript{18} Bentham referred to this goal as the “happiness principle,” which is the basis of his principle of utility. In his \textit{Introduction to the Principles of Morals and Legislation}, Bentham writes the following:

\begin{quote}
Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we
\end{quote}

\textsuperscript{17} Ibid., 97.

can make to throw off our subjection, will serve but to demonstrate and confirm it. 19

The happiness principle suggests that pain and pleasure cause action to seek pleasure and prompt the individual to define his own good. Subsequently, good as an end goal affirms Utilitarianism as a system of consequence-based ethics. In this system, maximum benefit produced is the factor used to determine the morality of the action causing the result.20

Moreover, Bentham asserts that good can be both an individual and a communal goal. He concedes that “self-regarding interest is predominant over social interest; each person’s own individual interest over the interest of all other persons taken together.”21 However, utility comes from individual reasoning, and should improve aggregate happiness, so compromise is a fundamental aspect of human nature. Therefore, the individual’s interest ties to the community’s interest when finding optimal happiness in a given situation.

Conclusively, Bentham proposes that aggregate happiness is of greater importance than individual happiness, but only in the sense that individuals will be happy because they are doing what is best for the community. He urged the view that the happiness principle is “the standard of right and wrong in the field of morality in general,

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19 Ibid.
20 Ibid.
and of government in particular.”22 Therefore, striving for this goal requires a willing
government of people to both desire good and to empathize with one another, sharing
both success and failure. In the context of social and political order, Bentham invests in
the social contract shared with Rousseau and Locke, shaping Utilitarianism to insinuate
compromise and asserting that the only justifiable criterion for morality is that which
maximizes the general will.

The Utility of Free Speech

From the utilitarian point of view, society must regulate liberty and conduct with
consequences in mind. This means that society may only use freedom of speech as an
instrumental value, not as an intrinsic one. Bentham sees physical harms and other
societal problems provoked by speech. He argues that the resulting confusion cause by
free speech takes away from society’s aggregate happiness and diminishes the good that
speech can provide when appropriately used.

Another utilitarian perspective comes from John Stuart Mill (1806-1873),23 a
philosopher who wrote his Enlightenment influenced concepts in the nineteenth century
and subsequently maintained the Enlightenment views in democratic-focused nations.
Mill believed that utility should be couched in terms of the “harm principle” that “the
only purpose for which power can be rightfully exercised over any member of a civilized


Speech: A Treatise on the Theory of the First Amendment. (New York: Matthew Bender, 1984), §§1.01-
1.03.
community, against his will, is to prevent harm to others.” Therefore, free speech enlightens the marketplace of ideas—the place where speech would be accepted as truth and good only by a majority which would “consume” the message. In his treatise, On Liberty, Mill takes a deep look into freedom of speech, and argues that it is the foundation of liberty and government. He targets the nucleus of speech and its communicable purpose by agreeing with his contemporary philosophers that truth is at the core of both freedom and cooperation within a community.

Mill also emphasizes the importance of speech as educational and quite necessary for progress and communal happiness. He warns that though the political world seeks universality in truth, all determinations of truth require the consensus of the collective citizenry. Therefore, those members of society who desire to suppress a certain idea by censoring speech then “deny its truth, but they are not infallible. They have no authority to decide the question for all of mankind and exclude every other person from the means of judging.”

Mill maintains that free speech gives lawmakers the opportunity for further searching and brings the community closer to the pleasure and harmony to which Bentham refers. Thus, individual speakers provide insight that the community may

24 Ibid.

25 Ibid. In Chapter 3, we will see Supreme Court Justice Holmes adopt the view of the “marketplace of ideas,” which is an inherently libertarian view of speech and the democratic community. See Abrams v. United States, 250 U.S. 616 (1919).

26 Ibid.

accept or respect, but either way, society is given the chance to learn and decide the usefulness of the message.

**Kant and his Moral Duty**

Immanuel Kant (1724-1804), a late Enlightenment philosopher from Austria-Hungary, lived during the transformation of Europe during the Enlightenment, and his philosophical predecessors in Western Europe were critical in his views on society and morality. Kant agreed with many basic concepts of Locke, Mill, Rousseau, and others, concerning the power of reason, but he also advanced liberty as an absolute necessity. Although his philosophy represents a conservative view, the importance of his positions helps shape the notions of self-government and protection of civil liberties we know today.

In basic ways, Kant concurs with many of his Western predecessors and contemporaries in regard to the necessity of standards of rationality in the understanding and achievement of leading a free and moral political life within a community of individuals. However, Kant’s doctrine also diverges from other Western philosophers’ view of reasoning when he applies the rational will to morality. What distinguishes Kant from some of these philosophers is that he built a morality structure similar to the Newtonian, scientific understanding of human nature, and set about carving out ethical rules that must be dutifully followed without exception. This theory differs greatly from the more flexible Utilitarian ideas of Jeremy Bentham and John Stuart Mill.

The Kantian ethic explains how autonomous reasoning generates moral principles that are duty-based (*deontology*) rather than consequence-based (*teleology*). Kant insists
on *a priori* morality, which is a method seeking moral principles as achieving inherent good rather than instrumental good.\(^{28}\)

Though this theory is similar to the views of Rousseau and Mill, the duty-based ethic separates Kant from the other Western philosophers because of the emphasis on the priority of the individual as the basis for reason and good. Still, this philosophy is deeply grounded in basic concepts of the Enlightenment. In 1794, Kant addressed the relationship between his morality and the Enlightenment by simply proposing the question, “What is Enlightenment?” To answer, he determined:

> Enlightenment is man's emergence from his self-incurred immaturity. Immaturity is the inability to use one's own understanding without the guidance of another. This immaturity is self-incurred if its cause is not lack of understanding, but lack of resolution and courage to use it without the guidance of another. The motto of enlightenment is therefore: Sapere aude! Have courage to use your own understanding!\(^{29}\)

If enlightenment is the emergence from ignorance into knowledge, then man must have the freedom and ability to reason in order to achieve the progress needed to acquire good. Kant defines freedom as making public use of one’s reason and not relying on others for guidance that can be acquired by ourselves.\(^{30}\) Here is where Kant differs from his contemporary Enlightenment thinkers because while humanity is united in the ability to reason and act, Kant creates a doctrine that the rational will, which will contribute to the general will, must be both autonomous and derived from the creator of laws to which

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\(^{28}\) Ibid., 20.


\(^{30}\) Ibid.
man will commit himself. This doctrine becomes the categorical imperative, and this imperative to reasoning will then apply to all individuals who make the effort to use their rational will in order to know what is universally good for themselves and for others.

This individual reaches conclusions based on critical self-reflection, which will be discussed in more depth later. Primarily, reflection has been understood as involving an appraisal of one's desires, testing them for internal consistency, their relation to reliable beliefs, and considering other reason-based factors. Thus, because mankind is already aware of what is good, Kant establishes a moral responsibility innate to the species of rational beings, and this duty will carry on to determining one’s ethical obligations.

Kant initiated several of his philosophical positions in *The Groundwork of the Metaphysics of Morals* (*Groundwork*), and though he claimed a rigid moral structure, he altered some of those views in later works, but his ethics do not waver. Collectively, his works tie Kantian ethics, especially the imperative, to the Enlightenment thought that would provoke declarations of civil liberties for the burgeoning democratic governments of the late eighteenth century.

In the *Groundwork*, Kant constructs his moral creed to apply to every known or hypothetical situation the same way because, like the physical sciences, the formula of morality does not change. Morality always aims to achieve good, and goodness is known by all of humanity in the same ways. This premise begins the categorical imperative,

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31 Ibid.

32 Ibid.

which is the notion that a maxim that produces good must be inherently good and universal in application.\textsuperscript{34}

Kant first creates the categorical imperative and rejects teleology by stating that one is to “act only in accordance with that maxim through which you can at the same time will that it become a universal law.”\textsuperscript{35} If one’s maxim of action can be universalized without contradicting itself, the action is a duty. Further, Kant recognizes that to avoid contradiction, duties have degrees that Kant names as "perfect and "imperfect" duties.\textsuperscript{36} Respectively, they are those that directly affect the self and indirectly affect others, and those that indirectly affect the self and directly affect others.\textsuperscript{37} Combined, these two categories produce the imperative morality known by humanity through reason and nature. Through the universal principle, Kant insists that uniformity is part of the essence of the duty. Thus, he looks at the inherent and normative nature of goodness rather than its consequences.

This concept leads Kant to an aspect of the categorical imperative which emphasizes the principle of ends. The imperative demands “a certain line of conduct

\textsuperscript{34} Paton, \textit{The Categorical Imperative}, 20.

\textsuperscript{35} Kant, \textit{Groundwork}, 421.

\textsuperscript{36} Paton, \textit{The Categorical Imperative}, 20.

\textsuperscript{37} When reviewing the concept of self-government, the requirements of the individual are familiarized as perfect and imperfect duties of Kant’s imperative because, while an imperative is uniform and unmoving, these maxims offer much consideration for the community of individuals. One person has a duty to be and act with reason and moral law, and this recognition of duty enables and limits this person’s autonomy to enjoy civil liberties as much as he can, provided that these rights stop where others’ rights begin. We will see in the American republic that, although the intellectual leaders of America prepared themselves for an Enlightenment-based government, some still feared the people with society who would abuse such liberties, without fully understanding the reasoning and morality required to exercise autonomy properly.
directly, without assuming or being conditional on any further goal to be reach by that
cconduct.”\textsuperscript{38} This formulation rejects the consequence-based goal by indicating a breach of
duty through abuse when we rely on others to acquire good. Kant relates that "an action
done from duty derives its moral worth; not from the purpose which is to be attained by
it, but from the maxim by which it is determined, and therefore does not depend on the
realization of the object of the action, but merely on the principle of volition by which the
action has taken place, without regard to any object of desire."\textsuperscript{39}

Further, Kant extends this rule specifically to interaction between people, offering
that one should “act as to treat humanity, whether in thine own person or in that of any
other, in every case as an end withal, never as means only.”\textsuperscript{40} These duties affirm that
humanity should only conduct itself in the “kingdom of ends” and cannot use ourselves
or other as means to ends because good will not be achieved.

Kant's categorical imperative is accepted in the sphere of Enlightenment
philosophy because the duty of morality protects freedom, education, and safeguards
against preference, which violates the duties of the imperative and produce negative
results.

The Kantian imperative confirms that there is a duty to the self, and in turn, a
duty to respect each other's freedom and autonomy because society represents each
individual, who are all similar in physical and moral make-up. Observing this duty is

\textsuperscript{38} Kant, \textit{Groundwork}, 416. Quoted in Ibid., 20.

\textsuperscript{39} Ibid., 400.

\textsuperscript{40} Ibid., 46.
connected to seeking enlightenment, and, consequently, the individual “will disseminate
the spirit of rational respect for personal value and for the duty of all men to think for
themselves.”\textsuperscript{41} Therefore, the violation of autonomy by one is a violation for all. The
knowledge of one suffering by the hands of another, which is a violation of autonomy,
requires us by moral law to defend our humanity.

Kant also indicates that very few people within a community truly exercise
freedom and reason. Thus, while he has a system of social compliance and morality
based on an individual’s reasoning, he also sees the Age of Enlightenment as an era
meant for establishing bodies of government necessary to enforce the rules by which
those who follow others will abide.\textsuperscript{42}

Through the realist view that not all people reach this rational and moral potential,
he asserts that a government must then be formed to provide for the interest of the
commonwealth. By reviewing his understanding of the individual, freedom, reasoning,
and the rational, moral man’s place in society, Kant applies the Enlightenment’s
revolution of humanist thought to the morality required to form an appropriate
government and to retain civil liberties. Kant uses the same term of “general will” and
“social contract” from the works of Rousseau in order to describe the nature of political
order.\textsuperscript{43} However, for Kant, the purpose of the united will is to enable people to have

\textsuperscript{41} Kant, \textit{What is Enlightenment?}, 1.

\textsuperscript{42} Ibid.

\textsuperscript{43} Ripstein, “Private Justice and Public Justice: Kant and Rawls,” 1428.
their needs met in a way that is consistent for all, having the same rights. The public nature of this order makes the respect for others’ rights enforceable.\textsuperscript{44}

At the same time, Kant believes that while the categorical imperative provides a moral compass, the government must have authority, through morally diligent leaders, to restrict some individuals who fail to act with reason. Therefore, government needs a “mechanism whereby some members of the commonwealth must behave purely passively, so that they may, by an artificial common agreement” achieve public ends.\textsuperscript{45} With the goal of pursuing the public interest, the roles of individuals in society aforementioned play into Kant’s focus on moral duty. While there are people who must behave passively, or be restricted, in order for society to function and care for these individuals, there are times when the intellectually engaged and progressive citizen must be passive as well, according to the appropriateness of the time and manner and duty to the self and, in turn, community.

In the context of Kant’s home in Prussia, he makes a literary gesture to the prince, praising the monarch who accepts the benefits inherent in the individual’s freedom and duty that self-governs each person.\textsuperscript{46} Coupling freedom with education, openness, and speech, Kant praises a monarch who creates an environment where one may “publicly

\textsuperscript{44} Ibid.

\textsuperscript{45} Kant, \textit{What is Enlightenment?}, 3.

\textsuperscript{46} Ibid.
submit to the judgment of the world their verdicts and opinions, even if these deviate here and there from orthodox doctrine."47

He also refers to governments abroad, such as the United States, that are now “a shining example of how freedom may exist without in the least jeopardising public concord and the unity of the commonwealth.”48 Kant shows faith in this self-governing system, believing that “[m]en will of their own accord gradually work their way out of barbarism so long as artificial measures are not deliberately adopted to keep them in it.”49 Here, Kant is approving of not only the frightening French Revolution, but also of the successful creation of the United States of America, which would adopt clauses for civil liberties with an intent to interpret these freedoms in a manner similar to the categorical imperative, without room for abridgment so long as no harmful conduct was involved.

**Kant and Speech**

Using speech to protest is then a civil, desirable way of communicating and affecting change because it provides a necessary method of education and choice. In the essay defining Enlightenment, Kant emphasizes the necessity and appropriateness of a verbal medium, asserting that it is an innocuous form of working toward progress. Kant proposes that “a man of learning who may through his writings address a public in the

47 Ibid., 2.
48 Ibid.
49 Ibid.
truest sense of the word, he may indeed argue without harming the affairs in which he is employed for some of the time in a passive capacity.”

Using speech serves the democratic community because outrage, protesting, and other publication provide the proper means of educating and enlightening society in order to make optimal decisions. Kant argues that free speech does not lead to harm because an individual fulfills his moral and social duty when he works toward progress. Kant connects enlightenment to the “citizen [who] does not contravene his civil obligations if, as a learned individual, he publicly voices his thoughts on the impropriety or even injustice. . . .”

On the hand, using speech only to provoke negative reactions by society violates the maxim not to use people, or ourselves, as means to ends. The latter use then does not educate in the manner by which a democracy may flourish. Further, in violation of the categorical imperative, the latter speech may not be protected by the "innocuous" notion because the negative response and using of people falls under the category of misconduct with no intent or production of good.

The Application of Political Theory

In light of this diversity of philosophy, the Enlightenment theory committed the era to establishing universal truths derived from reason and not traditional authority. Rene Descartes asserted that he had always desired “to distinguish the true from the

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50 Ibid.
51 Ibid.
false.” 53 This search for truth, reason, and good evoked distrust for traditional authority, which, in Europe, denied its subjects the right to educate themselves and question the above authority. Therefore, the Enlightenment theories that encouraged truth and good seeking required that political order consists of both freedom and compromise to become a part of a society that works to achieve common values. This compromise, like the one posed by Rousseau, would embody civil liberties and restrict certain types of conduct that create only harm in order to harmonize individuals into one community. The bargain of these two elements then creates “some form of social contract entered into by rights-bearing individuals: individuals give up a portion of their natural rights to secure civil order.” 54

The application of this social contract began to appear in the seventeenth century as a supplement to the existing monarchical rule. For example, in 1689, England experienced a remarkably bloodless transition of power when James II abdicated his throne, passing over power to his relatives William and Mary of Orange. 55 In an effort to appease British citizens wary of a new family in power to replace the Tudor family descendents, which had ruled in England for over two centuries, Parliament passed the English Bill of Rights, which was the first truly publicly focused legislation since the


Magna Carta of 1215. The English Bill of Rights lacks protection of free speech and other specificities, but it still provided more at its time than any other era and transformed England into a constitutional monarchy.\textsuperscript{56}

At this point, the American colonies, which had a conjoined history with Britain, enjoyed the civil liberties permitted by the crown. However, when the colonies began to lose some of these crucial rights, especially the limited freedoms surrounding speech and the press, it would not be long before the Enlightenment philosophy persuaded America to start a revolution and bring about a political experiment where liberty would be the keystone for the existence of society and social order.

In this chapter, I have shown how the Enlightenment aspired to raise the expectations of humanity by building a functional community on both self-reliance and social responsibility. With a carefully guided argument for reason and morality, the philosophers of the seventeenth and eighteenth centuries advocated self-government and respect for individual rights.

From here, the following chapter will examine the formation of the American republic, and how the Enlightenment influenced the creation of the Constitution and Bill of Rights. I will also show how the Kantian absolute view of civil liberties is crucial to complementing the adoption of the more cautious Utilitarian view of the social contract. Both are seen in the American founding documents, but we will see that without civil liberties, democracy cannot be successfully executed.

\textsuperscript{56} Smith, “Recovering (From) Enlightenment?” 13.
CHAPTER 2
THE ENLIGHTENMENT AND AMERICAN CONSTITUTIONALISM

This chapter will display how the Enlightenment philosophy infiltrated American culture and politics through the contemporary literature distributed and the open forum for speech, provoking revolution and democratic social order reflected in the United States Constitution. Specifically, we will see how the Kantian, absolutist view of civil liberties compelled the majority in Congress to amend the Constitution with a Bill of Rights as a presumed condition to the social contract. Therefore, the creation of the First Amendment also follows the Enlightenment philosophy, which provides the guidance for its foundation and interpretation.

Creating the Enlightenment’s Republic

The historic principles that led to the gradual evolution of the European Old World would drastically shape the New England colonies through revolution. The leaders of America decided on an experimental democratic republic, having at hand both the philosophy of reason and the advantage of a clean slate, or what Locke called a “tabula rasa.”

As the European philosophers published their views of humanism, which advocated respect for and trust in the people through a more representative form of government, the American colonists developed these views and began to devise a way to emancipate themselves from their distant and tyrannical English ruler and to create the republic sought by the Enlightenment.

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The influence mainly came from Britain and France. The latter country played a role in the development of western European civilization, influencing the empires and nations with its fashion, culture, and politics through commerce and literature. France also became a center for political philosophers to gather and conducted discussions on metaphysics, morality, and the current status of government and social frustration.

America was destined to embrace the United States Constitution because of the belief in and devotion to the nation’s embodiment of Enlightenment philosophy. As early as 1765, John Adams, the future second president of the United States, declared that all of America’s previous history had “pointed toward eighteenth century Enlightenment.” Adams argued that the seventeenth century colonists had set the stage for “a grand scene and design in Providence for the illumination of the ignorant and the emancipation of the slavish part of mankind all over the earth.”

The Revolutionary War became the zenith of this historic sea change. With severed ties from Britain’s tyranny, the citizens of America understood that their precedence made them the “most enlightened nation in the world.”

Revolutionary leaders’ idea of freedom proved to be “shared by enlightened British, French and German eighteenth century reformers as well.”

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4 Ibid.

anticipated imminent, drastic changes to society. In 1764, he observed that “we are approaching a state of crisis and the century of revolutions.”7 From the perspective of a French philosopher in Prussia, Voltaire agreed that “everything [he sees] sows the seeds of a revolution which will not fail to come.”8 Similarly, Thomas Jefferson, an intellect of the Virginia Commonwealth, understood the patterns of history and politics. In 1787 from Paris, Jefferson reflected upon the War of Independence and asked “what country before ever existed a century and a half without a rebellion? . . . The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.”9

Persuaded by the ideals of the Enlightenment and need for revolution, the Founders of the impending American nation continued to recognize the Enlightenment philosophy and determined that the thirteen colonies were already fairly independent from the British motherland. Thus, self-government was quite possible. Further, these leaders understood the ability and versatility of speech to influence political change throughout the vast stretch of the American east coast.10 They implemented that very power to serve the political results they so desired, and in turn, they professed that the public voice, or vox populi, was the element by which democracy was grounded and developed. Publication en masse encouraged the colonies to unite and fight against

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6 Ibid., 169.
7 Ibid., 28.
8 Ibid.
9 Ibid.
Britain for sovereignty, and further communication would play an essential role in bringing America toward peace and order.

The Declaration of Independence serves as the official medium of communicated that severed ties from the Britain and created the sovereignty of the original thirteen colonies. Drafted by Thomas Jefferson on July 4, 1776, the Declaration of Independence redresses grievances of the New England colonies by stating the violations of humanity and civil order experienced under British rule. The Declaration intends for political order of the colonies sovereign from England and refers to the Enlightenment’s foundation: the pursuit of happiness, which Jeremy Bentham calls the “happiness principle” and what Jefferson knew from the French as “la recherché du bonheur.”

**American Constitutionalism**

After the Revolution, the formation of the union depended upon the same ideals that sparked war. Without the immediate adoption of the Constitution as we know it, there was social unrest in New England. Rebellions broke out in the then-commonwealth states, evoking doubt as to whether America was prepared for the freedoms avowed in the Enlightenment. However, rebellion also reinforced the need for the type of

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13 Ibid.

government suggested by the Enlightenment, which showed compassion for political struggle and strove to represent the needs, shown by unrest, in a civil manner.

The intellectual leaders of America held steadfast to the Enlightenment philosophy and worked toward properly representing these ideas in a realistic manner fit for an entire nation. First, and foremost, with thirteen colonies stretching across the east coast, these leading politicians determined that democracy would be best served with a republic—a government that would represent the regions of the country with delegates who would in turn represent their regions’ people and needs in order to be happy and better develop the union.15

Even before America’s leader decided a republic was best for the nation, the American people, aware of the Enlightenment theory of self-government, questioned both the power of the government and the power of the masses, unsure that a balance could be properly struck. How would the social contract stand the test of time as both a social compromise and an endorsement of the civil liberties fought for in the war of independence?

James Madison, considered the Father of the Constitution, connected the Enlightenment philosophy to the ideal of a republic, ensuring that the guidance that prevailed in the Revolution would prevail in the political order subsequent. In 1792, Madison praised the nation’s “great charters,” which would reflect the Age of Reason. He addressed the issue in awe, stating “how devoutly is it to be wished, then, that the public opinion of the United States should be enlightened…and that it should guarantee,

with a holy zeal, these political scriptures from every attempt to add to or diminish from them.”

Although reason encompassed the ideals of the Enlightenment, the people used pragmatism to doubt the possibility of executing such a document and actual application of the philosophy. This cautionary approach to the republic led to the initial union of the thirteen colonies, known as the Articles of Confederation. However, this collaboration had no power for either the government or the people. In fact, the Articles proved to be more of a war-time alliance than a social contract. The Articles did have a Declaration of Rights, but without a strong government, there was no enforcement. Thus both government and civil liberties were rendered unachievable under these documents.

After this trial run for a social contract, intellectual leaders from each colony reconvened in Philadelphia in the summer of 1787 to establish and ratify a stronger, timeless social contract, as seen in the Constitution. Although a second proposal, the American Constitution follows Enlightenment philosophy arguably better than the Articles of Confederation because of theory of reason and morality which balance the government’s authority and limitation. The basic foundation of reason lends to two aspects of implementing a Constitution. First, it guides the document to create a government consisting of citizens who will properly represent the people’s interest. This

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19 Kahn, “Reason and Will,” 450.
is because the representatives are among the people and share these interests and rationale. Secondly, the philosophy weaved into the Constitution is timeless in that it seeks progress and the public welfare. Thus, even though technology and political controversy may change, posterity will interpret the document with the same reasoning and understanding in mind as the original creators of the government.

The Constitution also sets a properly balance amongst the various parts of government. In order for the republic to function, the Constitution compartmentalizes three branches of government to separately legislate, interpret, and enforce the laws of the land.20 Within Congress, the majority of the delegates discussing this formation of government believed that the republic’s constitution embodied the foundation of the Enlightenment era. However, several of these leaders proclaimed that the Constitution was missing the most important and fundamental part of the Enlightenment philosophy: the very liberties, safeguarded in a Bill of Rights, which government was forbidden to abridge.21 To these leaders, a constitution needs to prohibit certain acts of government that may be in the name of public interest but actually hinders equally important, if not more imperative, civil liberties.22

The dilemma to permanently document inalienable rights also exposed the problem in a republic concerning reconciliation of majority rule and minority rights, and transforming natural rights into solid civil liberties. The question to be answered, or

20 See United States Constitution (1787).

21 Ibid.

unanswered, was whether there truly is “a conflict between liberty understood as individual freedom from public restraint and liberty understood as the activity of communal self-restraint.” However, to the minority in Congress, the Enlightenment basis for the republic would disagree that civil liberty would ever come into opposition with communal welfare because the Kantian imperative shows that it is when civil liberties are absolute that autonomy benefits the society of individuals.

This objection raised yet another debate for Congress, and while the Constitution was embraced by the states, beginning in December of 1787, other states hesitated to accept the document without a bill of rights, which would encapsulate the view of the Enlightenment: absolute freedoms that were considered natural and inalienable.

At this juncture, factions became quite prominent, causing much confusion and turmoil amongst American society as to whether or not the Constitution with a Bill of Rights, would empower a tyrannical government or not grant enough power to protect the citizens of the union. With the Constitution already established, the two parties took on clear identities with respect to the strength of federal government. The Federalists favored a strong centralized government, and the Anti-Federalists opposed a centralized government that had no explicit civil liberties protected.

The Federalists took their position based on the presumption that rights which were not given to Congress explicitly remained with the sovereign people, and with fear of the mob rule were the Constitution to grant more liberties than government authority.

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In this way, the faction showed the already prominent distinction of classes and education in the new republic.

Representing the Federalist faction with his ideals, John Randolph, a Virginia statesman and drafter of the Virginia Constitution, mistrusted the masses of people, referring to them as a “herd” even with literacy and participation in the community. Leaders like Randolph ignored the pleading for a portion of the Constitution establish clearly the human rights recognized by a republic and resented the ratification of the Bill of the Rights as the conclusive compromise between the two schools of political thought.

At this time in the early 1790s, these rights applied to only the participating citizens with land and voting rights and not to the “ignorant vulgar,” even though the latter group consisted men who equally served as this philosophy’s audience and fought in the Revolutionary War for these very causes initiated by the founding fathers. Nonetheless, the Federalists remembered the previous rebellions and feared civility and order would be drowned out by the masses, for these veterans of war knew the Enlightenment intimately through their war experience and wanted the very rights fought for: to speak and be free.

On the other hand, intellectual leaders proved the possibility of social order and opportunity for all through the reality of the Enlightenment efforts. Again, speech played


an important role. Because of the free-flowing publications encouraged by these times, newly educated non-land owners joined the intellectual leaders and began to grow into various groups of independently-minded Americans with diverse political views, and the ordinary men joined in with these groups as literate participants of politics.\footnote{Thompson, “James Madison: The Idea of Fundamental Law,” 245.}

Consequently, the audience for political speech expanded to include more classes of men, from the refined gentleman to the working class. Moreover, by the late 1790s, all free white men could vote and participate in civics. The audience and speakers of political speech would then all have equality in the forum, regardless of education, wealth, or experience. The Founding Era evolved from a time of urban culture and elitism to what the Enlightenment philosophers created in their ideal political world, a society on which James Madison said the following:

\begin{displayquote}
People were now told repeatedly that they rightfully had a place in politics, and lest they should forget, there were thousands of new rising popular tribunes, men who lacked the traditional attributes of gentlemanly leaders, to remind them, cajole them, even frighten them into political and social consciousness.\footnote{Ibid., 253.}
\end{displayquote}

Even with this newfound equality, the Anti-Federalists forced the issues of civil liberties to the forefront of debate in the states.\footnote{Giles Patterson, \textit{Free Speech and a Free Press} (Boston: Little, Brown, and Company, 1939), 114.} To these dissenters, the Constitution meant to account for government’s abilities, or disabilities and the disabilities of this burgeoning, experimental democracy necessitated a Bill of Rights to ensure free speech
needed to address the short-comings. Thus, the Bill of Rights would cement the very ideas of Enlightenment to boldly and honestly extrapolate on what disparate elements in a new government might come to fruition.

The Anti-Federalists opposed the Federalists’ view of the Constitution in significant ways, as they represented a majority of the agricultural and immigrant populations. They also published literature during the ratification debates to address major concerns over many speech issues, including the government’s taxation of the printing presses. Because taxation would result in limiting most forms of speech, the Anti-Federalists’ argument, bolstered by the Enlightenment ideal of free speech, would prevail upon the eventual speech protections in the Constitutions amendments for civil liberties.

These arguments reveal an on-going debate over the relationship between individual rights and preservation of state authority. This faction’s cautionary voice regarding the fallibility of government indicates that the Federalists were not entirely convinced of their own version of the Constitution. In this way, the Anti-Federalists agreed with the Federalists, both using the same medium to voice similar views of liberty. This voice kept several states from ratifying the Constitution and prompted more, arguably necessary, deliberation.

**Ratifying the Constitution**

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31 Ibid.
The eventual ratification of the Constitution came about with the promise that the newly formed government would enact amendments to the enlightened document, including fundamental civil liberties. The framers understood the difference between natural liberty and negative liberty, referring to the restraints on and by the government, but there was fear of the government, as this body’s power was obvious with destructive arms and the ability of surveillance and enforcement.\(^{32}\) Thus, the American people needed reassurance that the Constitution could realistically strike an enlightened balance between liberty and power.\(^{33}\)

It was not until the last few days of the federal convention of 1787 that the framers mentioned a bill of rights. While there were fears of mob rule and anarchy,\(^{34}\) still several states demanded that for a central government to properly adhere to limitations, civil liberties must be the explicit limitation.\(^{35}\)

To gather support for this Enlightenment vision of government, several of the Founders exercised their right to speak and published several essays on the concept of a democratic republic. James Madison, Alexander Hamilton, and John Jay anonymously wrote under the pseudonym, Publius, a collection of essays entitled *The Federalist*.\(^{36}\)

While all of these papers defend the Constitution, some written by Madison also


\(^{33}\) Ibid.


\(^{35}\) Ibid., 34.

advocated the need for the Constitution to spell out the human rights sought after by the enlightened citizens of the states.

Alexander Hamilton, who wrote most of these papers to defend the Constitution, mirrored the theory of Locke to simply point out the need for a strong government, with or without documented rights. His approach to the republic was adopted in part and reflected in the Constitution. He concurred with Locke that man’s identity is “nothing but a participation of the same continued Life,” and that while there is an innate human right, there is no natural duty.

Further, Hamilton dismissed the ancillary bill of rights, stating that in a republic, only public opinion could protect personal liberties. He argued that natural rights were inherent and could not be enacted by a limited government. In *Federalist 84*, he inquired, “For why declare that things shall not be done which there is no power to do?” Rather, the legitimate political society is created because we empower a government to do as the people desire. Therefore, civil liberties, as held in public opinion, were controlled by the people and not the government.

On the other side of the Enlightened aisle, Madison advanced the same majority idea of needing the Constitution and government provided, but also wrote sections of *The

37 McWilliams, “The Discipline of Freedom,” 35.

38 John Locke, *Essay on Human Understanding* (Book II, Ch. 27, Sec. 6), Quoted in McWilliams, “The Discipline of Freedom,” 34.

39 Stevens, *Shaping the First Amendment*, 34.

40 Ibid., 35.

41 Ibid.

42 McWilliams, “The Discipline of Freedom,” 35.
Federalist legitimizing the placement of civil liberties into the Constitution as both inherent and in need of documentation. Madison praises the Constitution because, unlike the original Articles of Confederation, the newer document will actually enable the pursuit of happiness. Madison assures that the Confederation had to “be sacrificed … [because it patently fails to secure] the safety and happiness of society.”

Madison revives the goal of pursuing happiness, which is embraced by the Enlightenment categorically. He observed that “since political society exists to serve the private purposes of free individuals, the balance (of liberty and power) must always tilt toward individual rights and liberties, the moral center of liberal civilization.” In this way, Madison voiced the Kantian categorical imperative, which was also central in Jefferson’s Declaration of Independence.

First, Madison persuaded the people with Enlightenment support, making it clear that he was “relying on moral and political principles: the just principles of government announced in the Declaration and to which the vast bulk of the American people adhered, having displayed their respect for them in public utterances, such as the documents of their state governments.” He reasoned that “the aim of every political constitution is, or

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44 Ibid.

ought to be, first to obtain for rulers men who possess most wisdom to discern, and most
virtue to pursue, the common good . . . .”

Moreover, Madison looked to the factions and determined that while these parties
are potentially destructive to a union, they are inevitable and hold beneficial purposes.
This version of Publius reasoned that the government seeks the “great and national
objects,” which must be requested by the majority voice of the union. The minority
voice, so long as it strives for good, would only be served with a Bill of Rights,
acknowledging the common interest and securing the liberty of those who may not desire
the majority rule in respect to preferences, a concept warned against by Kant. Madison
further balances majority rule and minority rights by pointing out the obligation within
social order to deliberate and provide for all citizens. He asserts that even with
disagreement, “considerations of duty arising . . . could have supplied any defect of regular
authority.”

In reference to the ideals of the Declaration of Independence, Madison concurred
with Jefferson and established in his essays that “the only sure foundation of this
generous and liberty-loving policy is widespread acceptance of the truth and justice of the
Declaration’s principles.” Jefferson’s understanding of “inalienable rights” involved
the concept that the laws by which we should be governed are “higher than any law of

Foundation of Liberty,” 21.

47 James Madison, Federalist No. 10. Quoted in Ibid.


mere artifice.”

Enlightenment philosophy and public policy refer to this view as positive law.

In terms of civil liberties, Madison was a firm advocate of equal natural rights for men. After all, regardless of economic status or education, the Enlightenment philosophy and science proved that each person is made of the same elements and has the same process of thinking. As though a follower of Kant, Madison believed that man is comprised of a delicate balance between reason and passion, “but it is reason alone of the public that ought to control and regulate government.” Similar to Kant, Madison also doubts that all men use their potential to reason in order to seek good and allow for the happiness of other. Therefore, he also asserted that “the passions ought to be controlled and regulated by the government.”

In this way, Madison persuades the people to adopt the Constitution because of his trust in the government to have this kind of control, especially since this authority consists of the people. This trust also spurs from the previously mentioned Kantian duty-based ethics and obligations to society.

Applying these philosophic points to the Constitution, Madison further argues the Kantian absolute view. In Federalist No. 10, he supports the Republican, anti-Federalist view by showing a corollary between natural rights and the duty-based imperative to

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50 Stevens, *Shaping the First Amendment*, 3.

51 Ibid., 5.

52 Ibid., 7.

53 Ibid.
respect others’ autonomy. Madison enforces the necessity and possibility of liberty within a republic by creating his own categorical imperative. He offers that “all men are to be considered as entering into society on equal conditions; as relinquishing no more, and therefore, retaining no less, one than another, of their natural rights.”

Again, this concept assures the minority voice in the union that they will not be trampled upon by a majority, which does not have unwieldy power under the Constitution.

Over all, Madison’s view of humanity’s capability for self-government goes beyond the equality principle and requires both consent and participation, as seen in the philosophy of Locke, Rousseau, utilitarianism, and Kant’s categorical imperative. This American philosopher acknowledged the people’s apprehension of this form of government and put his trust in them as rational beings who understood the necessity of government. Madison mused, “But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary.”

Ultimately, his papers appease the people by supporting freedom, admitting that while “no form of government can render us secure, to suppose that any form of government will secure liberty without any virtue in the people is a chimerical idea.”

**Beyond the Constitution**

*The Federalist* became the connection between Enlightenment idealism and reality, as it successfully coaxed the thirteen colonies to ratify the Constitution, and the

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55 Madison, *Federalist No. 51*. Quoted in Ibid., 8.

56 Ibid., Madison, *Federalist No. 55*. 
Bill of Rights would stand as the necessary condition to the establishment of America’s republic. Further, Madison believed that after this compromise, further conventions to revise the Constitution were unnecessary because the Constitution was “self-perpetuating and self-perfecting,” a concept that rang throughout the Enlightenment’s efforts.\(^{57}\)

Internal moral and political principles did not need external revision because the enlightened philosophy rooted in the Constitution was meant for humanity of all times, not just contemporaneous citizens of the eighteenth century. This view of the Constitution is the crux of the matter for posterity when determining the future of the Constitution, the Bill of Rights, and public policy over all.

After much debate, James Madison insisted that the new House of Representatives, created by the initial ratification of the Constitution, appoint a committee to “codify all the suggestions into amendments.”\(^{58}\) The framers within the government enabled this idea, and Congress submitted ten of twelve amendments to address human rights that were a rigid and unwavering set, paralleling the categorical imperative established in the Enlightenment. These amendments were ratified in December of 1791.\(^{59}\) Nonetheless, the initial controversy between the factions to emboss the Constitution with a certified, inseparable covenant of civil rights would set a precedent to question both the interpretation and extent of rights conveyed and the authority conveying such rights.


\(^{58}\) Schaub, “Justice and Honor, The Surest Foundation of Liberty,” 34.

\(^{59}\) Ibid., 35.
In this chapter, I have portrayed how establishment of the Bill of Rights proved to be necessary in completing the Enlightenment ideals of the American republic. This part of American history continues in the next chapter to show how the debates surrounding the Bill of Rights perpetuated not only in the ratification of the First Amendment but also in the interpretation of free speech during controversies that the majority in Congress would declare as exceptions to the imperative of civil liberties. We will see, however, that even though foreign relations and domestic struggles presented a threat to the republic, civil liberties remain the true fundamental condition to the existence of the republic.
CHAPTER 3

FIRST AMENDMENT AND FIRST SUSPENSIONS OF LIBERTY

The previous chapter discussed the influence of the Enlightenment on the debates of the Constitutional convention that were so crucial to laying down the foundation of the American experiment. In this chapter, I will show how the First Amendment solidified the Enlightenment ideal of free speech by implementing, as Vincent Blasi describes, a pathological perspective: a view that at all times the First Amendment must be interpreted as an absolute to provide American society with maximum service, even in those hateful, intolerant, and radical times when the government is the most prone to stifle dissenting opinions through other valid means such as in the name of ensuring national security.

I will also describe how the First Amendment insistence on free speech was almost immediately abridged by the Federalists who dominated Congress and who had rejected a written Bill of Rights during the debates of 1787. The debates in Congress between the Federalist majority and Anti-Federalist minority exemplified the political discussion encouraged by the Enlightenment-influenced First Amendment. Therefore, the resentment by the Federalists to incorporate a Bill of Rights not only displays the power struggle seen between the parties but also demonstrates how the abridgment of speech deters progress and violates the Kantian autonomy stressed by the Enlightenment.

1 Vincent Blasi, “The Pathological Perspective and the First Amendment,” Columbia Law Review 85, no. 4 (April 1985), 449. Blasi is a Corliss Lamont Professor of Civil Liberties at Columbia University and contemplated the way in which the First Amendment enables all other civil liberties, thus becoming the crux of the social contract where inalienable rights and the pursuit of happiness meet. My argument greatly agrees with Blasi’s thesis, and with this perspective, I am supported in showing the way the Supreme Court is aligned to invalidate hate speech legislation under the auspices of the pathological intention.
In this chapter, we will see that an absolute insistence on civil liberties enables security prioritized by self-government, not the other way around.

In order to prove the argument that Enlightenment philosophy colors the First Amendment and its interpretation, I will provide the opinions of several Supreme Court cases where prominent figures such as Justices Oliver Wendell Holmes, Jr., Louis Brandeis, William O. Douglas, and Hugo Black refer both to the Founding Fathers and to Enlightenment philosophy to affirm the absolutist view of civil liberties as a means to social order and progress. These cases range from speech against the government to speech against ideas and other people, and the Court’s opinions that embody a Kantian, absolute imperative set the stage for the modern controversy regarding hate speech legislation as seen throughout the country and on state university campuses in the form of speech codes.

Creating the First Amendment

By the time the leaders of the Revolution were in control of the government they had constructed, they feared that the same press that had brought the nation together by weakening trust in the British authority would also shake confidence in the new republic. Those leaders who supported the Constitution without a Bill of Rights claimed there was no need for a federal Bill because the states had already adopted those agreed upon, inherent freedoms in their own state declarations.²

However, Madison warned against this dismissal of explicitly protecting civil liberties from the newly formed government. He declared, “In Virginia, I have seen the

[state] bill of rights violated in every instance when it has been opposed to a popular current…wherever the real power in a Government lies, there is the danger of oppression.”

Through this statement to Congress, Madison affirmed his view that natural rights are beyond the scope of the government and that civil liberties need to be published for all to know and enforce.

Noah Webster, an American patriot who wrote the nation’s first dictionary, doubted the need to put such an obvious freedom in writing. He facetiously mused that if it were truly necessary to write an inherent right like freedom of speech in the Constitution, then the framers may as well write everything in, such as a provision “that everybody shall, in good weather, hunt on his own land, and catch fish in rivers that are public property… and that Congress shall never restrain any inhabitant of America from eating and drinking, at seasonable time, or prevent his lying on his left side in a longer winter’s night…when he is fatigued by lying on his right.”

Madison countered Webster’s sardonic view and focused on freedom of speech to emphasize the danger of merely assuming rights: “The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British constitution… and are regularly abused. . . .”

With a reminder of the history and tyrannical government they rejected, the Federalists finally capitulated to Madison’s liberty-loving view.

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3 Ibid., 71. Madison refers to the Virginia Constitution and its bill of rights, as was similarly adopted by several other states.

4 Ibid., 73.

5 Ibid.
With the final consensus to amend the Constitution with a Bill of Rights in 1789, James Madison set out to draft the First Amendment. There were several versions of this amendment, but each one stressed the same concepts of freedom of speech, press, expression, and religion. Just as the writers of the Virginia Constitution of 1776 helped to shape the federal document, the Virginia drafters mandated that the freedom of speech must provide for as much freedom as realistically possible. On June 8, 1789, Madison’s first version introduced to the House of Representatives borrowed language from Virginian George Mason, advocating, “The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.”

The committee in the House of Representatives, designed to finalize the language and submit the amendment for a vote, added other provisions to the first draft and published, “The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed.” The addition of the right to redress grievances embodies perhaps the most important element of the First Amendment for a couple of reasons. First of all, political discussion represents one of the Enlightenment’s

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6 Frederick Schauer, “Free Speech and Its Philosophical Roots,” in The First Amendment, ed.T. Daniel Schumate (Virginia: George Mason University Press, 1985), 134. George Mason is quoted to have emphasized freedom of the press in a similar manner to James Madison. George Mason was a dominant drafter of the Virginia Constitution, alongside Randolph.


8 Ibid., 731 (August 15, 1789).
core values and means to evoking truth and progress. Secondly, it was the vocalization of frustrations about British control that enabled the creation of the republic in the first place. Thus, explicitly providing this aspect of free speech in the First Amendment not only properly explains the meaning of free speech, but also enriches the Constitution with the history of the nation that prompted this Bill of Rights to be adopted.

At this time, Federalists were in the majority in the Senate and objected to several sections of the draft, but after the Senate revised the House of Representative’s version, the First Amendment became the first publication of American protected civil liberties with the following:

> 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.9

Several voices supported Madison, including Patrick Henry, a leader of the Revolution and an Anti-Federalist. Henry concurred that civil rights were absolute and guarding them is inherent in a democratic system. As a proponent of the Amendment, he attempted to persuade the citizens of the United States of the imperative nature of a Bill Rights as follows:

> You have a Bill of Rights to defend you against the State Government, which is bereaved of all power. And yet you have none against Congress, though in full and exclusive possession of all power! You arm yourself against the weak

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and defenceless, and expose yourselves naked to the armed and powerful. Is not this a conduct of unexampled absurdity?\textsuperscript{10}

While he believed that securing civil liberties into the Constitution was the bedrock of any democratic society and of this republic, Madison did not get one amendment in that he proposed to “the most valuable in the whole list.” This amendment provided that “no state shall violate the equal rights of conscience, or of the freedom of the press…because it is proper that every government should be disarmed of power which trench upon those particular rights.”\textsuperscript{11} The House of Representatives approved this amendment, but it failed to receive a two-thirds majority in the Senate. The amendment’s opponents decided that it was redundant and that the Constitution already had too many limitations of power on the states.\textsuperscript{12} Later, however, the federal legislature would find it necessary to limit the states’ power, and the judiciary would enforce the application of the Bill of Rights to the states.

Taking Madison’s view to heart, when the Constitution was ratified in 1791, Virginia displayed the way in which free speech should be interpreted by proposing a Kantian addition to the First Amendment, proposing language that would protect the First Amendment rights absolutely.\textsuperscript{13} This state wanted the bill to declare that “liberty of Conscience and of the press cannot be cancelled, abridged, restrained, or modified by any


\textsuperscript{11} Hentoff, \textit{The First Freedom} 74, quoting James Madison.

\textsuperscript{12} Ibid., 75.

\textsuperscript{13} Ibid.
authority of the United States."\(^{14}\) Virginia’s version of the amendment denies to the entire government the right to limit civil liberties, suggesting that no authority—federal or local—could bereave the people of what is inherent, inalienable, and the only means to promoting civic duty and the good life described by both the Declaration of the Independence and the Constitution.

Even though Virginia’s draft did not take form in the federal First Amendment, Madison emphasized the democratic process of government and the power of the people by declaring in a letter in 1794 that “we shall find that the censorial power is in the people over the Government and not in the Government over the people.”\(^ {15}\) Madison and Jefferson’s correspondence as well as their essays, while not completely incorporated into the Bill of Rights, were and continue to be crucial as a guide to understanding the intent behind a civil liberty as absolute as freedom of speech and of the press. These founders’ comments would be used to invalidate censorship legislation and pave the way to permit speech neither articulated nor known by the eighteenth century drafters, including hate speech.

Unfortunately, the Federalists in power of the newly formed government must have taken Madison’s statement to mean that the people, represented by the government, could use the democratic process to censor because that is exactly what the majority did shortly after the formation of the United States.

**The First Amendment in Practice and the Onset of Censorship**

\(^{14}\) Ibid.

\(^{15}\) Ibid., 75.
Keeping in mind Enlightenment philosophy and its extensive influence on the creation of the United States Constitution, the Bill of Rights leaves no room for the government to make any abridgments to these freedoms. As Blasi asserts, the placement of civil liberties into the social contract grounds the view that liberty is the means to security, and without freedom there is no stability. Thus, even though the First Amendment underwent several drafts, the words of this safeguarding amendment limit the government and tightly seal the various forms of speech from suspension of any kind.

Of course, with libel and slander in the history of America and the press, prompting the Zenger case, there are exceptions to free speech that look to be pure speech but do not pursue truth or a place in the market. These exceptions are known as “irresistible counterexamples” and include soliciting criminal conduct, fraud, and libel. The argument is that the counterexamples are not within the freedom of speech protections the same way harmful conduct has nothing to do with purely conveying a message. Even Jefferson suggested that the First Amendment language not protect “false facts affecting injuriously the life, property or reputation of others or affecting the peace of the confederacy with foreign nations.”

As I will later show, these counterexamples are excluded from the protection of the First Amendment, but in an effort to censor, both the federal and state government

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16 As seen in the previous chapter, the Zenger case established the need to secure freedom of the press and also distinguish distributing information from spreading libel and false statements.


will use the “impure speech” argument to categorize undesirable ideas as an unprotected counterexample. Thus, we will see that criminal conduct performed through speech is the only exception acknowledged by the legislature and the Supreme Court. However, even criminal content draws a sharp line between speech advocating ideas and action associated with criminal intent.

While the language of the First Amendment seems to be quite straightforward, questions arose as America continued with its experimental republic and new status in the world. As a nation, America had not only novel domestic policy frontiers but also foreign ones. What is speech exactly? What is press? How do these freedoms play a role during war? What if these words cause harm? These inquiries would be answered in haste as war and problems on the home front arose, beginning with speech against the government and then speech against people.

Even after ratification, the United States still felt great tension between the Federalists and Anti-Federalists, who were at that point known as Democratic-Republicans, or Jeffersonian Republicans. Moreover, Alexander Hamilton had become Secretary of the Treasury and exercised his authority to further his Federalist, national views of how government should care for its citizens. One way of unifying the states was by implementing a system of public finance where the federal government addressed the union’s war debts, established a national bank, and invested in new business and industry. In the same vein of his Federalist views, Hamilton consolidated power in the national government in such a way as to stifle the system of checks and balances created by James
Madison. Hamilton had studied with admiration the role that innovative public finance had played in the building of the British Empire, and with financial security in mind, members of Congress and leaders of the financial community supported these tactics, especially since they had opportunity to acquire profits this way.

Hamilton's plan “also made the federal government dependent on customs revenues from imports, and most of those imports came from England.” Madison was concerned that too many officers of the U.S. government had financial incentives to favor England over France, especially in regards to the ongoing wars between those countries, making it impossible to remain neutral in relation to these European nations.

In 1793, during its own revolution, France declared war on Britain. The American Democratic Republicans tended to favor France, while the Federalists sympathized with the more stable Britain. The latter party’s majority in Congress set out a foreign policy to reflect the preference to Britain, and this policy irritated relations with France, making war with the revolting country seem imminent.

America could not ally itself with France, as this European nation had followed suit and broken out in revolution. Unlike America, however, the French Revolution spread across the continent. Secondly, the Federalists believed the Democratic-

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19 Hentoff, The First Freedom, 80.
20 Ibid.
21 Ibid.
Republicans were disloyal, consisting of provocative newspaper men and immigrants who would sympathize with France and the revolution.\textsuperscript{22} The Democratic-Republicans (Republicans) were already quite suspicious of centralized government and wanted the government to be “responsive to the people at large,”\textsuperscript{23} not just to the majority voiced in Congress-especially regarding the contemporary foreign policy. The Republicans believed that America was a refuge and symbolized the self-governing liberty of men seeking to be free.\textsuperscript{24} In order to make it known that this party clearly dissented from the Federalists, Republican newspapers published their disapproval and caused much concern among the American citizens, many of whom were immigrants of Ireland and France, which were the two countries that took issue with the Federalists’ support of Britain.

With the frustrated Republicans and belligerent European immigrants in mind, the Senate’s Federalist majority feared that those who openly disapproved of America’s foreign policy with France would cause dissolution of the union. Hence, Federalists used the power enabled by Hamilton, in the name of national security, and sought to quash the Republicans by making use of the government’s war powers and cutting off their resources to communicate such dissent: immigrant constituents and the press.


\textsuperscript{23} Hentoff, The First Freedom, 79.

\textsuperscript{24} Ibid.
Even though the Federalists maintained majority power in Congress, they continued to rally around this means of preventing war on the American side of the Atlantic Ocean, and, in 1798, Congress and President Adams enacted the “Aliens and Sedition Acts.” The Aliens Act portion of this legislation targets immigrants and made unlawful the following:

. . . [F]or the President of the United States at any time during the continuance of this act, to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States...[a]nd in case any alien, so ordered to depart, shall be found at large within the United States after the time limited in such order for his departure, and not having obtained a license from the President to reside therein, ... every such alien shall, on conviction thereof, be imprisoned for a term not exceeding three years, and shall never after be admitted to become a citizen of the United States. 25

While the Constitution was not as stringent with laws concerning immigrants, the Sedition portion of the legislation flew in the face of all the work Madison and Congress had done to secure free speech in the First Amendment. The Sedition law maintained:

And be it further enacted, That if any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered, or published, or shall knowingly and willingly assist or aid in writing, printing, uttering, or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either House of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either House of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States; or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law,

or of the powers in him vested by the Constitution of the United States; or to resist, oppose, or defeat any such law or act; or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.26

Since the Democratic-Republicans had supported both the Bill of Rights and their constituency of immigrants, the Aliens and Sedition Acts applied mostly to this coalition and its supporters. The lesson of the Zenger case lingered in the Sedition Act with one legacy: the Act allowed the right of the accused to plead the truth of what he had said or published as a defense to seditious libel.27

The Republican press reacted and rallied around their Constitutional rights. The Boston Independent Chronicle reminded its readers that in a truly free nation it was a civic duty of citizens to speak their conscience.28 Therefore, the Sedition Act prevented the people from performing this duty and maintaining democratic process.

The principal Republican paper, Aurora, which was edited by Benjamin Franklin’s grandson, Benjamin Franklin Bacche, published a satiric advertisement in his paper to show his outrage on the very day the Act was put into law. Bacche referred to the censorship law as the “Muzzle in Gag Street.” On a more fundamental note, he posed the question: “Ought a Free People to obey the law which violates the constitution they have sworn to support?”29 Bacche’s question not only shed a philosophical light on the

26 Ibid., Section 2, Sedition.
27 Hentoff, The First Freedom, 81.
28 Ibid.
29 Ibid., citing Bacche in Aurora.
Sedition Act, but also it lent itself to the principle of judiciary review the Supreme Court would not see for another five years.

The Sedition Act’s first victim was Congressman Matthew Lyon of Vermont. Lyon exemplified the Republican party. He came from Ireland as an indentured servant, earned his freedom, fought in the Revolutionary War, and got elected to Congress in 1797. He vocalized his frustration with the Federalists and Sedition Act, believing that censorship was the gateway to tyranny. Lyon challenged the ideology of Federalist leaders such as Alexander Hamilton and President Adams, claiming that the Adams administration had forgotten the public welfare “in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice.” In turn, the Federalists accused Lyon of sedition and treason, prompting Lyon to respond to these accusations. Lyon wrote to a newspaper in reply to an attack on him, stating the following:

When I shall see the efforts of that power bent on the promotion of the comfort… of the people, that executive shall have my zealous and uniform support: but whenever I shall… see … the public welfare swallowed up in a continual grasp for power … behold men of real merit daily turned out of office … men of meanness preferred for the ease with which they take up and advocate opinions … when I shall see the sacred name of religion employed as a state engine to make mankind hate … I shall not be their humble advocate.

Upon this response, the Federalist government tried, jailed, and fined him. However, observing this violation of freedom caused Lyon’s constituency to protect their

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31 Hentoff, *The First Freedom*, 82.

own beliefs and freedoms. In the next congressional election, the people of Vermont exercised the democratic process and voiced their opinion through the only speech against the government that would not violate the Sedition Act: the vote. Thus, Lyon was freed from jail as a reelected official of the state.33

While Lyon’s release from prison was a victory for the Republicans, the Federalists became more vigilant in their enforcement of the Sedition Act. Thirteen more indictments were brought under the Sedition Act, mostly against editors and publishers of Republican newspapers. While some Republican newspapers were forced to close down, many others were intimidated not to criticize the government. One Republican was convicted of sedition for publishing a campaign ad supporting Thomas Jefferson, who ran against John Adams for presidency, in the form of a pamphlet that accused President Adams of appointing corrupt judges and ambassadors. Two men were found guilty of raising a “liberty pole” and putting a sign on it that said, “Downfall to the Tyrants of America.”34

Eventually, as the citizens of the United States saw no war impending with France, the antics of the Federalists began to look unjustified across the party lines. In 1801, the people elected Thomas Jefferson to the presidency, and on March 3, 1801, the Aliens and Sedition Act expired. Jefferson pardoned everyone convicted under the Act,

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33 Hentoff, The First Freedom, 84.
34 Stone, Perilous Times, 18.
and having spent much time in France before its revolution, this Republican president described the Adams administration as America’s own “reign of terror.”

Madison, then Secretary of State, took the Sedition Act as a clear violation of the Enlightenment imperative, declaring the experience with the Act one that “ought to produce universal alarm because it is levelled against the right of freely examining public characters and measures and of free communication among the people thereon, which has ever been justly deemed the only effective guardian of every other right.”

In an effort to combat the Federalist-imposed legislation, Madison joined forces with Thomas Jefferson to pass resolutions to counter the abridgment of free speech the same year the Aliens Act was passed. Known as the Kentucky and Virginia Resolutions, these proposals reaffirmed the agreed upon construction of American government: that the Constitution created a compact between the states to form a union, and that the federal government had no authority to exercise powers not specifically delegated to it by the Constitution. Therefore, were the federal government exercise a non-existent power, any legislation enacted must be invalid and dissolved immediately.

Unfortunately, the states did not take on the resolutions; however, Madison desperately hoped the Sedition Act would be lesson for posterity as to why he had devised a First Amendment to protect the speech that was censored by the Federalists.

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35 Hentoff, *The First Freedom* 84.

36 Ibid., 85.


38 Ibid.
Madison undoubtedly wanted to secure the intention of the framers by posing the question: “Is then the federalist government destitute of every authority for restraining the licentiousness of the press, and for shielding itself against the libelous attacks which may be made on those who administer it?”

Nonetheless, it would be over a century before Enlightenment philosophy would again shake its imperative head at censorship legislation. The history and precedent of First Amendment abridgment under the Aliens and Sedition Acts shaped the subsequent discussion of censorship in law and in the Supreme Court, and, while Enlightenment philosophy seems inherent to the Constitution and interpretation, it took a revolution in the Court to return the balance of liberty and stability. Later in the twentieth century, the Supreme Court affirmed that the interpretation of the First Amendment must follow the Enlightenment view of self-government: that security of the nation and the continuation of democracy both derive from an absolute form of liberty.

**Resurgence of Gag Rules**

Although Thomas Jefferson and Congress let the Sedition Act expire, political factions of the nineteenth century continued to attempt to suppress the other’s voice in the public forum, even to the detriment of the First Amendment and the core values upon which they based their righteousness. In the 1830s, the slavery debate culminated in a

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successful gag rule enacted by Southern, pro-slave Congress. The Northern, minority voice of the Whig Party in Congress preached both freedom of speech and abolitionist sentiment. This outrage about slavery frustrated the South, which had previously ratified the Constitution with the agreement that slavery was permitted. This aspect of the America’s social contract violated the Kantian imperative of prohibiting using anyone as a means to an end, and because of the moral controversy, the debates continued from the foundation of the union through to the next century. In 1834, these abolitionists exercised the right to petition as a means of banning slavery on the federal level.

Thus, in 1836 the Southern majority quashed these symbolic uprisings and efforts by passing a rule, which stated that in regards to petitions “on the subject of slavery, or the abolition slavery, shall, without being either printed or referred, be laid on the table and...no further action shall be had thereon.” The House conceded that this gag rule did not prohibit petitioners from sending their pleas to Congress but cautioned them such petitions would not be brought to debate. However, rather than discouraging petitions, groups such as the American Anti-Slavery Society created an insurgency of these citizens’ bills, inundating the Southern-led Congress with claims of reason and civil rights.


42 Ibid.

43 Ibid. 177, citing Cong. Globe, 24th Congress, 1st Sess., 383-87, 405-06.

44 Ibid.
Major leaders in America, including John Adams’ son and America’s sixth
President, John Quincy Adams, and John C. Calhoun perceived the gag rule as a violation
of the Enlightenment philosophy and time-honored civil liberties and civil rights.
Nonetheless, the gag rule succeeded more than the Sedition Act of 1798 and was
reauthorized twice.45

In this context, the Northern voice supported the Kantian categorical imperatives
regarding autonomy. First, anti-slavery sentiment falls into the bedrock of democratic
values in that every man is free to seek the pursuit of happiness and that no person can
use another as a means to an end.46 Secondly, the freedom of speech is absolute and
cannot be abridged without abridging the autonomy of the rational, moral person in a
community of beings.

The gag rule was reauthorized each year in Congress through 1844, but by then,
tension between the North and South proved that War was inevitable to maintain the
Union. The result of the Civil War included the abolition of slavery among other
successes for the North regarding civil liberties and equality. Furthermore, in 1866,
through a war crimes case, the Supreme Court determined that the war power of
Congress is limited by the Bill of Rights. At this point, the Enlightenment philosophy

45 Ibid., 179.

46 In Chapter 1, I describe the categorical imperative of Kantian philosophy, including the ethic
that in order to appreciate our own autonomy, we cannot use others as a means to an end because it violates
our own civil liberties. In this respect, our civil liberties are both intrinsically and instrumentally good.
This concept plays out with speech against people, and eventually “hate speech” because the audience who
reacts to the hateful opinion of another violates the autonomy of the speaker to state his mind and join the
marketplace of ideas. If Congress bases permission of speech on consequences, all speech must very well
be censored as not to offend or result in chaos.
prevailed as so fundamental to the existence of the republic as to restrict even decisions during times of war.\textsuperscript{47}

**Twentieth Century Censorship**

As America joined the world and its struggle with foreign diplomacy, the Constitution and Bill of Rights yet again experienced a suspension of enforcement in exchange for a version of stability through government paternalism. Thus, those in government feared that speaking out against authority equated to breaking up the union internally. As long as the majority in Congress was unchecked, the federal government could censor speech considered undesirable to the majority’s cause.

However, soon after World War I, the Supreme Court became that very power that would check both other branches of government and would play a key role in interpreting the Bill of Rights by upholding or invalidating legislation affecting the First Amendment.

There was much scholarly support of judiciary involvement concerning the protection of civil liberties. For example, observing the engagement of the Supreme Court contemporaneously to the first freedom of speech cases, Alexander Meiklejohn advocated free speech and involvement of the judiciary to enforce the intent of the First Amendment. He asserted that political freedom is an ideal, though not yet realized, that

\textsuperscript{47} Stevens, *Shaping the First Amendment*, 43.
should guide judicial interpretation of the Constitution because the Supreme Court “is and must be one of our most effective teachers.”

In the context of the First Amendment, Meiklejohn found interpretation of the free speech and press rather simple in plain meaning. He interprets the intent of this freedom to include the following:

“[S]peech that constitutes a part of the process of self-governance is entitled to the protection of the First Amendment. Communications which have no political significance, or which are not motivated by a public-spirited search for the general welfare, fall outside the ambit of First Amendment concern.”

Although this definition seems limiting, Meiklejohn’s view is as broad as the plain term “speech,” meaning that all but harmful conduct is effectively protected as politically significant for the public welfare. Further, Meiklejohn understands the self-reliance required by self-government in the view of the Enlightenment, and determines that “‘We, the people’ are sovereign and hence must assume the responsibilities of governing.” Therefore, when the Supreme Court reviews the speech in question of protection under the First Amendment, the conduct subsequent to provocative speech will

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48 Alexander Meiklejohn, “What Does the First Amendment Mean?” *University of Chicago Law Review* 20 (1952-53), 473. Alexander Meiklejohn was a professor of philosophy, dean at Brown University in Rhode Island, and president of Amherst College. He is a proponent of free speech and wrote about philosophy of policy. He greatly influenced subsequent justices of the Supreme Court.

49 Ibid. Meiklejohn disagreed with the Supreme Courts initial decisions of First Amendment cases. He wrote criticism of Holmes’ view of the “marketplace of ideas,” determining that the interpretation of such would create a capitalist limitation on speech.


51 Ibid.
be the liability of the audience acting, not the speaker if he is merely communicating an idea.

Unfortunately, this view of the First Amendment would not become well-established in the Supreme Court until half-way through the twentieth century. The first half of the century perpetuated the apprehension of mob rule that dates back to the Constitutional debates, and again, Congress sacrificed free speech in order to avoid deleterious reactions, or speculated reaction, of an audience receiving allegedly harmful and, therefore, unprotected messages.

In 1917, as a reaction to World War I and the Red Scare, Congress and President Woodrow Wilson passed the Espionage Act to monitor German activity and to combat socialism that began spread across America in the form of newspaper publications and small advocacy groups. Socialism represented a very minor voice from both citizens and immigrants who sympathized with the revolution in czarist Russia. Under this law, citizens were prosecuted for publishing their beliefs and grievances with the government while the country waged war. Moreover, because the Aliens and Sedition Act had never been invalidated, similar legislation was never brought to the

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52 The fear of socialism and labor unions’ revolting in America after World War I was known as the Red Scare.

53 Morgan, Law and Politics, 33. The Espionage Act makes it illegal to “willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces…[to] willfully cause or attempt to cause insubordination =, disloyalty, mutiny, or refusal of duty…and shall willfully obstruct the recruiting or enlistment Service of the United States to the injury of the service, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.”
Supreme Court. However, the expiration and criticism of this eighteenth century law did stir up enough commotion to finally bring the abridgment of speech to judicial review.54

The first case to reach the Supreme Court was Schenck v. United States in 1919.55 Schenck was arrested for targeting draftees and mailing them circulars, which argued that conscription was a moral wrong to society, spurred by the evils of capitalism.56 Further, the pamphlet said “Do not submit to intimidation,” which could imply action; however, Schenck only suggested peaceful action to protest the war such as sending a petition to Congress to repeal the Conscript Act, which enacted the draft for the war.57 Of course, the right to petition is a protected act of speech within the First Amendment.

Justice Oliver Wendell Holmes, Jr. wrote the opinion for a unanimous Supreme Court. This first speech case would be the only opinion in which he would diagnose this type of speech as out of the protection of the First Amendment. In this case, Holmes

54 Elena Kagan, “Regulation of Hate Speech and Pornography after R.A.V.,” in The University of Chicago Law Review 60, no. 3-4 (Summer-Autumn, 1993), 882. While Meiklejohn advocates the discretion of the courts, judicial review remains a question concerning the role and limits of the Supreme Court, as the justices interpret law, they also create law. The cases I present in the next two chapters involve viewpoint discrimination in the name of keeping the peace on the home-front during times of war and troubled times after war. Elena Kagan, who is the former dean of Harvard Law School, current United States Solicitor General, and candidate for Associate Justice on the United States Supreme Court, maintains that judicial discretion was necessary during the first times cases were brought to the Supreme Court because the public was receiving two dueling concepts of government: that the role was to protect society by limiting civil liberties and the government was to enable society to exercise their civic duty to support democracy and vote in an informed manner. The censorship and legislation mentioned in this chapter will demonstrate that abridging civil liberty inhibits civic duty. Further, representatives in Congress legislated censorship erroneously creating much work for the Judicial branch to review in order to reinstate the original intent of the First Amendment.


56 Ibid.

57 Ibid.
offers that protesting the government’s action during war time created a threat of imminent physical harm. He states:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.\textsuperscript{58}

In this way, Justice Holmes may still have disagreed with the Aliens and Sedition Act because in his case, America was actually at war. Holmes also admits that “in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights.”

Nevertheless, \textit{Schenck} still restricts speech and the conduct associated with publishing ideas that would usually be protected by the Bill of Rights. Although Holmes refers to the Constitution and the civil liberties we have secured, he separates this freedom from the security provided by the government from dangers--that “the character of every act depends upon the circumstances in which it is done.” Holmes goes further to interpret the First Amendment and boldly claims that “the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.”\textsuperscript{59}

\textsuperscript{58} Ibid. Here, Holmes establishes the “Clear and Present Danger” test for the Court to support the Enlightenment view of speech and distinguish between speech that provokes chaos based on an audience’s passion and speech that provokes action based on a reasonable person’s perception of danger from the words spoken.

\textsuperscript{59} Ibid.
Additionally, *Schenck* marks American history not only by being the first speech case but also by admitting that speech is so powerful because it provokes action. To the Founding Fathers, the social contract might seek to protect the people from unenlightened speech, the way Kant acknowledges that government is to protect the people from those who do not use their innate reasoning in order to properly utilize and appreciate their freedom. However, Holmes’ opinion only considers the consequences of speech and limits the duty-based, absolutist civil liberties safeguarded by the framers. In this way, later Supreme Courts would take Holmes’ “clear and present danger” test to narrow the speech prohibition.

**The Return to Reason and Liberty in the Supreme Court**

Later in the same year as *Schenck*, the Court used Holmes’ clear and present danger test to continue convicting war protestors; however, Justice Holmes would begin to dissent with the Court’s view and use of the test. In *Abrams v. United States*, a Russian immigrant and a professed anarchist, was arrested in New York City with four others, who admitted to writing, printing, and distributing two sets of pamphlets that called President Woodrow Wilson as a "coward" and a "hypocrite" for sending troops to fight the Soviet Union during World War I. One leaflet was in English and one was in Yiddish. The latter version proposed a strike among all workers to protest against Wilson's policy.

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While Holmes saw the 1917 Espionage Act as a means to “punish conspiracies to obstruct as well as actual obstruction,” he then distinguishes between banning the distribution of literature that intends to cause action, as seen in *Schenck* and banning speech that only conspires to provoke ideas. Holmes reasoned, "If the act, its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime." In *Abrams*, Holmes agreed with the majority opinion that the government's power to suppress speech is greater in times of war than in times of peace, "because war opens dangers that do not exist at other times." However, he also warned that "nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so."

Holmes’ philosophy within this judicial review poses a similar argument to that of John Stuart Mill, but what looks to be a direct parallel is his “market place of ideas. Holmes offers in his dissent that “when men have realized that time has upset fighting faiths, they may come to believe the very foundations of their conduct is better reached

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61 Schenck v. United States, 47.
62 Ibid.
63 Abrams v. United States, 616.
64 Ibid.
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.”\textsuperscript{65}

Vincent Blasi articulates the marketplace metaphor to mean that it “generates the collection of individual beliefs and, in some sense, the production of observations and arguments.”\textsuperscript{66} Blasi continues by looking at speech in a Lockean manner, asserting that “scarcity, both of production and consumption resources, is the phenomenon that drives markets for goods and services…Scarcity of a sort also limits what ideas can be believed and communicated.”\textsuperscript{67} Blasi also notes that the marketplace metaphor has the problem that the dominant voice will be “ideas that favor intelligent, well-spoken people—the priority accorded higher education might be one example—have a distinct and unfair advantage in the marketplace.”\textsuperscript{68} However, like the actual market, spurious products will be discovered and rejected in favor of those intelligent, well-researched ones. From there, the truth will be that which is most accepted as congruent with man’s capacity to reason and acquire good.

This modern review of Justice Holmes’ analogy of free speech evokes both the thoughts of Mill as well as Locke, on property.\textsuperscript{69} Such a comment endorses the idea that

\textsuperscript{65} Ibid.


\textsuperscript{67} Ibid.

\textsuperscript{68} Ibid.

\textsuperscript{69} As stated in Chapter 2, Locke’s view of property is that private property is a necessary evil to incentivize keeping social order and working toward acquiring resources and individual good. The marketplace analogy for speech fits into Lockean theory in that finding the best ideas to be taken as truth will enable proper distribution of ideas and enlightenment.
the modern Supreme Court looks back to the original intent of the framers to incorporate Enlightenment philosophy.

Moreover, to ground the First Amendment in the Enlightenment, Holmes emphasizes how crucial it was for the framers of the Constitution to embed affirmative rights in conjunction with the negative rights language into the founding the document of our democracy in order to sufficiently limit the government and promote the freedom required to seek truth and progress. Holmes asserts:

That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophesy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.70

In regards to the authority of history, this Supreme Court Justice believes that the United States erred in enacting the Sedition Act of 1798 and seems to be under the impression that the nation repaid the “fines it imposed” at those times.71

Without discouraging the use of the “clear and present danger” test created in Schenck, Holmes describes the First Amendment as one with categorical, “sweeping command” that is only limited by an infrequent “emergency that makes it immediately dangerous to leave the correction of evil counsels to time.”72 Here, Holmes shows his reasoning to be similar to Kant, who was quite aware of the man’s capability to be evil.

70 Abrams v. United States, 630


72 Abrams v. United States, 630.
Thus, there must be a practical balance between embracing civil liberties by those who understand the moral law and implementing government to enforce the social contract and limit those who abuse the freedom to speak.

Holmes further strengthened the reasoning behind the freedom to speak in the marketplace by weakening the ideas of those who supported censorship. He sarcastically claimed:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises.\(^{73}\)

While he has reservations regarding provocative speech in times of war and other emergencies, Holmes uses his judicial discretion to support the Constitution and interpret it in the light most favorable to original intent, which advocated an absolutist approach toward this civil liberty. As noted before, the framers were well aware of the power of the masses—their ability to destroy, and yet, while the Anti-Federalists won out to imprint what seemed to be the most basic statements concerning civil liberties, nowhere is there also an exception to absolute liberty, such as during war or times of emergency. Thus, like a Kantian philosopher, Holmes cautiously explains his clear and present danger test to be used regarding the imminence of conduct, as opposed to the speculation of conduct.\(^{74}\)

\(^{73}\) Ibid.

\(^{74}\) As I mentioned in Chapter 2, Kant believes that the purpose of government is to protect society from those who do not use their inherent reasoning or understand moral law in the communal sphere.
Nevertheless, the majority in power influenced the supposedly politically-free
Supreme Court well into the 1950s, through World War II and the second Red Scare. It
would take other means of censorship by the individual states for the Supreme Court to
overturn the aforementioned decisions.

Avoiding Speech Issues through Criminal Conduct Statutes

As fear of the Communist Party spread across the nation, the individual states
attacked the problem of speech by regulating discussions as equivalent to soliciting
crime. While the Supreme Court majorities before had not prohibited Congressionally
legislated censorship, the Judiciary was alerted by the Fourteenth Amendment’s
application of the First Amendment to the states to see the slippery slope of censorship of
any kind leading to categorical restrictions on civil liberties.

In 1925, the Supreme Court heard *Gitlow v. New York*, the first case regarding a
state law that prohibited advocacy to overthrow the government. Gitlow was a socialist
who was arrested for violating the New York criminal anarchy law by distributing copies
of a "left-wing manifesto" that called for the establishment of socialism through strikes

Holmes’ clear and present danger test provides a limitation against those who abuse their own freedom to
speak and act. Arguably, speech that proposes action rather than ideas falls under the “irresistible
counterexamples” that are intrinsically speech but only cause harm, such as libel, fraud, or soliciting
criminal conduct. This concept will lend itself later to hate speech, which offers ideas and not necessarily
conduct.

75 Previously stated in this chapter, the “irresistible counterexamples” to speech would include
soliciting criminal conduct, fraud, and harmful threats.

76 After the Civil War, Congress amended the Constitution with the Fourteenth Amendment,
which applied most of the civil liberties of the Bill of Rights to the individual states in order to create
equality in the post-slavery country. Even today, however, the states push their authority to the limit,
bringing legislative questions to the Supreme Court regarding their constitutional limits.

and class action of any form. At trial, Gitlow argued that no action resulted from his publication; therefore, the law was in violation of the First Amendment for punishing speech that lacked the propensity to incite real action.\footnote{Ibid.}

The Supreme Court abandoned Justice Holmes’ “clear and present danger” test and adopted a “bad tendency” test,\footnote{Jasper, The Law of Speech and the First Amendment, 25.} which would allow a state, even without clear and present danger, to forbid both speech and publication if they have a tendency to result in actions deemed dangerous to public security. This latter test enabled the Court to uphold Gitlow’s conviction, asserting that just because no action resulted the evidence does not disprove an intention to cause an immediate threat to the security of the State.

The dissenting opinions came from Justices Holmes and Brandeis, who used the clear and present danger test from \textit{Schenck} and determined that under that analysis, no danger was obvious from the defendant’s actions or speech.\footnote{Ibid.}

While \textit{Gitlow} did not rest well with First Amendment absolutists, the Court’s view toward anti-Communist legislation changed slightly to focus more of the criminal conduct and abuse of speech that was not intended to be protected by the Framers’ First Amendment. In 1934, the Supreme Court heard the case of \textit{Whitney v. California}, 274 U.S. 357 (1927), where the defendant was being prosecuted under that state's Criminal Syndicalism Act., which prohibited advocating, teaching, or aiding the commission of a crime, including "terrorism as a means of accomplishing a change in industrial
ownership. . .or effecting any political change."81 Whitney had been charged in violation because she helped to establish the Communist Labor Party and gained support of members of the Communist Party to violate laws enacted to prevent anarchy in the state.82 In a unanimous decision, the Supreme Court held that the California criminal syndicalism act was valid under the Fourteenth Amendment and also did not abridge the First Amendment in the parameters of Justice Holmes’ “clear and present danger test.” The Court argued "that a State. . . may punish those who abuse this freedom by utterances. . .tending to. . .endanger the foundations of organized government and threaten its overthrow by unlawful means."83

Justice Brandeis, writing a concurring opinion, determined that the legislation was valid but also guarded freedom of speech, distinguishing criminal syndicalism from pure communication of ideas. He emphasized that even unpopular ideas should be voiced in the marketplace of ideas, as they are bound in the democratic process of citizens having a duty to be well informed in order to vote and do what Is right and best for the community. Thus, Brandeis advises the various levels of legislatures that while they may restrict truly dangerous expression, these laws must clearly define the nature of that danger.

In this way, Brandeis advocates the original intent of the First Amendment. His opinion for Whitney even refers to the history of the American republic as follows:

82 Ibid.
83 Ibid. 375-76.
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 means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.  

Moreover, Brandeis refers to the Enlightenment ideal, encouraging the people to be rational, moral citizens and exercise their civil liberties in the manner best for themselves and society. Brandeis asserts:

To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Finally, the Court overturned the erroneous precedents that upheld the abridgments, which violated the First Amendment and core values of the Enlightenment. In *DeJonge v. Oregon*, the Court invalidated the Oregon state criminal syndicalism act, reasoning that to preserve the rights of free speech and to peaceable assembly, which are principles of the Bill of Rights applied to the states through the Fourteenth Amendment, the actions of the defendant must be outside of the bounds of freedom of speech. After examination of DeJonge’s case, the Court decided that not only did his conduct as a  

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84 Ibid.  
85 Whitney v. California, 377.
member of the Communist party not apply, but that the state law was too vague and in clear violation of the First Amendment.

Chief Justice Charles Evans Hughes rejected the Oregon state criminal syndicalism laws concerning anti-government speech:

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free speech and free assembly in order to maintain the opportunity for free political discussion . . . 86

The aforementioned cases set a precedent for Supreme Court justices to comfortably refer to the framers of the Constitution and the Enlightenment influence to establish the absolute nature of the First Amendment amid political controversy and schemes to legislate in favor of contemporary preferences.

For example, according to Wallace Mendelsohn, Justice Black, a mid-twentieth century justice, “found solace in the ‘plain meaning’ of words” so as to have no ambiguities of meaning.87 This view of interpreting language in the Constitution gives rise to an absolutist understanding of the First Amendment, where “no law abridging” means exactly what it says: that the government, federal and state, cannot restrain or punish people for their thoughts, frustrations, or hatred. Further, this Justice not only referred directly to Madison, whom he had studied for most of his life, but also confirmed the placement of Enlightenment philosophy in the American republic’s First Amendment, stating the following:


The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the duties of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.88

Blasi commented Justice Black’s philosophy, asserting, “If any result, if any opinion, if any paragraph deserves the encomium ‘Madisonian,' that's the one.”89

In a dissenting opinion, Justice Black argued that “Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind.”90 Moreover, he emphasized the absolute authority of the First Amendment by looking to the foundation of the republic, offering that the “Framers of our Constitution and Bill of Rights were too wise, too pragmatic, and too familiar with tyranny to attempt to safeguard personal liberty with broad, flexible words. . . .”91 that could open interpretation to the whim of current sentiment. Rather, Justice Black saw the founding documents as unchanging as Enlightenment view of humanity.

In 1949, Justice Black’s dissenting opinion in Turner won the day through Terminiello v. Chicago.92 This case involved a defendant who criticized both political and racial groups, and this message instigated a public riot. The defendant was arrested under


91 Ibid.

a “breach of peace” statute. Using the precedent of *Schenck* and Justice Holmes’ “clear and present danger test,” the Court could have determined that the defendant’s words were not protected by the First Amendment’s peaceable assembly provision, and such a decision would have narrowed the definition of speech. Instead, however, Justice Douglas saw the difference between a speaker wreaking havoc and an audience acting under its own volition. Concurring with Justices like Holmes and Brandeis, Douglas made use of the “clear and present danger test” as the extreme threshold for speech. Writing for the majority, Douglas looked to the intent of the First Amendment and advanced the notion inherent to the republic with the following:

A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute…is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.\(^{93}\)

From this opinion in 1949, Justice Douglas affirms the influence of the Enlightenment and the formation of the American republic to foster the political discussion and openness necessary to perpetuate a democratic system. As humans, we are driven to progress, and this cannot occur without with the give and take of ideas and challenges acknowledged by the Enlightenment-driven framers of the Constitution and Bill of Rights.

\(^{93}\) Ibid. When Douglas says that speech is not absolute, he is referring to the “counterexamples” mentioned as exceptions to speech because of the criminal intent and conduct associated with the words.
In this chapter I have shown that regarding the First Amendment, the dominant political parties, who feared the overturn of their authority, ultimately lost out to the immobile fundamental purpose of the Bill of Rights. Further, the Supreme Court cases clarify that where speech against the government is concerned, there is a crucial difference between speech and speech creating imminent danger. Moreover, the Supreme Court justices find it to be there legal and moral duty in the American republic to safeguard speech as the foundation for all other liberties enjoyed without government intervention. Of course, there must be a division between pure speech and the counterexamples that do not further political discussion or enlightenment, but in the twentieth century, most laws affecting speech and political discussion violated the First Amendment.

Building on the historical record of the Supreme Court upholding the protection of anti-government speech under the First Amendment, I will next display how the Supreme Court-approved absolutist protection of seditious speech paved the way to protect speech against groups of people. This, in turn, will lead to our discussion of the modern controversy over hate speech and restrictions on speech upheld in educational institutions.
CHAPTER 4
THE RETURN TO REASON

This chapter will continue to highlight the cases that emphasize the framers’ intent for the First Amendment to protect even the most controversial speech with the exception of words that provoke action reflexively in the community. The last chapter focused on speech against the government, and this section shows the transition from seditious speech against particular ideas or groups of people, known today as “hate speech.” We will see how the creation of criminal syndicalism laws enabled the Supreme Court to interpret the First Amendment to safeguard speech to the brink of criminal conduct. Therefore, any restriction of hate speech that does not incite immediate criminal action must be protected by the First Amendment in accordance with Kant’s categorical imperative. Further, the campus speech codes against hate speech appear as to be invalid exceptions to the First Amendment as interpreted by the Supreme Court. Ultimately, even the most undesirable, malicious speech is protected as an idea to be defended or refuted under the protection of free speech in America. Further, even hate speech arguably contributes to the education proposed by the Enlightenment philosophers.

From Advocacy to Hate Speech

As mentioned in the previous chapter, the opinion in Terminiello v. Chicago set a new precedent to protect political advocacy, determining that the government cannot punish a speaker when his words do not incite harmful conduct by others. The opinion of the case then opened this view of speech to protect other types of advocacy, including speech that shows a hatred toward targeted groups of people. Terminiello, in conjunction
with the abolition of the censorship aspect of criminal syndicalism statutes, limited restrictions on speech only to those which actually cause imminent harm.

After Terminiello, the Supreme Court became skeptical of criminal syndicalism legislation in the scope of First Amendment exceptions. It would take a couple decades, but as no real actions occurred to fuel the fear fire, the Red Scare finally dissipated. In 1940, Congress had enacted the Smith Act, similar to the Espionage Act of 1917, in order to restrict Communist discussions. The Acts reads quite similarly to the World War I legislation as follows:

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof - Shall be fined under this title or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.¹

Even without direct reference to the founders or the Age of Enlightenment, the Supreme Court understood that the nature of the republic required free speech, and that its interpretation of the above law needed to respect the First Amendment’s permission for speech concerning the Communist party in America. In Dennis v. United States,² the Supreme Court addressed the difference between preventing evil conduct and allowing

for speech to be passed through the marketplace of ideas. After World War II, Congress enacted another law feeding the second Red Scare and targeting Communist sympathizers through speech restrictions. Justice Frankfurter concurred in his opinion, agreeing that the Smith Act did not inherently violate the First Amendment, but also distinguished the importance of pure speech, stating that “the demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interest, within the confines of the judicial process.”

Because the Dennis opinion both upheld the Smith Act and reaffirmed free speech protections, the Court created a balancing test to better determine the difference between speech that induced harmful conduct and protected pure speech that did not have criminal intent. Ultimately, the Court broadened the definition of pure speech to be the exchange of ideas, and subsequently, future Supreme Court justices would be protected speech that falls under the category of political discussion. As we will see, the term “political discussion” would extend First Amendment protections from speech against the government to speech that advocates hatred toward targeted groups of people.

While Dennis seemed to still advocate some semblance of censorship through criminal syndicalism statutes, a case concerning racism and incitement of violence would ultimately eliminate censorship restrictions regarding this type of legislation. In 1969, the Supreme Court heard Brandenburg v. Ohio, in which the state convicted a member of

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the Klu Klux Klan for violating the Ohio Criminal Syndicalism Act, which forbid the following:

\[\ldots\text{Advocating}\ldots\text{the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform}\ldots\text{and for voluntarily assembling with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.}^{4}\]

In the opinion, the Court held that Ohio’s statute seeks to punish mere advocacy and to forbid, by criminal punishment, the assembly of others in an effort to advocate the described action. Therefore, this statute fails the balancing test of preceding cases, including *Dennis* and *Terminiello*, and violates First and Fourteenth Amendments. The Court continued that freedom of speech and freedom of press prohibit a State from forbidding advocacy of the use of force or breaking the law except where such advocacy is directly linked to inciting or is likely to produce immediate criminal conduct.\(^5\)

As a landmark precedent, the Court created a test through the *Brandenburg* decision in order to apply the case to future, and even past, First Amendment cases. With deference to the intent of Justice Holmes’ “clear and present danger” test, the *Brandenburg* Court created three requirements for advocacy to cross the threshold from speech to incitement. First, the speaker must subjectively intend incitement. Secondly, in context, the words voiced must be likely to induce imminent lawless action. Lastly,


\(^5\) Ibid.
the words used by the speaker must objectively encourage and urge incitement to execute criminal action.\footnote{Ibid.}

Ultimately, this case permitted strong speech by speakers and held an audience liable for their own actions. Moreover, mere teaching of abstract doctrines, as seen in \textit{Schenck} and \textit{Abrams}, are protected because they are not likely to provoke a group to violent action. Such a view holds the individual person to a higher standard, as was envisioned by the Enlightenment philosophers and American founders.

\textit{Brandenburg} overturned \textit{Whitney v. California}, raising the standard between criminal action and mere advocacy.\footnote{Ibid.} Further, previous cases that upheld restrictions against speech are now seen as a counterexample to the pure speech interpretation of the First Amendment. For example, the fighting words doctrine from \textit{Chaplinsky v. New Hampshire},\footnote{Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).} now falls under the test of Brandenburg where the objective words are most likely to incite violence the same way shouting “Fire” in a crowded theater provokes a reflexive response by an audience to panic. In \textit{Chaplinsky}, a Jehovah’s Witness was convicted for violation of Chapter 378, § 2, of the Public Laws of New Hampshire, which reads as follows:

\begin{quote}
No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.\footnote{Ibid.}
\end{quote}
Thus, *Brandenburg* deepened the divide between speech and action, giving the First Amendment more tolerance for aggressive, hateful speech, as envisioned by the American framers of the Constitution and Bill of Rights.

**Inclusion of Symbolic Speech**

As the modern Supreme Court has broadened protections under the First Amendment, freedom of speech includes freedom of expression. Under freedom of expression, symbols also constitute speech without falling into the category of action. Free expression safeguards these symbols because these actions are harmless and do not produce physical injury that criminal law would obviously be able to prohibit.

These symbols range from wearing an anti-war jacket to burning an American flag.\(^{10}\) In these cases regarding expression, the Supreme Court was at its peak of overturning previous case law that had restricted speech. In *Cohen v. California*, the Court noted:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message. . . .\(^{11}\)

\(^{10}\) Cohen v. California, 403 U.S. 15 (1971), where the Supreme Court protected a man who entered a municipal courthouse, wearing a jacket that bore the words, “Fuck the draft.” Also see Texas v. Johnson, 491 U.S. 397 (1989), where the Supreme Court allowed the defendant to burn the American flag as a symbol of his disgust for current politics.

In *Texas v. Johnson*, Justice Jackson follows the precedent of Supreme Court justices who refer to the intent of the Constitution to be static and literal in meaning. He contends that "[i]f 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." Therefore, because burning a flag expresses discontent and does not harm anyone, the government may not prohibit this type of expression because it is within the understanding of what the First Amendment should protect.

From this view, regarding symbolic speech, the Supreme Court embraced the intent of the eighteenth century framers, reaffirming that “if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”

**From Symbolic Speech to Hate Speech**

From *Texas v. Johnson*, the Supreme Court broadened speech to what may have seemed to be the widest range of speech and expression. The coverage of symbolic speech also means that citizens can use mediums other than their own voice or pen to convey a message. They may choose to do it anonymously as well. These symbols, of course, vary in meaning, which means that the Court would need to take a neutral view to the content of the message, unless it was not protected by precedent. Thus, even speech

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and expression motivated solely by bigotry falls under the protection of the First Amendment. The history of “hate speech,” as this message is now known, in the Supreme Court parallels the progress of speech in other categories such as speech and symbols, its eventual permission as a protected category of speech brings the interpretation of the First Amendment back to the original intent of the framers.

In 1952, the Court heard *Beauharnais v. Illinois*, upholding a state libel law which made it illegal to defame a race or class of people. The defendant was a white supremacist, charged with violating the law when he distributed leaflets advocating actively keeping African Americans out of the dominantly white neighborhoods. The Court maintained the validity of the law by pointing out the fact that libel is a counterexample that is not protected by the First Amendment.

This decision remained in the Supreme Court until the late 1970s, when a case revolving around a Neo-Nazi march on a predominantly Jewish town in Illinois seemed to be more aligned with incitement in *Brandenburg*. In the case of *National Socialist Party of America v. Village of Skokie*, the Supreme Court addressed this controversial issue by allowing an anti-Semitic group, through the right of assembly, to march down the streets of Skokie, Illinois and express their anti-Semitic sentiments amongst even

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14 As mentioned in the introduction, “hate speech” is any bias motivated expression, particularly against racial minorities, women, and religious affiliation. Since the Civil War, much of the hate speech controversy has revolved around white supremacists.


aging Holocaust survivors. While the idea of this permission shocked America, the foundation of civil liberty prevailed upon America. Moreover, the swastika symbol of the Nazis did not constitute “fighting words,” which would not be protected by the First Amendment as the Skokie attorneys argued.

While the Skokie case was a victory for free speech, the case did not adequately address symbolic speech, resulting in a distinction the Court would eventually need to tackle. In 1992, *R.A.V. v. St. Paul* created a new precedent regarding hate speech because the Supreme Court invalidated a city hate crimes ordinance by interpreting it to apply to “fighting words” as described in *Chaplinsky*. In *R.A.V.*, a white youth burned a cross in the front yard of an African American family. He was convicted of violating a city ordinance, which banned words that would incite anger, alarm or resentment in others on the basis of “race, color, creed, religion, or gender,” while not prohibiting other bases like political affiliation or sexual orientation.

The Court noted that the ordinance is violation of the First Amendment on its face because "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." The First Amendment prevents government from punishing speech and expressive conduct because it disapproves of the ideas expressed. Justice Scalia led

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18 Ibid.


20 In 1867, Nathan Bedford Forest established the Klu Klux Klan, a white supremacist, anti-black, Jewish and Catholic, organization in which its members would cloak themselves in white sheets and show their disdain for African Americans by burning crosses, among other terrorizing actions and physical injuries, with the intent of intimidating African Americans. For more information, see Greenhouse, Linda, "Supreme Court Roundup; Free Speech or Hate Speech? Court Weighs Cross Burning," in *New York Times*. (May 29, 2002). (Available at: http://www.nytimes.com/2002/05/29/us/supreme-court-roundup-free-speech-or-hate-speech-court-weighs-cross-burning.html?pagewanted=all) (Accessed on July 12, 2010).
the majority in this case and reasoned that the ordinance’s ban is comparable to the
government prohibiting only libel that was critical of the government. He wrote, “The
First Amendment does not permit St. Paul to impose special prohibitions on those
speakers who express views on disfavored subjects. In its practical operation, moreover,
the ordinance goes even beyond mere content discrimination, to actual viewpoint
discrimination.” Scalia protected the intent of free speech by explaining, "Let there be no
mistake about our belief that burning a cross in someone's front yard is reprehensible. But
St. Paul has sufficient means at its disposal to prevent such behavior without adding the
First Amendment to the fire.”21

The concurring justices decided that the ordinance violated the First Amendment
because it was overbroad and criminalized free expression protected by the Bill of
Rights.22 Through this decision, *R.A.V.* brought the judicial interpretation of the First
Amendment closer to a neutral view of loaded words that can inflict emotion pain for
targeted groups that have been persecuted and victimized physically. Rather than
focusing on the discriminatory conduct, the Court looked for conduct and saw none
speculated by the message conveyed.

Since *R.A.V.*, the Supreme Court has had a chance to correct the slight ambiguity
seen in the 1993 decision, continuing toward a plainer and broader First Amendment
interpretation, going as far as communication can be understood within the
Enlightenment concept of the freedom of speech. In 2002, three men were charged with

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22 Ibid., see concurring opinions of Justices, White, Blackmun, O'Connor, and Stevens.
two separate crimes, including cross-burning. This act violated a Virginia statute, providing that “it shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or to cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.”

The men lost their case and challenged the constitutionality of the cross-burning law under the First Amendment. The Supreme Court heard the case as Virginia v. Black, and avoided discrimination and issues concerning the scope of the First Amendment by giving a two-fold opinion. First of all, Justice Sandra Day O’Connor opined for the majority and saw a criminal intent in burning a cross with the objective to intimidate another person. She offered that “the First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation.” Even in his dissent, Justice Clarence Thomas advised that “just as one cannot burn down someone’s house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point.” On the other hand, the majority enforced the First Amendment and reckoned that burning of a cross should not automatically be associated with the crime of intending to intimidate.

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24 Ibid.
25 Ibid.
Relying on Kantian logic, the Supreme Court recognized the limitation that arises between an individual’s right to express himself and the point where that expression violates another person’s right to live in peace on his own property.

**The Future of Hate Speech Legislation**

What remains for the Court lies in public school campuses. The irony here is that these academic institutions are the sources for the teachings of Enlightenment philosophy, and yet the same fears that political parties have to maintain peace and stability motivate these state-run places of learning to censor speech. While the Enlightenment insists that open discussion is the only path to true knowledge, these public universities believe that with establishment of diversity as a priority in academia, the community will thrive better without the intimidation and resentment of hateful speech lurking on the premises. As we will see, both secondary education and places of higher learning have attempted to restrict speech for sake of equality, and for the most part, the involvement of the courts has distinguished freedom of speech from actual illegal conduct or promotion of crime.

Censorship in education has received much criticism. To Alexander Meiklejohn, education within a democracy is crucial to understanding rights, promoting tolerance, and properly engaging in the community as well informed citizens. Meiklejohn believed that self-government compels the government to take positive steps in order to promote public debate. These actions include providing gathering places for the exchange of views and, most important, an educational system that will "attempt to so inform and
cultivate the mind and will of a citizen that he shall have the wisdom, the independence, and, therefore, the dignity of a governing citizen."\textsuperscript{26}

While in theory, freedom of speech is intrinsic to an education, some academic administrators began to believe otherwise and replaced this priority of civil liberties with the idea that in order to create a diverse community in the academic institution, equality must be possible, and some civil liberties cannot coexist when one is abused. However, the Supreme Court has invalidated even speech codes on high school campuses, where the government arguably has a more interactive role with students.

In 1965, just as the Vietnam War began to escalate, students in secondary education exercised their freedom of speech to protest the war, prompting the first censorship attempts on campus for the purpose of restricting controversial political speech. For example, in Iowa, a group of students protested America’s continuation of belligerence across the Pacific by wearing black arm bands during the school day on their high school campuses. The Iowa schools system banned this form of expression, which angered parents and students alike. One student’s family sued the school, and the case reached the Supreme Court through \textit{Tinker v. Des Moines Independent School District},\textsuperscript{27} where the petitioners sought an injunction against the school for banning the silent mechanism used to protest the government’s policy in Vietnam.

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\textsuperscript{26} Vincent Blasi, “The Checking Power of the First Amendment,” 556, citing Alexander Meiklejohn, \textit{Political Freedom}.
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With Justice Abe Fortas writing for the majority, the Court adopted two views. First of all, “First Amendment rights are available to teachers and students, subject to application in light of the special characteristics of the school environment.”\(^{28}\) Secondly, the process of education in a democracy must be democratic, meaning that political discussion is the foundation of the republic and the means to progress. Fortas stated that “it can hardly be argued that either students of teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”\(^{29}\)

Fortas continued to set the tone toward free speech in the campus community by likening the censorship in an educational environment to the abridgments created by politicians in fear of losing their authority in government. Fortas was not moved by the argument that the fear of physical violence in association with campus speech made censorship necessary. Instead, in a democracy, he argued the following:

[A vague and speculative fear of disturbance]. . . is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinions may inspire fear. Any word spoken in class…or on campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take that risk…and our history says that is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and rigor of Americans who grow up and live in this… often disputatious society.\(^{30}\)

Through this opinion, Justice Fortas incorporates the intent of the framers of the Constitution and the history of American society. He cited these two aspects in order to enforce the concept that the American experiment is a republic that requires explicit civil


\(^{29}\) Ibid.

\(^{30}\) Hentoff, 5, citing Tinker v. Des Moines Independent School District.
liberties in order to permit speech that encourages political discussion improves our quality of life. It is the opinion in *Tinker* that safeguards speech on campus and prepares the Supreme Court to invalidate campus speech codes.

Since this case, the more contemporary Supreme Court has not overturned the opinion in *Tinker*, restricting high school campus speech when it falls under counterexamples. For example, in 2007, the Court heard *Morse v. Frederick*, where a student created and posted a banner on campus that read, “Bong Hits 4 Jesus.”31 A high school administrator subsequently suspended the student. The student sued, claiming his First Amendment rights had been violated. The Supreme Court only denied the student’s claim because the purpose of the speech was to advocate illegal action involving drugs, purporting that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.32 Because this particular speech had a reasonable correlation to advocating a criminal act, this case becomes a counterexample to speech. However, this exception to free speech would most likely be protected by the First Amendment in a university setting, as it could also be construed as a political statement. This stance would eventually take form after much debate regarding hate speech restrictions on higher education campuses.

Even with the distinctions of speech in *Tinker* and *Morse*, university administration felt compelled to provide policies that would curtail offensive speech in an effort to give students a safer learning environment. Thus, university speech codes have

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32 Ibid., 397.
rarely reached the Supreme Court, and when they have, the Court has taken the stance that policies must be narrowly geared toward actual conduct with the only speech related restricted. In 1972 the Supreme Court adjudicated a college campus speech case, *Healy v. James*, which would create a precedent assuring students their ability to speak openly at their place of learning.

In *Healy*, a local chapter of Students for a Democratic Society (SDS) at a state supported college was denied recognition as a campus organization, which would have entitled the petitioners to use campus facilities for meetings and to use of the campus bulletin board and school newspaper. The college president denied recognition, and, thus, a right to speak and express, because he believed that this chapter was associated with national organization of SDS, which, he concluded, advocated disruption and violence. This assumed violent mission would have been in conflict with the college's “declaration of student rights,” which protected students from intimidation and other tactics to inflict emotional pain by way of hate speech.

Justice Powell delivered the opinion of the Court, warning that the same limits on the First Amendment applied to university campuses but that a university campus is not the place to censor political discussion. Like Justice Fortas in *Tinker*, Powell asserted that speculating violence would limit speech in a way that does not overall serve an academic institution or parallel the “clear and present danger” test or the “fighting words” philosophy adopted by the Court. Powell determined that the understandings of free

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33 Healy v. James, 408 U.S. 169 (1972).

34 Ibid., 172.

35 Ibid.
speech "leave no room for the view that, because of the acknowledged need for order [in
the classroom], First Amendment protections should apply with less force on college
campuses than in the community at large."36 In this way, Powell emphasized that the
college classroom and its surroundings are a distinct "marketplace of ideas" that requires
the openness and quest for truth required to properly engage citizens in political
discussion necessary for the prosperity of the republic.

A year later, the Court used the Healy precedent, suggesting that while campus
administrators had, what Powell called, a “heavy burden” to balance speech and
harmony, Healy made "clear that the mere dissemination of ideas - no matter how
offensive to good taste - on a state university campus may not be shut off in the name
alone of 'conventions of decency.'"37

From offensive speech codes, public universities aimed to restrain speech
motivated by racism, sexism, and homophobia, which all target minority groups on
campus. After the Supreme Court upheld the constitutionality of affirmative action, the
increase of minority students on campus caused resentment and intolerance by some
groups on campus.38 During the 1980s and 1990s, in order to maintain the peace and
create a comfortable setting for all to enjoy an education, public universities campuses
enacted speech codes and harassment policies.

36 Ibid.


upheld that an academic institution could use race as a factor to admit students in order to promote diversity
in the classroom. This decision also supported the institution’s First Amendment right to academic
freedom.
Proponents of speech codes believe that free speech is a limited right that must be weighed alongside other important rights, including justice, equality, and dignity. However, this argument contradicts the purpose of the First Amendment in that allowing everyone the right to speak creates equality by virtue that there is no bias or qualification in allowing the conveyance of a message. While this endeavor is well-intended, as Richard Bernstein notes, these policies struggle with the constitutionality issues and philosophical criticism that the costs outweigh any result seen as a benefit of restricting speech on campus that would otherwise be legally protected. Bernstein also warns that “[h]iding behind the innocuous, unobjectionable, entirely praise-worthy goal of eliminating prejudice from the human heart lies a certain ideology, a control of language, a vision of America that, presented as consensual common sense, is actually highly debatable.”

Gerald Uelman, Dean of Santa Clara University in California, has a similar view of the fundamentally controversial nature of speech codes. He attests that speech codes raise ethical questions, asking, “When civil liberties are pitted against the right to freedom of speech, which does justice favor? Do the costs of hate speech codes outweigh their benefits? Is the harm that results from hate speech so serious that codes to restrict

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40 Ibid.

freedom of speech are morally required? These questions are answered by both academic colleagues and the United States Judiciary.

During his time as dean, Uelman weighed the benefits and costs of speech codes, showing that while there is a right to have an education in peace, there is also a fundamental right to speech, and the free transmission of ideas will provide a more realistic education about the world and promote an insight that will lead the ignorant toward tolerance. In fact, censorship is the diametric opposite way in which to encourage an education that supports tolerance of diversity in other ways. Were censorship to continue, over time, the same fervor that brought hate speech codes will bring further restrictions by administrators eager to create the façade of equality in institutions within an unequal world. A guise developed by censorship violates the intent of free speech in the scope of Enlightenment philosophy because as individuals come closer to finding truth, society will realize that equality is inherent in respecting civil liberties of others.

Up until this point, no case has reached the Supreme Court regarding campus speech codes. Precedent indicates that the First Amendment still has no place for abridgment of messages said on university grounds, as public schools are arms of local and state government. Still, campus speech codes have instigated litigation in the pursuit of allowing the First Amendment to remain unrestricted on campuses.

42 Ibid.
43 Ibid.
Since Healy, college campus speech codes have only reached the federal court on the district level. In 1989, the Eastern District Court of Michigan struck down a university campus speech code. The speech code, enacted in 1988, prohibited individuals, under penalties ranging from restitution to expulsion, from "stigmatizing or victimizing" individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status. A student on campus contested the policy when he, a biopsychology major, asserted that there could be biological differences between races and between men and women.

Since the policy would have censored this student in even the most civil of circumstances, such as a discussion within a bio-psychology class, the speech code was criticized and invalidated for being overly broad. The District Court determined that "[l]ooking at the plain language of the Policy, it is simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct." Although this code may have had the best interest in maintaining peace and security on campus, such broad restrictions of speech inhibits students from truly acquiring an education and becoming free and informed adults, prepared to make use of their experience in a diverse university setting and contribute their minds and skills to society.

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45 Ibid.
46 Ibid.
One speech code that has remained on the books has already undergone judicial reprimand. In *UWM Post, Inc. v. Board of Regents of University of Wisconsin System*, the University System enacted a rule prohibiting students from directing “discriminatory epithets” at targeted individuals with the intention to demean them and create a hostile educational environment. The speech policy at the University of Wisconsin proscribed the following:

The university may discipline a student in non-academic matters in the following situations:

(2)(a) For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets or other expressive behavior or physical conduct intentionally:
1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
2. Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.

A student would be in violation if:

a. He or she intentionally made demeaning remarks to an individual based on that person's ethnicity, such as name calling, racial slurs, or "jokes"; and
b. His or her purpose in uttering the remarks was to make the educational environment hostile for the person to whom the demeaning remark was addressed.

The federal court in Wisconsin decided that the policy did not meet requirements of “fighting words” doctrine, as defined in *Chaplinsky*, because it was overbroad and covered a substantial number of situations where no breach of peace was likely to

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result. This policy could ban even innocuous speech were someone to misinterpret the language and find it derogatory toward himself. Subsequently, the University System needed to amend its code were any restriction of expression to be permitted.

Unfortunately, even though the federal court invalidated the Wisconsin speech code, the University Board of Regents still maintains almost identical language in its “Racist and Other Discriminatory Conduct Policy.” The rule now focuses on prohibiting racist conduct as follows:

"Racist and other discriminatory conduct" means intentional conduct, either verbal or physical, that explicitly demeans the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry, or age of an individual or individuals, and (1) has the purpose or effect of interfering with the education, university-related work, or other university authorized activity of a university student, employee, official or guest; or (2) creates an intimidating, hostile or demeaning environment for education, university related work, or other university authorized activity.

According to Donald Downs, a professor at the University of Wisconsin, “a university is a humanitarian institution that has several obligations that are sometimes in conflict: pursuing truth, preparing students for competent participation in constitutional citizenship, and promoting civility and mutual respect.” He has condemned the college’s attempt to censor students because he believes that “such policies corrupt the

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49 UWM Post, Inc. v. Board of Regents of University of Wisconsin System.

50 Samantha Harris, “Speech Code of the Month: University of Wisconsin System.”

51 Ibid.

52 Donald A. Downs, Restoring Free Speech and Liberty on Campus (New York: Cambridge University Press, 2005), 271.
painstaking process of building mutual respected by tempting authorizes to indulge in moral bullying.”

This chapter has shown that as the Supreme Court and lower courts in these mentioned cases support absolute civil liberties, there is no doubt that Enlightenment philosophy continues to guide the decisions of the Supreme Court who hold the keys to the future of the American republic. The nation has progressed because politically-attuned citizens have voiced their concerns by exercising their freedoms. Thus, even the cruelest speech, unaccompanied by the threat of imminent harm or hateful action, has only intellectual provocation in the realm of the enlightened community of individuals who embrace their capacity to communicate, learn, discover, and create in order to achieve a higher quality of life.

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53 Ibid., 270-271.
CONCLUSION

Having viewed the context of the Bill of Rights, it is clear that the Enlightenment era represents more than merely a catalyst for new government. Rather, this Age of Reason stands in history as a wake-up call for humanity to realize its potential and embrace the faculties that make us human, complex, and talented creatures and that in many ways shape our own destiny. At this time in history, the Western world has determined that democracy is the best way to enable individuals to strive for a better life and allow others to enjoy this same aspiration.

Democratic community depends upon many social practices, and since the Enlightenment era, when the first modern republic arose in America, speech had been at the forefront of both social practices and liberties inherent to its progress. In the area of speech, Kant’s imperative includes what he refers to as the “innocuous” freedoms: natural rights that do not infringe upon another’s autonomy and right to live in peace. Speech takes on many forms, and each mode provides information, ideas, and requests for others in the community. Without the transmission of this form of communication, humanity is at most in a static situation, unable to learn, take risks, or seek transcendence or safety within the political sphere.

In this way, America was destined to be an experiment of the Enlightenment. The eighteenth century produced a number of philosophers who argued that humanity is capable and deserving of an autonomy that could not be enjoyed under the European regimes. Even when compromising certain freedoms in a community, autonomy of the individual is crucial as a means to maintaining a secure society that collectively provides
basic necessities at a minimum. In the political sphere, autonomy is not only necessary for mere survival but also for seeking a higher quality of life. As Kant notes, the individual represents the whole of humanity. Therefore, allowing for one’s successful quest for truth enables all to succeed.

In America, freely discussing political issues was the reason that intellectual leaders found consensus and were able to declare independence with the certainty that a nation could be built upon democratic foundations. These leaders of the emerging republic read the same philosophers, argued with similar logic, and found themselves acting upon the teaching of the Enlightenment. Further, because of these political and philosophical discourses, taking a risk to form a government such as a republic became possible.

Engraving speech into the Bill of Rights as an established, inherent liberty was, therefore, bedrock to the foundation of the government sought by those American leaders. While it may be easier to tolerate all forms of speech in a more homogenous society, the leaders were aware of the great variety of immigrant and political groups when they decided to make freedom of speech an inalienable aspect of their democratic system. Allowing for all voices to speak meant that education was at the forefront of becoming a well-informed, participatory citizen. Further, incorporating this civil liberty acknowledged that no individual, political party, or group of people can ever be an authority on what truth is. Therefore, what may be considered a controversial idea at one time to one person may change with culture, or with those in political power. Even the most hateful and intolerant messages, although not encouraged, are protected as a means
of providing education and chance for groups to promote change and acceptance in a society where individuals must respect others’ autonomy and rights.

The American experiment depends on self reliance and the responsibility of individual citizens. Hence, when the Supreme Court allows hate speech under the protection of the First Amendment, the interpretation of free speech requires the people targeted by the spiteful messages to accept that there is no physical or governmental vindication.\(^1\) As Blasi offers, there is only counter-speech that suffices as a remedy.\(^2\)

Because the experiment requires this social responsibility, censorship becomes attractive because it acts as a crutch for the weak-willed who would like to silence messages they adamantly dislike. Words can only inflict emotional pain, and so, censorship of insular, minority views allows the contemporary majority view to monopolize the forum and minimize the quest for truth. However, curbing speech in name of peace not only transfers the blame to the speaking party, rather than the rash audience which may react negatively, but also actually creates social discord rather than stability.

The university setting is no different. As Downs relates, “Rather than harping on sensitivity and the idea of tolerance, universities should emphasize the fundamental principles of learning, which include free speech and academic freedom.”\(^3\) Further, he believes that the best way to acquire a complete education is by allowing free speech on

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3 Downs, *Restoring Free Speech and Liberty on Campus*, 271.
campus in order to expand the scope of the outside “real” world and broaden the constituency in a way that checks local power. This result promotes James Madison’s policy from *Federalist 10*, which emphasizes the need to bring universal principles into local community.⁴

In sum, the American experiment is not perfect in the same way that all ideals are not flawless when set in motion. Perhaps, then, those first incidents of censorship and suspension of civil liberties were the “trial and error” times in the nation. However, in order for the American republic to thrive, citizens must commit to their duties within the political sphere. This includes accepting the right of others to speak, to control oneself by reasoning and respect, and to contribute to the political discussion whether by voicing an opinion or remaining silent. As the Enlightenment teaches, civil liberties and education are codependent in a manner where neither truly exists without the other. Therefore, the self-governance sought by both the Enlightenment philosophers and intellectual leaders of America can only prevail when “we the people” endeavor to sustain the freedom afforded by both.

Thus, after many debates, our modern Supreme Court and other scholars have assured us that because of the Bill of Rights, the Enlightenment philosophy is timeless, and because of America’s respect for the nation’s history and devotion to the founders’ values, there can be a high tolerance for speech and, thus, ironically no room for its abridgment under the protections of the First Amendment.

⁴ Ibid., 268.
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