FREEDOM OF SPEECH

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Edited by

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INTRODUCTION

Freedom of expression found perhaps its most eloquent advocate in John Stuart Mill, whose *On Liberty* (1859) encapsulated the case for the unfettered dissemination of ideas like no other work before or since. In words that would echo through debates over personal and press freedoms until our day, Mill declared: "If all mankind, minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."

While political philosophers and legal theorists have differed over the theoretical roots of free speech, and while it has sometimes foundered in confrontation with other values, few would deny the importance of expressive liberty to the feasibility and success of democratic societies. Whether free speech is defended as a fundamental right that inheres in each individual, or as a guarantee that all of society's members will have a voice in democratic decision-making, or as vital to a "marketplace of ideas" that facilitates the emergence of truth by allowing vigorous competition among diverse points of view, the central role of expressive freedom in liberating the human spirit is undeniable.

Freedom of expression is of fundamental concern for democracy generally, and nowhere has this freedom been subjected to such intense and searching debate as in the United States. Freedom of speech came to American law through the influence of the English common law and through eminent scholars of that law, particularly William Blackstone. Enshrined in the First Amendment to the United States Constitution with a brevity that would belie its subsequent history of intricate judicial parsing, freedom of expression was bequeathed to posterity by James Madison and the first Congress in a way that has since been emulated by nascent democracies throughout the world. The First Amendment proclaims that "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 of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." As interpreted by a Supreme Court increasingly zealous in the protection of expressive liberty as the twentieth century unfolded, this amendment became a bar not only to congressional and federal interference, but also, through the due process clause of the Fourteenth Amendment, to intrusion by state governments as well.

First Amendment absolutists notwithstanding, the constitutional rights of free speech and the press have undergone a frequently contorted history, as justices struggled over other, competing values ranging from

national security to personal privacy and property rights. As many of our contributors observe, life's proclivity for spoiling clear and seemingly simple declarations was much in evidence as the courts confronted the great and controversial issues of the twentieth century. Loyalty oaths, political demonstrations, antiwar leafletting, flag burning, union picketing, convictions of Communist Party organizers, and state attempts to expose and subdue civil rights activists in the segregated South were all controversies that landed on the Supreme Court's docket and helped to forge First Amendment doctrine. Just as the origin and fate of the Sedition Act of 1798 influenced early Americans' concern to protect publications from prior restraint and subsequent criminalization, these more recent controversies have shaped conceptions of expressive freedom in our time.

As the essays in this volume illuminate, freedom of expression will be tested by new and continuing controversies as the twenty-first century unfolds. Advances in digital technology raise pressing questions regarding freedom of speech and, with it, intellectual property and privacy rights. The capacity to maintain large electronic databases has fueled fresh concerns about privacy and more fervent calls for restrictions on the exchange of information and ideas, a reaction that might prove as deleterious as the threat that inspires it. As growth of the Internet tests, and often confounds, laws and judicial decisions established in the era of the printing press, cyberspace looms as a relatively uncharted frontier for free speech and copyright law. Combating "hate speech" has spawned speech codes on American campuses, while campaign finance reform limits the formerly sacrosanct category of "political speech." Expressive liberties may face their greatest challenge from governmental efforts to thwart terrorism.

In recent years, the U.S. Supreme Court's free speech doctrines have been subjected to radical critiques. Our first three authors each examine these critiques and find them, for a variety of reasons, unpersuasive. In his essay, "Equality and Expression: The Radical Paradox," Andrew Altman observes that radical critics of liberalism attack the liberal state because it unjustifiably protects forms of speech that maintain racial and sexual oppression. He sketches the historical background of today's radicalism, finding it in the 1960s radicalism of Herbert Marcuse, who rejected any liberal system of expression as thinly disguised oppression. In contrast, proposals put forth by contemporary radicals to rectify liberal oppression are far more modest than Marcuse's. The very modesty that makes these proposals seem plausible, however, also makes them compatible with liberal principles. Altman describes some of the main elements of a liberal system of expression and defends them against the skeptics. He concludes by showing that the greater the role played by speech in maintaining the racial and sexual oppression that radicals allege to exist, the more weight that liberal arguments about free expression must carry in order for the current radical position on speech to be coherent.

Scott D. Gerber, in "The Politics of Free Speech," addresses both what freedom of speech means in American constitutional law and what it should mean. He examines how several prominent constitutional theorists have proposed various reasons for altering free speech law in order to further their preferred values and political objectives. Gerber surveys the free speech views of: the leading feminist legal theorist, who finds combating pornography sufficient reason to curtail the First Amendment; critical race theorists, who value the proscription of "hate speech" over unfettered liberty; legal republican theorists, who find "deliberative democracy" the more attractive value; and libertarian theorists, who critique the Court for devaluing commercial speech. Gerber assesses each position in light of the most trenchant criticisms that each view has garnered, whether the courts have been influenced by any of the radical views, and, in conclusion, whether it is possible to advance a nonpolitical, that is, a purely law-based or value-free, theory of free speech.

Two forms of free speech skepticism have been surprisingly influential in American academic circles, observes Daniel Jacobson in "The Academic Betrayal of Free Speech." First, progressives argue that the "silencing" of certain objectionable opinions can actually promote speech rights. Second, postmodern critics claim that free speech is conceptually impossible and that censorship is both ubiquitous and desirable. Jacobson finds that the classical liberal conception of freedom of speech has the resources necessary to answer both challenges. Moreover, although free speech skeptics claim to be especially sensitive to the social landscape, Jacobson responds that they actually distort the facts about the very social environment with which they are most familiar: academia. Despite their claims that they are concerned about promoting academic freedom, Jacobson finds these protestations merely opportunistic, leaving him unconvinced that the free speech skeptics have a sincere commitment to intellectual diversity.

The seven papers that follow each tackle a conflict or an alleged conflict between free speech and another important social or individual value. Judith Wagner DeCew, in "Free Speech and Offensive Expression," reviews philosophical arguments in defense of maximal free speech, consequentialist and other justifications for limiting free speech, and legal guidelines on offensive expression. She then examines how the United States Supreme Court has struggled to address sexually explicit expressive conduct that does not rise to the level of 'obscenity' under First Amendment jurisprudence. The Court has been sensitive to the competing values of communities that wish to preserve an environment conducive to family values and security. In DeCew's assessment, the Court appears to have implicitly recognized sexually explicit yet nonobscene expression as "lower value" speech, which is less fundamental and less worthy of First Amendment protection. DeCew argues that philosophical justifications for this position are inadequate, and that recent moves by the Court, especially in cases on city ordinances designed to curb nude

dancing, undermine traditional First Amendment protection and point in the direction of an erosion of free speech in the United States.

In "Copyright, Trespass, and the First Amendment: An Institutional Perspective," Lillian R. BeVier addresses the supposed conflict between free speech and copyright law. She asks whether tangible property law could offer appropriate analogies to help resolve disputes over conflicting claims of access to the expressive content of copyrighted works, to content on the Internet (whether copyrighted or not), and to Web sites and proprietary e-mail networks. BeVier focuses on the institutional choices that are embedded in the question, and suggests that whether and how much to "propertize" digital content, and whether and how much to grant First Amendment rights of access to it, pose a fundamental choice about whether to lodge decision-making authority over access in private or public sector actors. BeVier defends the choice to lodge such authority in the hands of private owners. She concludes that tangible property law does indeed offer appropriate analogies because its principal instrumental justification—encouraging investment by rewarding owners with the profits of their investment decisions—applies equally well to intellectual property. In addition, she concludes that the First Amendment does not require owners of either tangible or intangible property to grant access to those who wish to use it without the owner's permission.

In his essay, "Restrictions on Judicial Election Campaign Speech: Silencing Criticism of Liberal Activism," Lino A. Graglia examines the oddity that had existed in twenty-seven states, where judges were elected by the people, but prevented from campaigning on their political or judicial views. In these states, judges had adopted codes of ethics that restricted the speech of judicial candidates. The practical effect of these codes, argues Graglia, was to silence any criticism of liberal judicial activism and to keep the electorate uninformed about opinions that deviated from liberal doctrine. In *Republican Party of Minnesota v. White* (2002), the Supreme Court, split 5 to 4, invalidated such a code as prohibited by the First Amendment. The First Amendment, oddly, thus permits states to not elect judges at all or to abolish judicial elections, but it does not permit the *restriction* of judicial election campaign speech if a state does select judges by election. The dissenting justices in *White* would have upheld the code of ethics by reiterating the central fiction of American constitutional law: that our judges, despite the power of judicial review, are not political actors, and that subjecting them to elections is therefore unnecessary, although not impermissible. Electing judges may not violate the First Amendment, but neither does it solve the problem of political rule by judges, which, Graglia laments, is an inevitable consequence of judicial review.

In "Property Rights and Free Speech: Allies or Enemies?" James W. Ely, Jr., notes that, historically, the rights of private property owners and the right to engage in expressive activity were linked; both were seen as es-

sential to protecting personal freedom by restraining the power of government. Yet in recent decades, there has been controversy over the claimed right of nonowners to engage in expressive activity on privately owned property, such as shopping centers and residential communities. Ely points out that the right of owners to maintain exclusive possession of their premises has long been seen as an essential component of the concept of property. He contends that shopping centers and residential communities are not public forums for the purposes of the First Amendment. Moreover, he argues that owners have legitimate reasons to ban free speech activities from their property, and that they should not be compelled to furnish a forum for the views of others. Ely stresses that there is no artificial division between speech and property rights, and that both are essential to a free society.

David E. Bernstein observes that freedom of speech would be of little practical consequence if the government could suppress ideas by prohibiting individuals from gathering with others who share their views. Freedom of expression, Bernstein notes in "Expressive Association after *Dale*," must consist of more than the right to talk to oneself. The right of expressive association first garnered protection from the U.S. Supreme Court during the late 1950s and early 1960s, when the Court prevented states in the South from forcing the NAACP to disclose its membership lists. The right of expressive association then languished in obscurity for over two decades. When it reemerged, the Court was clearly not pleased that its creation, born to defend civil rights groups, was now being claimed by organizations that wanted to defend their discriminatory policies against women. Not until 2000, in *Boy Scouts of America v. Dale*, did the Court endorse a broad-based right of expressive association against the competing claims of an antidiscrimination law. While reaction to *Dale* by commentators has been predictably mixed, lower courts have given it a broad interpretation. As a result of *Dale*, Bernstein sees far-reaching implications for the free exercise of religion and for free speech on college campuses.

C. Edwin Baker's "Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment" explores the tension between free speech and the desire for privacy. Baker notes that the right not to have others disseminate personal, private information about oneself has been considered one of the greatest innovations in the common law during the twentieth century. This innovation, however, is not an unalloyed benefit, since one person's right of informational privacy can conflict with another person's right to freedom of speech. To the extent that the two conflict, Baker maintains that speech freedom should prevail, since it is essential for individual autonomy. Nevertheless, recognizing this speech freedom leaves open a host of appropriate legal ways to protect informational privacy. Yet, he suggests that some of the impulse toward greater emphases on personal privacy may have a questionable pedigree. Often speech that violates privacy (gossip, for example), serves

valuable social functions, including a more egalitarian distribution of power and the encouragement of social and political change.

The 2000 U.S. Presidential election witnessed a major effort to promote legislation restricting the marketing of violent and/or sexually explicit movies, music lyrics, and video games on the assumption that they are an underlying cause of violence by young people. In "Current Proposals for Media Accountability in Light of the First Amendment," Ronald D. Rotunda looks at the empirical evidence regarding a causal relationship between violence depicted in the entertainment media and violence in real life, and examines the theoretical bases of free speech law, in order to determine if government can or should restrict or regulate the marketing and distribution of entertainment products that depict violence, particularly when minors are in the audience. Rotunda concludes that such regulation is bad policy, in part because entertainment advertising is not deceptive: it is not misleading for Hollywood to advertise an R-rated movie as rated R or a PG-13 movie as PG-13. Moreover, Rotunda remains unconvinced of any causal relationship between, for example, watching a violent movie and then engaging in violence. Finally, as a constitutional matter, legal precedents likely forbid governmental efforts to limit advertising, a form of speech that has some First Amendment protection. This protection is heightened when advertising concerns entertainment, a form of speech that has complete First Amendment protection unless it is 'obscene', a legal term that does not apply to R-rated movies and similar fare. Free speech law increasingly suggests that government does not have the power to forbid truthful speech about lawful activities—particularly about activities that enjoy full First Amendment protection—simply because government wants to dampen interest in those activities. Nor may government prohibit advertising about a product that is lawful for adults simply because children are in the audience. As the Supreme Court held nearly a half century ago, such a sweeping effort would be "to burn the house to roast the pig."

The final two papers in this collection discuss modern free speech issues and doctrine through a historical lens. Thomas G. West explores the development and transformation of free speech from America's founding and early years to the articulation of modern free speech theories in the twentieth century. In "Free Speech in the American Founding and in Modern Liberalism," he casts grave doubt on the common conceit that there is more freedom of speech in America today than there was at the time of the founding. This thesis is correct, at least from the point of view of the political theory of modern liberalism, which sets minimal limits on obscenity and on speech promoting the overthrow of government. However, the thesis is not correct from the founders' point of view. Today's liberals, argues West, restrict speech where it ought to be free. With campaign finance reform acts, they ban some citizens from spending "too much" money publicizing their opinions on candidates for election or

political issues. With antidiscrimination laws, they lay down rules forbidding certain kinds of speech in private schools and workplaces. With laws licensing and regulating broadcasting, they impose prior restraint on speech and, thereby, manipulate the content of broadcasting. From the founders' perspective, liberals have reversed the founders' understanding of free speech. Today's liberals protect licentiousness but not liberty; the founders protected liberty but not license.

In "Democratic Ideals and Media Realities: A Puzzling Free Press Paradox," Michael Kent Curtis notes that a central justification for the rights of free expression has been the role that freedom of speech, of the press, and of peaceful assembly play in maintaining representative government. The ideal suggests that freedom of expression provides citizens with information and opinion that are both sufficiently detailed and diverse to make it possible for voters to fulfill their democratic function. A danger to free speech that is rarely overlooked is governmental interference, but speech rights can be curtailed by private, concentrated power as well. Americans recognized these twin threats, and early commentators conducted vigorous debates over both dangers, even though there was little activity in the courts. Such events as the Sedition Act of 1798 and the controversy over the attempt to suppress abolitionists' anti-slavery arguments in the South, stimulated much thoughtful discussion. Some commentators addressed a concern that resonates with many people today, which is how to protect against abuse by the press of its power. A number of observers suggested that diversity of ownership and viewpoint in the mass media was both an existing fact in the young United States and a protection against the abuse of press power. Today, the ever more consolidated, corporate, mass media is a potential threat to democratic self-government. Curtis argues that the mass media—and particularly television—is failing in its democratic mission. Curiously, in spite of its shortcomings, he thinks that the press in the period between 1830 and 1868 in some ways made more substantial contributions to democratic dialogue than American media does today. Recognition of the danger posed by media monopolies is a crucial first step to thinking about reforms, Curtis concludes.

These essays contribute to the ongoing debate on the justification, limits, and conflicts of expressive liberty. William O. Douglas, one of the leading defenders of free speech absolutism on the Supreme Court, stated the importance of this liberty well, when he wrote:

> Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart . . . . This has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality. We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen.

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