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# VIRTUE, FREEDOM, AND THE FIRST AMENDMENT

Marc O. DeGirolami\*

*“Despotism may govern without faith, but liberty cannot.”*<sup>1</sup>

## ABSTRACT

*The modern First Amendment embodies the idea of freedom as a fundamental good of contemporary American society. The First Amendment protects and promotes everybody’s freedom of thought, belief, speech, and religious exercise as basic goods—as given ends of American political and moral life. It does not protect these freedoms for the sake of promoting any particular vision of the virtuous society. It is neutral on that score, setting limits only in those rare cases when the exercise of a First Amendment freedom exacts an intolerable social cost.*

*Something like this collection of views constitutes the conventional account of the First Amendment. This Article offers it two challenges. First, the development of the First Amendment over the past century suggests that freedom is not an American sociopolitical end. It is a means—a gateway out of one kind of political and legal culture and into another with its own distinctive virtues and vices. Freedom is not a social solution but instead gives rise to a social problem—the problem of how to allocate a resource in civically responsible ways, so as to limit freedom’s hurtful potential and to make citizens worthy of the freedoms they are granted. Only a somewhat virtuous society can sustain a regime of political liberty without collapsing, as a society, altogether. Thus the First Amendment of the conventional account has not maximized freedom for all people and groups. It has promoted a distinctive set of views about the virtuous legal and political society.*

*Second, the new legal culture promoted and entrenched by the conventional account is increasingly finding that account uncongenial. In fact, the conventional account is positively harmful to its continued flourishing. That is because the new legal culture’s core values are not the First Amendment freedoms themselves, but the particular conceptions of political and social equality and individual dignity that the conventional account has facilitated and promoted. Proponents of the new legal culture in consequence now argue for aggressive limits on First Amendment freedoms.*

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1 I ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 393 (Henry Reeve trans., Century Co. 1898).

*One prominent group has invented a new legal category: “enumerated rights Lochnerism.” These scholars denigrate any First Amendment resistance to multiplying forms of expansive government regulation in the service of egalitarian aims as retrogressively libertarian. Another group argues for novel limits on the First Amendment in the form of balancing tests that would restrict speech that injures the dignity of listeners and religious exercise that results in vaguely defined and vaguely delimited harms to third parties. What unites these critics is the desire to swell features of the Court’s post–New Deal Fourteenth Amendment jurisprudence, and particularly the law concerning sex as a civil right, by protecting progressively expansive conceptions of equality and individual dignity. The critics see the conventional account of the First Amendment as an obstacle in the path of progress.*

*Part I of this Article presents the conventional account of the First Amendment in three theses. It then critiques the conventional account in Part II by offering three revised theses, developed through the somewhat unusual route of exploring the First Amendment thought of the late political theorist and constitutional scholar, Walter Berns. Freedom, for Berns, gave rise to a problem—the problem of making men sufficiently virtuous to merit their freedom. It was a problem that he thought had been ignored or even forgotten by defenders of the conventional account of the First Amendment.*

*But the problem of virtue and freedom has been remembered. Part III argues that contemporary defenders of the new legal culture have remembered the problem just as their own cultural and legal mores are ascendant. The new civic virtues—exemplified in multiplying anti-discrimination regulations for the protection of thickening conceptions of equality and individual dignity, particularly as those concepts relate to sexual autonomy—are those that were fostered by the conventional account of the First Amendment in tandem with significant components of the Supreme Court’s post–New Deal Fourteenth Amendment jurisprudence. And those civic virtues are already informing new criticisms of the conventional account and arguments about new limitations on the scope of religious freedom and freedom of speech. Berns’s arguments about freedom and virtue, it turns out, are highly relevant today since progressive opinion is no longer committed to First Amendment “absolutism.”*

*The Article concludes with two speculations. First, it seems we are no longer arguing about whether to restrict freedom, but for what ends. If that is true, then those arguments should neither begin nor end with egalitarian and sexual-libertarian fervor. Second, there is no account of the First Amendment that maximizes freedom for everyone—for all persons and groups. There is only the society that America was before the rise of the conventional account of the First Amendment and the society that it is becoming after it.*

## INTRODUCTION

The modern First Amendment symbolizes the triumph of freedom. It embodies the idea of freedom as a fundamental and self-evident good of contemporary American society, one so obvious as to need little defense. At the level of legal doctrine, the Supreme Court has only occasionally doubted the expansive protections of religious freedom<sup>2</sup> and freedom of speech that it has found in the First Amendment over the last century.<sup>3</sup> At the level of

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2 The situation of religious free exercise is somewhat complicated. See *infra* notes 86–102 and accompanying text.

3 This Article concentrates on these freedoms in particular because the doctrine interpreting them is more developed than that of the other First Amendment freedoms of petition and assembly. For an important recent study of the latter, see JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012).

ideas, the contest between communitarian or virtue-promoting views and libertarian views of the purposes of the First Amendment is widely believed to have been decided conclusively in favor of the latter. The First Amendment protects and promotes every individual's freedom of thought, belief, speech, and religious exercise as basic goods—as given ends of American political and moral life. It does not protect these freedoms for the sake of promoting any particular vision of the virtuous society. It is neutral on that score, setting limits only in those relatively rare cases when the exercise of a First Amendment freedom exacts an intolerably high social cost.

Something like this collection of views constitutes the conventional account of the First Amendment. Some may contest or quibble with certain of its details—indeed, some have<sup>4</sup>—but it is serviceable as a general statement of the prevailing understanding of the First Amendment's purposes and functions. The conventional account of the First Amendment has had profound effects not only on American law and politics but also worldwide, providing the foundation for new and revised accounts of religious and expressive freedom in international secular and religious documents. Some of those effects have been beneficial; others have not. This Article largely avoids these evaluative issues and instead offers two challenges to the premises of the conventional account.

First, the development of the First Amendment over the past century suggests—against the conventional account—that freedom is not an American sociopolitical end. It is a means—a gateway out of one kind of political and legal culture and into another with its own distinctive virtues and vices. To put it another way, freedom (How much? What kind?) is not a social solution but instead gives rise to a social problem—the problem of how to allocate a resource in civically responsible and healthful ways, so as to limit freedom's hurtful potential and to make citizens worthy of the freedoms they are granted. Only a somewhat virtuous society can sustain a regime of political liberty without collapsing as a society altogether. Freedom, as Tocqueville said, cannot govern without faith.<sup>5</sup>

The particular responses to the problem of virtue and freedom offered by the Supreme Court over the last hundred years have helped to shape—and transform—American society.<sup>6</sup> There is therefore no contest between the communitarian or virtue-promoting and the libertarian views of freedom under the First Amendment. Contestation requires rivalry, but these are not rival perspectives about freedom at all. Rather, the supposed triumph of the libertarian First Amendment, in combination with the broad expansion of the American regulatory state and the ever-hardening political commitment to equality as the preeminent constitutional value of our time, has steered American law away from one set of political commitments and toward

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4 See *infra* Part II.

5 See TOCQUEVILLE, *supra* note 1.

6 Of course, legal doctrines, and Supreme Court opinions in specific, are only one catalyst of social and political change. By focusing on law, this Article does not deny or minimize the role of other catalysts. Still, law and the Court have played their part.

another. The First Amendment of the conventional account has not maximized freedom for all people and groups. It has instead promoted a new set of views and dispositions about the nature of the virtuous legal and political society.

Second, as it becomes entrenched, the new legal culture is increasingly finding the conventional account of the First Amendment uncongenial. It no longer needs that account to achieve its most important aims. Even more, the conventional account is positively harmful to its continued flourishing. That is because the new legal culture's core values are not the First Amendment freedoms themselves (in this it resembles the legal culture that preceded it) but the particular conceptions of political and social equality and individual dignity that the conventional account has facilitated and even intentionally promoted. Proponents of the new legal culture in consequence have argued for aggressive new limits on First Amendment freedoms.

One newly prominent group has invented an entirely novel legal category: "enumerated rights Lochnerism." These scholars denigrate any First Amendment resistance to multiplying forms of expansive government regulation in the service of egalitarian aims as retrogressively libertarian. Another group argues for novel limits on the First Amendment. In the religion clause context, for example, they claim that religious accommodations are unconstitutional whenever they impose "substantial" or "material" "harms" on third parties, including vaguely defined and vaguely delimited harms to individual "dignity." In the Speech Clause context, they advocate new balancing tests in which speech would be measured against values implicating the dignity of listeners and broader social interests. And they champion the regulation of "revenge pornography" (but not pornography proper) and, especially, corporate speech while retaining maximum liberty for speech that is perceived to promote or be consistent with their favored ends. What unites these critics is the desire to swell features of the Court's post-New Deal Fourteenth Amendment jurisprudence, and particularly the law concerning sex as a civil right, by protecting progressively expansive conceptions of equality and individual dignity. These are the virtues of the new legal culture. The critics see the conventional account of the First Amendment as an obstacle in the path of progress.

Part I of this Article elaborates on the doctrinal and theoretical features of the conventional account of the First Amendment that has dominated its interpretation through the twentieth and twenty-first centuries. It presents the conventional account in three theses. The Article then critiques the conventional account in Part II by offering three revised theses—not so much point-by-point refutations of the conventional account as disagreements with some of its basic premises. The Article develops these criticisms through the somewhat unusual route of exploring the First Amendment thought of the late political theorist and constitutional scholar, Walter Berns. Berns believed that the First Amendment must be interpreted and applied so as to promote the virtuous society and that the interpretations given it by the twentieth-century Supreme Court were deeply in error. Freedom, for Berns, gave

rise to a problem for any society that had reflected seriously about the relationship of the state and society. The problem was that of making men sufficiently virtuous to merit their freedom. It was a problem that he thought had been ignored or even forgotten by the defenders of the conventional account of the First Amendment.

But the problem of virtue and freedom has been remembered. Part III of this Article argues that the virtue-promoting function of the First Amendment is alive and well. Contemporary defenders of the new legal culture have remembered the problem (if it ever had truly been forgotten) just as their own cultural mores are ascendant. The new civic virtues—exemplified in multiplying anti-discrimination regulations for the protection of thickening conceptions of equality and individual dignity, particularly as those concepts relate to sexual autonomy—are those that were fostered and facilitated by the conventional account of the First Amendment in tandem with significant components of the Supreme Court’s post–New Deal Fourteenth Amendment jurisprudence. And those new civic virtues are already informing criticisms of the conventional account and arguments about new limitations on the scope of religious freedom and freedom of speech—arguments that vindicate Berns’s view that the First Amendment’s function must be to inculcate distinctive political virtues. Indeed, Berns’s arguments about freedom and virtue are not less relevant today, but more so, since progressive opinion is no longer committed to First Amendment “absolutism.” Thus far, the Supreme Court has largely rejected the critics’ arguments; but if it were faithful to the First and Fourteenth Amendment jurisprudence that it has developed over the last century, perhaps it should accept them.

The Article concludes with two brief speculations. First, it appears that we are no longer arguing about whether to restrict freedom, but for what ends. If that is true, then those arguments should not begin and end with egalitarian and sexual libertarian fervor. Second, there is no purely libertarian First Amendment, no account of it that maximizes freedom for everyone—for all persons and groups. There is only the society that America was before the rise of the conventional account of the First Amendment and the society that it is becoming after it.

## I. THE CONVENTIONAL ACCOUNT OF THE FIRST AMENDMENT

The conventional account of the First Amendment will be familiar in its broad outlines to most observers of American law. Indeed, the ideas comprising it are so widely held as to seem nearly platitudinous.

### A. *The Core Purpose of the First Amendment Is to Protect and Promote Freedom of Religion and Speech as Intrinsic Goods of American Political and Moral Life.*

The text of the First Amendment speaks of the “free” exercise of religion and the “freedom” of speech, but it does not explain why these freedoms merit special legal protection and what political or social purposes they serve.

Those explanations have been generated over the span of the life of the republic. At times theorists have simply claimed that the freedoms protected by the First Amendment are so self-evidently good—so fundamentally a part of the American political landscape—as to need no justification at all, as to be a kind of inborn or native American preference. The eminent historian Daniel Boorstin, for example, once wrote that First Amendment freedom is part of the givenness of the American polity,<sup>7</sup> and the political scientist Louis Hartz argued that “the ‘great advantage’ of the American lay in the fact that he did not have ‘to endure a democratic revolution,’” being born free without having to become free.<sup>8</sup> A recent essay by Professor James Oleske similarly suggests that the value and limit of religious freedom is simply one of those “ingrained instincts” common to right-thinking, ordinary Americans.<sup>9</sup>

When justifications for special constitutional protection for free speech and religious freedom are offered, three recur most commonly.<sup>10</sup> The first concerns the necessary conditions of liberal democratic government. As to speech, “[l]iberal democracies,” as Kent Greenawalt has observed, “have a great need for free discourse about public affairs.”<sup>11</sup> Because liberal democracies depend for their survival on the choices of their citizens, it is believed that a citizenry whose speech is unrestrained becomes more informed, which in turn makes for an improved popular government.<sup>12</sup> Moreover, liberty of expression is necessary in order to call any liberal democratic government deserving the name to public account for abusive conduct, as well as to deter future misconduct.<sup>13</sup> Religious freedom is likewise a fundamental condition of liberal democratic government because, as writers since James Madison have observed, it demarcates the limits of such a government’s legitimate scope, constraining the government’s rightful purposes (and narrowing the social harms it ought to correct).<sup>14</sup> To be morally legitimate, a liberal demo-

7 DANIEL J. BOORSTIN, *THE GENIUS OF AMERICAN POLITICS* 138–39 (1953).

8 LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 35 (1955). The allusion here is to Tocqueville, who wrote that Americans were “born equal, instead of becoming so.” 2 *TOCQUEVILLE*, *supra* note 1, at 123.

9 James M. Oleske, Jr., *Doric Columns Are Not Falling: Wedding Cakes, the Ministerial Exception, and the Public-Private Distinction*, 75 *MD. L. REV.* 142, 143 (2015).

10 There are others, of course. Both in the speech and religion context, freedom is seen as a tool for promoting civic peace, for example. That justification could be regarded as independent or part of the political justification.

11 KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 6 (1995).

12 Lee Bollinger once argued that free speech promotes civic tolerance. See LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986). This, too, is a function that focuses on the civic or political benefits of unrestrained speech.

13 Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 *AM. B. FOUND. RES. J.* 521.

14 James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in *RELIGION AND THE CONSTITUTION* 51, 51 (Michael W. McConnell et al. eds., 2011) (“We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.”); RALPH KETCHAM,

cratic government must take this limited form. It must abstain from lawmaking that reflects any opinion as to religious truth, for these are matters beyond its proper ken.<sup>15</sup> And yet, the capacity of Americans freely to hold religious opinions was thought by Tocqueville to be foundational for the health of the civic polity.<sup>16</sup> This central justification for the freedom of speech extends back before the American Revolution to the *Letters of Cato*: “This sacred privilege is so essential to free governments, that the security of property and the freedom of speech always go together . . . Whoever would overthrow the liberty of a nation, must begin by subduing the freedom of speech.”<sup>17</sup> It highlights the instrumental relationship of liberty of speech and religion in producing a healthy, integrated civil and political community—“the liberty of the nation” as the political liberty of “the People.”

The second justification trades on the Millian idea of rivalry among ideas as an avenue to truth,<sup>18</sup> or what Oliver Wendell Holmes referred to as “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.”<sup>19</sup> Louis Brandeis’s renowned aphorism that the “remedy” for “falsehoods and fallacies” is “more speech” is to like effect.<sup>20</sup> The strongest arguments in the end win out only in a kind of survival of the fittest where people are at maximum liberty to choose and rechoose the most rational or the most persuasive. Truth, including ethical and political truth, is approached fitfully but by steady advance in a kind of unending progression of insight, critique, and correction.<sup>21</sup> First

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FRAMED FOR POSTERITY: THE ENDURING PHILOSOPHY OF THE CONSTITUTION 99–100 (1993) (“Madison’s original phrasing of what became the First Amendment further revealed his preoccupation with the public rather than the personal or private character of the five freedoms . . . . [T]he emphasis on not abridging civil rights, rights related to government, and on not having a national religion has clear reference to the ‘good health’ of the processes of government. These religious rights, that is, are necessary to conduct the public business freely and fairly as well as to protect individual liberty of conscience.”).

15 See generally PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* (2011).

16 TOCQUEVILLE, *supra* note 1, at 387–88.

17 1 JOHN TRENCHARD, *CATO’S LETTERS* 97–98 (1724).

18 JOHN STUART MILL, *On Liberty*, in *THE BASIC WRITINGS OF JOHN STUART MILL* 3, 35 (2002) (“No one can be a great thinker who does not recognize, that as a thinker it is his first duty to follow his intellect to whatever conclusions it may lead. Truth gains more even by the errors of one who, with due study and preparation, thinks for himself, than by the true opinions of those who only hold them because they do not suffer themselves to think.”).

19 *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

20 *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); see also *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (plurality opinion) (“The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.” (citing *Whitney*, 274 U.S. at 377)).

21 See Jeremy Waldron, *Mill and the Value of Moral Distress*, 35 *POL. STUD.* 410, 414 (1987) (describing “[t]he most important” of Mill’s arguments in favor of individual freedom of thought, discussion, and lifestyle as “based on the desirability of what I am going to



Amendment freedom is therefore conducive to grasping true ideas, or at least less false ideas, as errors are most efficaciously exposed when everybody enjoys a maximum freedom to speak.

The American conception of religious liberty trades on a related foundational idea—what sociologist Grace Davie has referred to as the “market-place” model of religion.<sup>22</sup> In the United States, religious groups splinter and diversify the better to suit the felt desires of existing and prospective adherents. They compete with one another as service providers or private firms would, with the consumer selecting the religion that best corresponds to his present circumstances. The consumer changes his associational affiliations accordingly.<sup>23</sup> What is “true” in this model is, as William James once had it, what most closely accords with “genuine happiness”: “If a creed makes a man feel happy, he almost inevitably adopts it. Such a belief ought to be true; therefore it is true.”<sup>24</sup> The Jamesian view of religion and its relationship to truth has had a powerful influence on the Supreme Court; indeed, it has been explicitly cited by at least one Supreme Court Justice for the proposition that a jury cannot distinguish sincerity of religious belief from religious truth.<sup>25</sup> Religious freedom thus assumes a highly voluntarist character.<sup>26</sup> The untrammelled freedom of individual choice-making and choice-changing is the primary object of legal protection because what is “true” depends not on the achievement and retention of a superior religious insight (an insight that the government would, in any case, be prevented from embracing by the Establishment Clause) but on the process of choice-making and changing in response to ever-altering circumstances and desires.

The third arch-justification focuses on the importance of expressive and religious freedom for individual identity. Its power has greatly increased since the mid-twentieth century.<sup>27</sup> Some have described the first two justifications as consequentialist, while this one is not, but that division is contesta-

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refer to as *ethical confrontation*—the open clash between earnestly-held ideals and opinions about the nature and basis of the good life”).

22 GRACE DAVIE, *THE SOCIOLOGY OF RELIGION* 12 (2d ed. 2007).

23 *Id.*

24 WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE* 78–79 (12th ed. 1906).

25 *United States v. Ballard*, 322 U.S. 78, 92–93 (1944) (Jackson, J., dissenting) (“I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience.”).

26 Some of the most eloquent defenses of religious freedom in the United States begin from explicitly voluntarist premises. See, e.g., Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 51 (2007); see also Thomas C. Berg, *Can Religious Liberty Be Protected as Equality?*, 85 TEX. L. REV. 1185, 1211–15 (2007) (defending Douglas Laycock’s understanding of substantive neutrality).

27 One of the historical progenitors of the individualist justification may be found in what David Rabban has called “prewar libertarian radicals,” who “viewed free speech as one of a connected set of fundamental rights to personal autonomy.” DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 14 (1997).

ble.<sup>28</sup> Freedom of religion and speech require special protection because religious exercise and verbal expression go to the essence of what it means to be a human person. They are, as Justice Stone once put it in dissent in *Minersville School District v. Gobitis*, “but guaranties of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them.”<sup>29</sup> The freedom to communicate one’s speech, including one’s speech about religion, is a sine qua non of human flourishing, protecting not only the development of human thought but also the self-realization or self-actualization of the speaker. Thus, these First Amendment freedoms are in some way intrinsically valuable simply because they are inextricably connected with the human dignity of the autonomous person: “An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do.”<sup>30</sup> This identitarian justification also relates closely to an egalitarian undercurrent: we treat people unequally unless we recognize and respect the beliefs, as manifested in their speech and their religious practice, that go to the core of their persons—their real or authentic selves.

This third justification is canonical for the conventional account of the First Amendment. It is reflected in what one casebook refers to with the umbrella term, “individual-centered theories” of the First Amendment,<sup>31</sup> theories that have achieved special prominence and centrality in the later twentieth century. Indeed, the other two core justifications—the civic and the truth-seeking—are increasingly subsumed or recharacterized within the identitarian or individualist justification. American political or civic cohesion more and more is not manifested in any shared set of substantive convictions of the people as a community (community convictions that might be fortified by free speech and free religious exercise) so much as in an allegiance to individual freedom itself—the freedom of the individual to speak, believe, and exercise religion as he wills. Very little that is permanent binds the People other than the conviction that very little that is permanent binds it. Likewise, it is truth as the individual perceives it, and as his subjective perceptions change about it, that is the object of speech and religious freedom protection, not truth as a separate reality from individual belief.

It is this personal, interior justification for freedom that has permeated the international secular and religious community as well. The European

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28 See, e.g., FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 48 (1982) (“In contrast to this social side of individual interests, both this chapter and the next focus on freedom of speech as an individual interest in a narrower (and stronger) sense. Here the ultimate point of reference is the individual, not the state, or society at large.”). Some writers describe the interest in personal “autonomy” served by this function in consequentialist terms, see, e.g., Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 143–45 (1989), but this points to the difficulty of separating cleanly consequentialist from non-consequentialist justifications.

29 *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, J., dissenting).

30 Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 216 (1972).

31 I VINCENT BLASI, *IDEAS OF THE FIRST AMENDMENT* 832–967 (2006).

Convention on Human Rights, for example, speaks of a universal “human” right to “freedom of thought, conscience and religion” as well as to “freedom of expression.”<sup>32</sup> Likewise, though the Catholic Church’s ontology of human dignity is rather distinct from that of secular Western nations,<sup>33</sup> the influence of this third justification has been felt in conciliar and post-conciliar Catholicism, as when Pope Paul VI (influenced by the American Jesuit intellectual John Courtney Murray) emphasized the connection between religious freedom and human dignity: “This demand for freedom in human society chiefly regards the quest for the values proper to the human spirit. It regards, in the first place, the free exercise of religion in society.”<sup>34</sup>

What unites all three justifications is the underlying view that freedom of speech and religious exercise is the fundamental premise of the political, intellectual, and moral life of American society—so fundamental as in some way to vindicate or at least excuse the view that First Amendment freedom needs no defense at all. The connective tissue of free speech and free religious exercise holds together the American polity—constitutes its deepest essence. Good is written “good” and bad is written “bad,” to denote the subjectivity of judgment that is believed to attend them. But freedom, of speech or religion, is never written “freedom.”

*B. In Achieving the First Amendment’s Core Purpose, the American State Remains Neutral as to Any Particular View of the Virtuous Life.*

The conventional account’s second thesis is that the state is forbidden from expressing any value preferences when it comes either to speech or religion. It is non-preferentialist and non-prescriptivist on both counts. The notion that there are some ideas that are supportive and nurturing of the political community and some that are debilitating and unhealthy is rejected: all ideas are equally public-minded, all equally part of the firmament of the common political community, all equally orthodox insofar as the state is concerned. Justice Jackson’s famous line from *Barnette* has itself become the Polaris of this general view: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>35</sup>

The point is not only about official compulsion to speak, believe, or behave in certain ways, or to refrain from doing so. It also concerns the

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32 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 9–10, Nov. 4, 1950, 213 U.N.T.S. 221.

33 On this point, see Mark L. Movsesian, *Of Human Dignities*, 91 NOTRE DAME L. REV. 1517 (2016).

34 Paul VI, Declaration *Dignitatis Humanae* para. 1 (Dec. 7, 1965), [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat\\_ii\\_decl\\_196512\\_07\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat_ii_decl_196512_07_dignitatis-humanae_en.html). The influence of American ideas of freedom on the Catholic Church’s position on religious freedom is remarked in JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM* (2003).

35 *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

American state's own outlook or worldview about the content of speech and religious exercise. That worldview is neutral. It gives no official support of any kind to virtuous views and no official sanction against vicious ones, for the First Amendment requires that there be no authority on what is "orthodox" in "matters of opinion." Heterodoxy of opinion is not only tolerated but also fostered; it is the commitment to protecting heterodoxy of opinion, and the commitment against official prescription or preference for any opinion, that binds the American people together as a political community.

Professions and defenses of neutrality as a core feature of the First Amendment are legion in the doctrinal and academic literature. Perhaps the best known in the speech context is the rule that any restriction on speech must be "content neutral," a regulation whose object may not be the control (understood in the broadest possible terms) of the communicative content of the speech and whose genesis may not lie in disagreement with the substance of a particular message or idea.<sup>36</sup> Non-content-neutral regulations are presumptively unconstitutional and trigger the Court's highest scrutiny.<sup>37</sup> The fact that the content of speech may cause offense, no matter how grave, never is by itself an adequate reason to deprive it of constitutional protection.<sup>38</sup> More than this, the Court has gone out of its way to underline that "the point" of free speech is to "shield" misguided and hurtful speech from any differential treatment by the state.<sup>39</sup> "Content-neutral" "time, place, and manner" restrictions are permissible, and certain categories of speech—at one time, speech that constituted a "clear and present danger" of bringing about certain "substantive evils,"<sup>40</sup> and today, speech that threatens physical harm, incites imminent illegal activity,<sup>41</sup> is maliciously defamatory, is "obscen[e],"<sup>42</sup> constitutes "fighting words,"<sup>43</sup> is of "purely private concern,"<sup>44</sup> and a few others—may be regulated because of its content. But the former do not target content, while regulations of the latter may be distinguished

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36 See, e.g., *Hill v. Colorado*, 530 U.S. 703, 719 (2000); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209–10 (1975).

37 *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992).

38 *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

39 *Id.* at 412–16.

40 *Schenck v. United States*, 249 U.S. 47, 52 (1919).

41 See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). For an earlier and less expansive speech test along the same lines, see *Masses Public Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917) ("One may not counsel or advise others to violate the law as it stands. Words . . . which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state.").

42 *Roth v. United States*, 354 U.S. 476, 485 (1957).

43 *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

44 *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2490 (2011); see also *Connick v. Myers*, 461 U.S. 138, 146 (1983). The category "matter[s] of public concern" covers lots of ground, however: any speech that might "be fairly considered as relating to any matter of political, social, or other concern to the community," *id.*, or that might be "a subject of legitimate news interest" or "a subject of general interest and of value and concern to the public" is of public concern, *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004).

from the ordinary case of expression as “performative” or “situation-altering utterances,” speech that is not simply an assertion of fact or value but an action.<sup>45</sup> They may also be distinguished simply as exacting too high a social cost to be tolerated.

Communications nearly universally regarded as odious, vicious, disgusting, cruel, and depraved, however, are not of this sort. They stand on equal footing, insofar as the state is concerned, with all other speech. Official neutrality toward (and not merely toleration of) such speech is “the price we pay” for a free society.<sup>46</sup> Yet the fee is readily forfeited. The state’s attitude of neutrality extends well beyond questions of prohibition, requirement, toleration, or even degrees of differential treatment. Noxious speech merits *equality of treatment* with salubrious speech; indeed, official judgments about noxiousness and salubriousness are forbidden. They are out of bounds for the political community. They are within the jurisdiction of the individual alone. The state must remain as neutral about speech defiling the memory of a dead soldier with accompanying rants about homosexuality,<sup>47</sup> or visual expression depicting sadistic-fetishistic torture and dismemberment of animals,<sup>48</sup> or the “ethnic cleansing [of] . . . African-Americans, Latinos, or Jews,”<sup>49</sup> as it is toward any other. “God hates fags” may be less “refined” than “God loves you” but the ideas within the expression—the values that stand behind the words—are perfectly equal from the state’s perspective, for the state must, in the main, confine its regulation to concerns other than content.<sup>50</sup> It is in fact instructive that the Court distinguishes the quality of these phrases in terms of “refinement,” inasmuch as it introduces a populist, class oriented, egalitarian theme. The Court thereby democratizes speech—levels it as indiscriminately valid in its substance—as the state’s neutrality toward ideas comes to imply its belief in their equality: “[O]ne man’s vulgarity is another’s lyric.”<sup>51</sup>

Even speech that is a lie—and known to be a lie about an easily verifiable fact, “an intended, undoubted lie”—must be treated equally with speech that is true.<sup>52</sup> The Court not only guards against the possibility that the government might draw untoward distinctions between falsehood and truth in ways

45 See KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 58 (1989).

46 Frederick Schauer has questioned how much “we” as a society (as distinguished from discrete victims) pay for odious speech. See Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1355 (1992).

47 *Snyder v. Phelps*, 562 U.S. 443 (2011).

48 *United States v. Stevens*, 559 U.S. 460 (2010). The Court in *Stevens* held that a federal statute criminalizing depictions of animal cruelty for profit was unconstitutionally overbroad. *Id.* at 482. This notwithstanding Justice Alito’s view that the statute had a “substantial core of constitutionally permissible applications.” *Id.* at 489–91 (Alito, J., dissenting).

49 *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2750 (2011).

50 *Phelps*, 562 U.S. at 454.

51 *Cohen v. California*, 403 U.S. 15, 25 (1971).

52 *United States v. Alvarez*, 132 S. Ct. 2537, 2542 (2012) (plurality opinion). The Court in *Alvarez* distinguished lies per se, which receive full constitutional protection, from

that might chill speech about complex and contested philosophical, aesthetic, political, and religious questions; it fears any such official distinction whatsoever, no matter the context, as portending the worst of tyrannical nightmares.<sup>53</sup> In one of the Court's more recent forays into content-neutrality, Justice Thomas held for the Court that any differentiation not only as to content proper, but also as to categories of speech (regulations, for example, of signage size that distinguish between political speech and speech offering directions to an event) as well as speaker is presumptively unconstitutional because it is non-neutral, the purposes of such regulations notwithstanding.<sup>54</sup>

Neutrality has long been a basic staple of religion clause jurisprudence as well, for both the Free Exercise and Establishment Clauses. Neutral laws—laws that do not target religious belief and practice for selective discriminatory treatment—and that apply generally do not violate the Free Exercise Clause.<sup>55</sup> Indeed, “non-neutral” laws are, after the *Smith* decision, ostensibly the only kind that implicate constitutional free exercise concerns.<sup>56</sup> Unequal application of the law is similarly objectionable because it is evidence that the law is in practice “targeting” or discriminating against religion notwithstanding its facial neutrality.

Likewise, from the very beginnings of the modern account of the Establishment Clause, neutrality has always occupied a central place: it “requires the state to be a neutral in its relations with groups of religious believers and non-believers.”<sup>57</sup> Various tests of neutrality have over time superseded the older secularist-separationist test of *Lemon v. Kurtzman*<sup>58</sup> as the Court's favored approach to Establishment Clause cases concerning government funding questions as well as state-sponsored displays of religious symbols. In the area of funding, the Court has stated that “government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge.”<sup>59</sup> As in the speech context, it has also emphasized the connection

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lies associated with specific legal claims such as defamation, fraud, and perjury, which may not. *Id.* at 2544–45.

53 *Id.* at 2547 (“Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.” (citing GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949))).

54 *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015). The Court cast considerable doubt on the continuing vitality of the “secondary effects” test, which subjects a regulation to lesser scrutiny if its predominate object is not disagreement with the message but control over “secondary effects” associated with the speech. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

55 *Emp’t Div. v. Smith*, 494 U.S. 872, 879–82 (1990).

56 “General application” is a proxy for a type of neutrality: laws that apply only selectively are suspected of non-neutral motivation and/or enforcement. In other work, I question just how firmly the rule of neutrality has been applied by lower courts. *See* MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* 147–66 (2013).

57 *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

58 403 U.S. 602, 609 (1971).

59 *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

between neutrality and individual or autonomous choice—between the neutrality of a government mechanism for distributing money indirectly to religious institutions (via a voucher system, for example) and the existence of “genuine and independent private choice” on the part of the individual financial beneficiary as to the uses of those moneys.<sup>60</sup>

The permissibility of the state’s display or use of religious words or symbols is governed by the so-called “non-endorsement” test, first articulated in a concurrence by Justice O’Connor in a case involving the display of “a Santa Claus house, reindeer pulling Santa’s sleigh, candy-striped poles, a Christmas tree, carolers, cut-out figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads ‘SEASONS GREETINGS,’ and the crèche” in the local shopping district of a Rhode Island municipality.<sup>61</sup> The test asks whether a “reasonable observer” of these kinds of pastiches would perceive that the state was thereby endorsing or disparaging religion in such a way as to convey a message of unequal membership or unequal status in the political community to that observer.<sup>62</sup> The word “neutrality” does not appear in the test, but perceptions of state neutrality are the key to satisfying it. The state’s position on religious symbolism must be neutral from the perspective of the individual reasonable observer’s eyes—neither endorsing nor disparaging—thereby communicating the equal political status of ostensible “outsiders.” The state must convey the message to reasonable individuals that it stands above and apart from partisanship in religious symbolism, and that it views all religious words and symbols as perfectly equal.

Neutrality as to the substance of speech and religion, and its various associations with equality and individual choice, is thus a mainstay of the conventional account of the First Amendment. It is a fundamental premise of the dominant approach to free speech and it has been said by one prominent academic exponent to “work[ ] well as a master concept in the theory of the religion clauses.”<sup>63</sup>

C. *The Supreme Court Has Achieved the Core Purpose of the First Amendment by “Autonomizing” It—Maximizing Freedom at the Level of and for the Sake of Individuals.*

If the core purpose of First Amendment freedom is to protect and promote freedom of speech and religion as intrinsic goods of American public life, while remaining neutral as to the nature of the virtuous life, the Supreme Court has fulfilled that purpose by progressively, and with only a few exceptions, maximizing freedom at the level—and for the sake—of indi-

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60 See *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

61 *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

62 *Id.* at 690–94 (O’Connor, J., concurring).

63 ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 4–5 (2013). Even those academic proponents of neutrality whose ambitions for it are less lofty place it at the center of their theories of religious freedom. See, e.g., Laycock, *supra* note 26.

viduals. That process, which this Article calls the “autonomization” of the First Amendment, has been one of the Supreme Court’s primary jurisprudential projects in this area over the last half century.

As to freedom of speech, the Court’s decisions evince its belief that the core purpose of the First Amendment is best attained through a broad reading of the Speech Clause that expands expressive freedom for individuals, not groups. As Justice Thomas has put it, “part of the Constitution—the First Amendment—does enact a distinctively individualistic notion of ‘the freedom of speech,’ and Congress may not simply collectivize that aspect of our society, regardless of what it may do elsewhere.”<sup>64</sup> And Justice Thomas’s view of the core “notion” underlying the protection of speech is only a relatively late expression of the increasing power of what was previously discussed as the third justification for First Amendment freedom—its capacity to fulfill or realize individual human identity or human dignity.<sup>65</sup>

A seminal case in the Speech Clause’s autonomization is *Cohen v. California*, which concerned criminal charges of disturbing the peace against a person wearing a jacket with the phrase, “Fuck the Draft,” in a local courthouse.<sup>66</sup> In finding that Cohen’s speech rights were violated, the Court emphasized that protection for speech extends not only to “cognitive” but to “emotive” expression as well. The notion that Cohen’s speech truly was healthy for the community—was a core example of the type of speech protected by the First Amendment—was not emphasized by the Court. This was perfectly sensible: Cohen’s speech neither was intended nor was remotely likely to occasion “open debate” or public deliberation about the merits of the Vietnam War. It was intended to shock, and it did so, though its embrace by the Supreme Court may have thwarted Cohen’s own shocking intentions for it. Justice Harlan’s majority opinion therefore highlighted not the promotion of public debate itself, but that the “necessary side-effects” of public debate include “verbal tumult, discord, and even offensive utterance,” the last of which was meant to characterize Cohen’s own expression.<sup>67</sup> The functions of Cohen’s protected speech—emotional, personal, implicating matters of “taste and style”—were assigned entirely to the realm of individual choice. As such, they are matters as to which the political community, as a community, has no legitimate judgment to offer. Indeed, the very fact that the speech was expressed through a personal article of clothing highlights its branding, identity-marking function. Public expression, as Joseph Raz once put it, is “itself an element of several styles of life,” and freedom of speech serves the function of validating those individual lifestyles, helping to cement the individual’s identification with his chosen lifestyle and opening up to

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64 *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 506 n.3 (1997) (Thomas, J., dissenting).

65 See *infra* note 85 and accompanying text.

66 403 U.S. 15 (1971).

67 *Id.* at 24–25.



other individuals the possibility of selecting that lifestyle.<sup>68</sup> Lack of such official validation through the mechanism of free expression is a concomitant affront to the individual dignity of the chooser—an insult and a repudiation of his way of life, and so of himself.<sup>69</sup>

The latter half of the twentieth century has witnessed the ascendancy of autonomized free speech protection. Speech that is “outrageous,”<sup>70</sup> that offends the “dignity” of the hearer,<sup>71</sup> that is both used and perceived as a weapon of “aggression and personal assault,”<sup>72</sup> that depicts “cruelty” and is sexually arousing because of the torture it inflicts,<sup>73</sup> that is personally abusive and intended to “inflict great pain”<sup>74</sup>—all of these go well beyond incendiary or bracing speech intended to elicit robust debate on a controversial matter of public concern and relate crucially to interests of various sorts in individual identity-formation and realization. That is because the First Amendment’s “fundamental rule of protection,” the Court has held, is “that a speaker has the autonomy to choose . . . his own message.”<sup>75</sup> Or, as Seana Shiffrin has argued, free speech protects the right of each particular “thinker” to become “a distinctive individual,” “[r]espond[ ] authentically,” and fulfill her “interest in being recognized by other agents for the person she is.”<sup>76</sup> To be sure, certain categories of speech continue to receive protection on the basis of non-autonomizing justifications. Commercial speech is an example, which the Court has held receives protection, comparatively limited though it may be,<sup>77</sup> because of the “informational function” that it serves.<sup>78</sup> And other more sizable categories of speech might not be easily justifiable through an autonomy-based rationale.<sup>79</sup> But many of the Court’s major contributions to free speech protection of the mid-late twentieth cen-

68 Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUD. 303, 310 (1991).

69 Censorship is only the most extreme form of non-validation. Any differential treatment might trigger claims of non-validation.

70 *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988).

71 *Boos v. Barry*, 485 U.S. 312, 322 (1988).

72 *Time, Inc. v. Hill*, 385 U.S. 374, 412 (1967) (Fortas, J., dissenting).

73 *United States v. Stevens*, 559 U.S. 460, 465–66 (2010). The Court held that the statute at issue was overbroad, refusing to remand to the lower court to determine whether the statute survived constitutional scrutiny as applied to crush videos. *Id.* at 481–82.

74 *Snyder v. Phelps*, 562 U.S. 443, 461 (2011).

75 *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995).

76 Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 289–90 (2011); see also C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 254 (2011) (emphasizing the purpose of free speech as protecting the speaker’s “authority (or right) to make decisions about herself”).

77 *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993).

78 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980) (citing *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)).

79 See, e.g., Eugene Volokh, *Speech Restrictions That Don’t Much Affect the Autonomy of Speakers*, 27 CONST. COMMENT. 347, 351 (2011) (emphasizing “listener interests” in the work of the dead).

ture have flown under the banner of autonomization, and it stands to reason that the Court has thereby greatly expanded the freedom of speech.

A similar movement toward autonomization can be seen in the progress of free speech theory. The great speech theorist, Alexander Meiklejohn, wrote nearly eighty years ago that the “model” of First Amendment free speech was the town meeting, in which “the people of a community assemble to discuss and to act upon matters of public interest” and accept procedural and substantive abridgements on their speech to fulfill the very purposes of free speech.<sup>80</sup> The town meeting, he continued, “is not a Hyde Park. It is a parliament or congress. . . . It is not a dialectical free-for-all. It is self-government.”<sup>81</sup> Likewise, the distinguished mid-century sociologist and celebrated author of *The Lonely Crowd*, David Riesman, once wrote that not all free speech is good speech, as when it may “serve the purpose of self-expression of a sadistic or masochistic sort. This may be subjectively pleasurable, but it is not a form of happiness which is tolerable in a decent community.”<sup>82</sup> Yet it is very rare for contemporary academic writers to speak of the value of free speech in these collective, politically communitarian terms. Few would say now that the First Amendment’s “point of ultimate interest is not the words of the speakers, but the minds of the hearers.”<sup>83</sup> Free speech is understood in far more individualistic terms, as the capacity of the American individual to attack conventions and traditions because such attacks are inherently positive as an instrument of identity formation. Free speech’s primary function is to facilitate “self-realization.”<sup>84</sup> The aspiration for “self-governance” articulated by Meiklejohn is transformed from a principle of the political community to a principle of individual morality: “For citizens to be free in the sense championed by the historic mainstream of liberal theory and by civic liberalism, they must be self-governing. They are exempted from the control of others because they can and do control themselves.”<sup>85</sup>

There is a parallel trajectory of autonomization for the religion clauses. That trajectory reflects the Court’s view that the core purpose of the First Amendment—the protection and promotion of religious liberty as an intrinsic good of American political and moral life—is best attained through the broad interpretation of the Free Exercise Clause prevalent from 1963 to 1990 (and the statutory regime of religious exemptions enacted thereafter) and the broad reading of the Establishment Clause inaugurated in 1947. In the free exercise context, the key issue concerns exemptions from general laws on account of religious scruple or objection. Up until the mid-twentieth cen-

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80 ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 22 (1948).

81 *Id.* at 23.

82 David Riesman, *Civil Liberties in a Period of Transition*, 3 *PUB. POL’Y* 33, 78 (1942).

83 ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (1960).

84 Martin H. Redish, *The Value of Free Speech*, 130 *U. PA. L. REV.* 591, 594 (1982).

85 THOMAS A. SPRAGENS, JR., *CIVIC LIBERALISM: REFLECTIONS ON OUR DEMOCRATIC IDEALS* 123 (1999).

ture, the Free Exercise Clause protected only against compelled affirmations and penalties specifically targeting religious beliefs; the dearth of case law finding that certain exemptions were constitutionally required, coupled with the Court's decision in *Reynolds v. United States*, offered almost no support for constitutionally mandated religious exemptions.<sup>86</sup>

The Court fundamentally altered the framework for evaluating exemption claims in 1963, when it introduced a balancing test approach to free exercise in which a claimant's asserted "substantial burden" on religious exercise was measured against the quality of the state's interests in regulation and the means used to achieve them.<sup>87</sup> Whether the issue is drug use, withdrawal of children from school, conscientious objection to military service (on religious grounds or otherwise) or to other government-imposed mandates, or others, in order to satisfy the requirement of substantial burden the claimant must at a minimum be "sincere" about his religious conviction. He must be telling the truth about his beliefs. Excepting cases of flagrantly and incontestably fraudulent claims, however, courts and administrators have shown great reluctance to inquire into the authenticity of a claimant's sincerity.<sup>88</sup> The claimant's say-so both about what he believes and how important his beliefs may be<sup>89</sup> are generally sufficient, for the state is not in any position to question the authenticity of what he says he believes.

More than this, however, an inquiry into the sincerity of a claim goes to highly personal interests in self-definition. Winnifred Fallers Sullivan, for example, tells the story of a prison administrator charged with determining whether a prisoner who desired a Seder dinner was authentically Jewish.<sup>90</sup> Though the administrator was not persuaded of the prisoner's sincerity, he allowed the dinner because religiosity implicates matters of shifting and

86 98 U.S. 145, 161–67 (1879). There is a rich debate among scholars about the extent to which exemptions from generally applicable laws were thought to be constitutionally mandated in the early Republic. Compare Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990), with Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992), and Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J. L. & PUB. POL'Y 1083 (2008). No court case ever decided that question before the mid-twentieth century, however.

87 *Sherbert v. Verner*, 374 U.S. 398, 403–04 (1963).

88 Even here the cases are complicated. See, e.g., *United States v. Meyers*, 906 F. Supp. 1494, 1508–09 (D. Wyo. 1995) (holding that the "Church of Marijuana" was not a bona fide religion, but refraining from stating that the individual claimant was lying). This pattern of reticence can be traced to *United States v. Ballard*, 322 U.S. 78, 86–87 (1944), in which the Court held that juries ought to determine neither questions of falsity nor sincerity as to religious beliefs because those two are bound up together.

89 Inquiries into the *centrality* of a particular belief in the individual's understanding of what his religion requires have been likewise avoided by courts and are prohibited by the Religious Land Use and Institutionalized Persons Act. 42 U.S.C. § 2000cc–5(7)(A) (2012) (defining religious exercise as "includ[ing] any exercise of religion, whether or not compelled by, or *central* to, a system of religious belief" (emphasis added)).

90 Winnifred Fallers Sullivan, *Judging Religion*, 81 MARQ. L. REV. 441, 453 (1998).

murky personal identity.<sup>91</sup> Furthermore, courts have repeatedly held that an individual's beliefs need not correspond at all with—indeed, may run directly contrary to—the beliefs of the religious group or community with which the individual claims to be associated.<sup>92</sup> Here again, the standard by which religiousness is measured is the individual believer alone. Notwithstanding what appears to be a generous test, religious claimants often have lost under it in court, but the reasons far more frequently involve the solicitude of courts for government interests that clash with a “substantial burden” than skepticism about the claimant's assertion of a burden itself.<sup>93</sup>

Concerns that the free exercise balancing test authorized a kind of hyper-pluralized, autonomized anarchy motivated the Court to change course in *Employment Division v. Smith*, where it ostensibly returned to the pre-*Sherbert* exemption regime.<sup>94</sup> But the passage of the federal Religious Freedom Restoration Act (RFRA) in 1993 and the Religious Land Use and Institutionalized Persons Act in 2000, together with sundry state versions of RFRA, restored the autonomized approach as the primary test against which religious exemption claims are evaluated. These laws generally instruct courts to avoid inquiries into the centrality of a belief within a religious tradition and the sincerity of the claimant.<sup>95</sup> Even assessments about the substantiality of the burden on religious belief are a delicate matter, as the subjective perception of burden cannot be questioned without some danger that a court is intruding on matters outside its jurisdiction. Religious exercise is primarily understood as a matter of autonomous, individual choice—a choice that must be honored because it is personally “fulfilling”<sup>96</sup> and that marks off one's distinctive human “identity.”<sup>97</sup>

True, not all recent doctrinal developments at least arguably concerned with religious free exercise reflect the contemporary trend toward autonomization. But these are largely outliers and have been met with fierce resistance. The Court's recognition of the ministerial exception, for exam-

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91 *Id.*

92 *See, e.g.,* *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) (“[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”); *Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999) (emphasizing autonomy interests in religious self-identification notwithstanding a religious community's judgment to the contrary).

93 *See, e.g.,* *United States v. Lee*, 455 U.S. 252, 257 (1982); *see also* 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION* 214 (2006) (“[T]he compelling interest test in exemption cases has never been quite what it seems.”).

94 *Emp't Div. v. Smith*, 494 U.S. 872, 888 (1990).

95 Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb1–4 (2012); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc1–5(7)(A) (2012).

96 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

97 *See, e.g.,* *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1853 (2014) (Kagan, J., dissenting) (“A person's response to the doctrine, language, and imagery contained in those invocations reveals a core aspect of identity—who that person is and how she faces the world.”).

ple, seemed to rest in part on the constitutional free exercise rights of religious organizations, not of individuals.<sup>98</sup> Likewise, the Court's recent decision in *Hobby Lobby* held that RFRA protected the free exercise rights of corporations as well as individuals.<sup>99</sup> Yet it is noteworthy that these opinions are opposed in significant part precisely for their non-autonomized conception of religious exercise. The principal *Hobby Lobby* dissent objected that, unlike for-profit entities, nonprofit organizations enjoy free exercise rights because furthering their religious "autonomy . . . often furthers individual religious freedom as well."<sup>100</sup> And several academics have criticized the Court's view of the ministerial exception on the grounds that the autonomy of individuals, not groups, is the primary if not exclusive object of free exercise protection, while the religious exercise of groups or organizations is at best parasitic.<sup>101</sup> The ministerial exception, moreover, is highly limited in coverage and not representative of the more general free exercise trends underway.<sup>102</sup>

The autonomization of the Establishment Clause began in 1947, though at that time it was blended with the distinct idea of church-state separationism. The Court's decision in *Everson v. Board of Education* is well known for constitutionalizing Thomas Jefferson's mural metaphor, which gave the test the appearance of focusing on the relationship between the separate spheres of government and religious authority.<sup>103</sup> Yet it is noteworthy that *Everson* itself dealt not with these abstract divisions, but with the rights of individual New Jersey taxpayers to refuse to pay money for the transportation of students to parochial schools.<sup>104</sup> With time, tests evincing the autonomization of the Clause began to displace the separationist approach in several contexts.

First, the Court developed an exception to its general prohibition on individual taxpayer standing: the special nature of the harm inflicted on the individual taxpayer—the harm to the individual taxpayer's conscience—when Congress uses its spending power in putative violation of the Establish-

98 *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 702–07 (2012). The Court relied on both free exercise and anti-establishment rationales for the ministerial exception.

99 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768–69 (2014).

100 *Id.* at 2794 (Ginsburg, J., dissenting) (quoting *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in judgment)).

101 See, e.g., MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 190 (2005); Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965, 1988–89 (2007) (arguing that the ministerial exception amounts to "privileging the derivative right over the primary one").

102 See Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 *SAN DIEGO L. REV.* (forthcoming 2016).

103 *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

104 As Justice Jackson noted in his dissenting opinion: "If we are to decide this case on the facts before us, our question is simply this: Is it constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination?" *Id.* at 21 (Jackson, J., dissenting).

ment Clause was held by the Court to require a unique exception to the usual standing rules.<sup>105</sup> Second, as discussed earlier, autonomized tests have been adopted in the government funding and religious symbolism contexts, replacing (or subsuming within them) the older separationist approach. In the former, the government's neutrality with respect to programs that provide funds indirectly to religious institutions is intimately connected with the existence of "genuine private choice" in the spending of those moneys. Here, autonomization cures what might otherwise be a constitutional violation: one individual's genuine private choice about how to spend his own money cannot trump another's. In the latter, the perceptions of the reasonable observer control the constitutionality of a religious display, and in some courts' more recent formulations, government conduct that is motivated by even the possibility that somebody might perceive religious endorsement (even if nobody actually has) is itself justified and validated by the Establishment Clause.<sup>106</sup> The autonomized Establishment Clause also connects closely to what Justice Kagan has described as the "breathtakingly generous" "norm of religious equality"<sup>107</sup> at its core: the Constitution requires the government to treat any individual's genuine private choices, and any individual's genuine perceptions of religious exclusion, with great solicitude; to do otherwise would not show each individual the equality of regard to which he is entitled.

Yet the fundamental point is that the increasing autonomization of the First Amendment is believed to be the surest way to maximize freedom for as broad a range of persons as possible. Autonomization is one of the primary mechanisms through which the Court as well as many academic writers have fulfilled the First Amendment's core purpose—to protect and promote speech and religious freedom as intrinsic goods of American society.

## II. THE REVISED ACCOUNT OF THE FIRST AMENDMENT

The conventional account of the First Amendment certainly has much to commend it. Some genuine and welcome expansions of freedom for speech and religious exercise have occurred under its auspices. Nevertheless, there are reasons to doubt that its three theses cogently explain the real position of freedom of speech and religion in American legal and political life. This Part offers a revised account of the First Amendment with its own three theses—not point-by-point refutations so much as basic disagreements with its premises and its consequences. It draws in part on the thought of the late political theorist and constitutional scholar, Walter Berns. For much of

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105 *Flast v. Cohen*, 392 U.S. 83, 104–05 (1968). *Flast* has been narrowed in subsequent cases, but it remains good law. See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 130 (2011); *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 609–10 (2007).

106 See, e.g., *Bronx Household of Faith v. Bd. of Educ.*, 750 F.3d 184 (2d Cir. 2014); see also *Locke v. Davey*, 540 U.S. 712 (2004). For criticism, see generally Marc O. DeGirolami, *The Bloating of the Constitution: Equality and the U.S. Establishment Clause*, in *THE SOCIAL EQUALITY OF RELIGION OR BELIEF* (Alan Carling ed., 2016).

107 *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1841 (2014) (Kagan, J., dissenting).

the twentieth century, Berns wrote probingly about many matters of crucial concern to American political life: patriotism, academic freedom, the history of political thought, democracy, constitutional history, capital punishment, and pluralism, among others. But Berns's interest in the First Amendment was a hardy perennial across his writing life, from his first book, *Freedom, Virtue and the First Amendment* in 1957, to his final work in 2006, a collection of essays titled, *Democracy and the Constitution*.<sup>108</sup> His overarching criticism, developed across decades, was that in developing First Amendment doctrine, the modern Court (and its academic defenders) utterly ignored—and may have willfully blinded itself to—the enduring relationship of freedom and civic virtue.<sup>109</sup> That insight informs the revised account offered here.<sup>110</sup>

A. *Freedom Under the First Amendment Is Not an Intrinsic Good of American Political Life but Part of a Larger Political Problem.*

In reflecting on the social and political quality of freedom of speech and religion, one might begin with the basic observation that no behavior is purely self-regarding. Thoughts and beliefs may be matters of entirely internal concern, but once thoughts and beliefs are expressed in words or conduct, they have been externalized. They are now part of the social realm. Speech and religious exercise universally affect other people—the hearers or observers, of course, but also, and albeit less immediately, the society more broadly. Almost all expression and conduct that anybody wants to restrict or even prohibit may be understood as harming third parties, whether those are the nearest people subjected to it or the more distant social polity. Moreover, speech's and religious exercise's harmful potentialities are not mitigated by the fact that no one is compelled to respond, let alone to agree. The harm is consummated by the speaker's act of outward expression and the hearer's internalization of that expression. Oftentimes the harm inflicted by speech and religious exercise is much graver and more lasting than many sorts of criminal acts.

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108 WALTER BERNS, *DEMOCRACY AND THE CONSTITUTION* (2006) [hereinafter BERNS, DC]; WALTER BERNS, *FREEDOM, VIRTUE AND THE FIRST AMENDMENT* (1957) [hereinafter BERNS, FVFA]. Other work by Berns considered in this Article includes WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* (1976) [hereinafter BERNS, FAFAD], together with several uncollected essays and articles.

109 Later in his career, Berns turned somewhat away from his earlier scholarship on virtue and freedom and toward first-wave originalist arguments emphasizing judicial restraint. See, e.g., Walter Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49, 82–83. This Article hopes to suggest, however, that his earlier work was the more prescient and penetrating.

110 This Article does not explore (or defend) Berns's own understanding of freedom's relationship to civic virtue, save to note that it is connected to an ancient tradition stretching back as far as the Aristotelian idea of a citizen as “[h]e who has the power to take part in the deliberative or judicial administration of any state . . . and . . . a state is a body of citizens sufficing for the purposes of life.” ARISTOTLE, *POLITICS* bk. III, at 127 (Benjamin Jowett trans., Random House ed. 1943).

The hurtful potential of speech and religious exercise gives rise to the problem of freedom under the First Amendment. The problem is how to regulate speech and religious exercise so as to limit their potential for excessive social hurt. By establishing regulatory limits on these freedoms, the society protects itself, but it also exercises an instructional function: it teaches its members about the conditions of civic inclusion and thereby aspires to make them civically virtuous, to make them worthy of the freedoms it accords. A society that limits expression must be alert to the danger that one limit can easily lead to another. It should therefore allow as much vicious expression—whether speech or religious exercise—as may be tolerated. Yet the limits on the freedom of speech and religious exercise that any society adopts (limits that all civil societies have, the rhetoric that they may indulge in notwithstanding) are precisely a reflection of those words and religious acts that it deems sufficiently vicious—or sufficiently hurtful—to require regulation. Thus, rather than an intrinsic good, freedom is instead part of a larger problem concerning the allocation of a resource that demands political and legal judgment. All such judgment curtails some freedoms as it expands others.

Berns's first reflections on the problem of freedom appear at the beginning of his earliest book, where he considers the issue of censorship. The issue, an ancient one in the history of political thought, pits two hoary stock characters: the civil libertarian and the suppressor of vice. The civil libertarian contends that any differential treatment of expression, let alone outright censorship, is disgraceful on the part of any enlightened society that aspires either to truth or to progress.<sup>111</sup> Our age is unique not because there is more vice than in the past but because there are more, and more efficacious, methods of reporting and transmitting it. Is it not better—more enlightened—steadily to increase the freedom of expression of every person? And is it not a greater sign of civic vice to prop up officious intermeddlers in other people's business, purported guardians of the moral commonweal? Once empowered to any degree, the censor "will not be content to stop with the proscription of the cheap and vulgar, but will continue his depredations against anything that happens to displease him."<sup>112</sup>

The suppressor of vice responds that because public expression inevitably affects and helps to form a society's tastes, values, and character, government has a role to play in defending certain standards of public decency and morality. The degraded quality of public expression affects the entire society. But it may be particularly problematic for less privileged sectors of it, because these are hit hardest by the government's aloof posturing and lack of other compensating resources. Yet no quantity of well-intended social work or money can deal effectively with the problem, which is genuinely universal in scope. True, our technological achievements have exacerbated the problem by increasing the speed and scope of reporting and transmission of all manner of vicious expression. But if we are to protect the core institutions

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111 BERNs, FVFA, *supra* note 108, at 12.

112 *Id.* at 14.



and values of American society and to avoid a kind of “rotting away” from the inside, American government must assume at least some supervisory role over the quality of public expression.<sup>113</sup>

What was unusual in the circumstances of twentieth-century First Amendment law, in Berns’s view, was not that the civil libertarian was having the better of the suppressor of vice. It was instead that the “classic . . . political problem” posed by the clash between these archetypes—“each insisting that its policy represents the true public interest”<sup>114</sup>—was felt to have been unequivocally and conclusively decided in favor of the civil libertarian. More than this, so thorough was the suppressor of vice’s rout that it appeared to Berns that the problem of freedom had been forgotten altogether by the vanquishers. It was as if there was no longer any problem at all. More freedom just was self-evidently a good thing for everybody. Yet Berns believed that freedom was not synonymous with justice, understood even in the thinnest sense of a best all-things-considered political arrangement; indeed, “[f]reedom in itself has no intrinsic merit.”<sup>115</sup> “Even for Mill,” Berns observes, “the goal was not freedom but the improvement of mankind.”<sup>116</sup> The First Amendment does not stand in isolation but is only one part of a Constitution that is a “charter of government” whose objective, as its preamble says, is to “establish[ ] justice.”<sup>117</sup> The virtue of justice, not freedom, is the central principle of American law and politics but “[w]hat was once the principal purpose of government is now forgotten entirely; the problem of making men virtuous and deserving of freedom is completely ignored.”<sup>118</sup>

Much of Berns’s first and most important book was concerned to show that many of the Supreme Court’s First Amendment decisions in the pre- and immediate post-War period on the one hand ignored or even explicitly denied the problem of freedom, while on the other hand tacitly acknowledged it in the cases’ disposition. Berns first notes that for all the absolutist rhetoric and cheerleading attending Justice Holmes’s celebrated “clear and present danger” test, announced in *Schenck v. United States* and defended in his *Abrams* dissent, Schenck was sent to prison with it, while *Abrams*, *Gitlow*, *Dennis*, and many others were sent to prison despite it.<sup>119</sup> Yet even though the clear and present danger test’s results were at best mixed in these early-mid-twentieth-century contests, its real influence lay elsewhere. By having struggled as an initial matter against national security, expressive freedom

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113 *Id.* at 10–12, 14.

114 *Id.* at 14.

115 *Id.* at 126.

116 *Id.* at 25.

117 *Id.* at 46 (emphasis omitted).

118 *Id.* at 229.

119 *Id.* at 50–53; *see* *Dennis v. United States*, 341 U.S. 494, 503–05 (1951) (plurality opinion) (though the test had been reformulated by this point); *Am. Comm’n Ass’n v. Douds*, 339 U.S. 382, 406–12 (1950); *Korematsu v. United States*, 323 U.S. 214 (1944); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Gilbert v. Minnesota*, 254 U.S. 325 (1920); *Pierce v. United States*, 252 U.S. 239 (1920); *Schaefer v. United States*, 251 U.S. 466 (1920).

was “caparisoned with . . . formidable armor.”<sup>120</sup> It was prepared for battles in which its opponent would be far less imposing an interest than national security. It was thereby assigned by the Court to a “preferred position”<sup>121</sup>—as enjoying a presumptively victorious posture over all rival civic and social interests other than national security.

And it did enjoy such victories in several subsequent, important mid-century decisions concerning the rights of Jehovah’s Witnesses and others—useful cases inasmuch as they blend rights of speech and religious exercise. In nearly all of these, the claim of religious and expressive freedom won,<sup>122</sup> but in Berns’s view, the importance of these cases is the Court’s shifting and expanding characterization of the core of First Amendment protection. The First Amendment right to solicit funds, to accost passersby, to blast speech from sound trucks in public parks, to approach private homes and to challenge, and even insult and degrade, the religious beliefs of whomever the speaker comes into public contact with—all of these were not merely tolerated under the “preferred position” approach. They were instead declared to occupy the selfsame “preferred position” under the First Amendment as the right of people to engage in private worship or listen to their chosen religious teacher: “This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits.”<sup>123</sup> Though the “preferred position” approach to the First Amendment did not result in absolute victory for expressive freedom in every case, it steadily shifted cultural understanding about what stood at the core of First Amendment protection, and which sort of competing interests in liberty were now disfavored. That understanding was advanced rhetorically even in cases where the First Amendment expressive interest lost, as when Justice Douglas argued in his *Poulos v. New Hampshire* dissent that “even a reasonable regulation of the right to free speech is not compatible with the First Amendment.”<sup>124</sup>

These early decisions already evince the sort of resource reallocation of freedom that the Court would greatly accelerate in later years. The freedom of private householders not to be confronted with insulting or degrading views of their own religion (surely this is one kind of religious freedom);<sup>125</sup> their freedom to be let alone; their freedom not to be badgered and

120 BERNs, FVFA, *supra* note 108, at 70.

121 *Id.* at 74–75. The phrase is taken from Justice Douglas’s majority opinion in *Saia v. New York*, 334 U.S. 558, 562 (1948) (citing *Marsh v. Alabama*, 326 U.S. 501, 509 (1946)).

122 *Saia*, 334 U.S. at 559–60; *Murdock v. Pennsylvania*, 319 U.S. 105, 117 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940); *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Lowell v. City of Griffin*, 303 U.S. 444, 453 (1938).

123 *Murdock*, 319 U.S. at 131 (Reed, J., dissenting) (citing *Douglas v. Jeanette*, 319 U.S. 157, 176 (1943)).

124 345 U.S. 395, 425 (1953) (Douglas, J., dissenting).

125 As Justice Jackson put it, “[h]ow then can the Court today hold it a ‘high constitutional privilege’ to go to homes, including those of devout Catholics on Palm Sunday morning, and thrust upon them literature calling their church a ‘whore’ and their faith a ‘racket’?” *Douglas*, 319 U.S. at 180 (Jackson, J., concurring in judgment).

harangued; the freedom of people to enjoy the amenity of a public park in relative quiet; the freedom, in sum, of the community, as a community, to enjoy the benefit of “reasonable regulations” of other people’s expression, religious or otherwise, that interfered with other public liberties and ways of life—all were explicitly downgraded in these cases. Expression detrimental to these interests was not merely now tolerated as the sort of hurtful or vicious speech and religious exercise that American society ought not, ordinarily and for prudence’s sake, to prohibit. It was given a makeover. It was declared virtuous under the First Amendment and awarded pride of place right alongside what were previously held to be core features of religious exercise. It was said to be perfectly equal to the freedom to select one’s own place of worship as a protected First Amendment right. Win or lose, “preferred position” rhetoric would have a profound effect on the course of expressive freedom in the decisions that followed.

The point is not that the Court made poor decisions in these cases. It is instead that the Court’s decisions reallocated freedom under the First Amendment in a way that offers some insight about the nature of the contest between Berns’s stock characters—the civil libertarian and the suppressor of vice. Berns presents them as offering competing views of freedom, but in reality they offer competing views of civic virtue. Each is indeed “civic-minded” but it will not do to say that one believes that “freedom of expression is the hallmark of American civilization”<sup>126</sup> while the other believes the opposite. Both instead offer distinctive outlooks about the manner in which First Amendment freedom should be apportioned. In doing so, both agree with one another, and disagree with the conventional account, that freedom is not an intrinsic good of American political life, not the “hallmark of American civilization.” It is a resource whose reapportionment moves the society away from one set of political commitments and toward another. The characters’ different views about the proper allocation of First Amendment expressive liberty are exactly divergent responses to the problem of freedom.

*B. The American State’s Responses to the Problem of Freedom Under the First Amendment Are Not Neutral as to the Virtuous Political Life.*

The second revised thesis follows naturally from the first: the American state’s, and in particular the Supreme Court’s, responses to the problem of freedom discussed in the first thesis are not and never have been neutral as to the virtuous political life. They have instead reflected distinctive views and attitudes about virtuous and vicious expression and religious exercise, and they have served not only to protect the American state from civic vice but also to instruct it as to civic virtue.

Perhaps the most obvious evidence of the state’s non-neutrality in the fashioning of First Amendment freedom are the limits that it has always imposed with respect to content-based expression and religious exercise. “Whether,” as Berns said, “bad speech is denominated ‘fighting words,’

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126 BERNs, *FVFA*, *supra* note 108, at 14.

obscenity, or incitations to breaches of the peace, it constitutes an authoritative definition of what is not to be permitted.”<sup>127</sup> Those limits have not disappeared since Berns wrote, though several have been modified, others have been added, and still others weakened. The point applies with equal force to those “time, place, and manner” restrictions that receive more forgiving constitutional scrutiny than the ordinary case of the content-based regulation: Why should “keeping the sidewalks free from obstructions” or the channels of traffic moving efficiently be self-evidently more important interests in public order than upholding other “conventions of decency”?<sup>128</sup> Some non-neutral theory of political governance lurks beneath the Court’s doctrinal categories. And the same has been true whenever the Court has held that certain religious exercises are simply not the sort that should enjoy First Amendment protection, as in the case at one time of polygamy<sup>129</sup> or in cases involving children whose welfare or physical safety may come into conflict with the religious exercise of their parents.<sup>130</sup> These exclusions may have been crafted on the basis of crude ideas of virtue and vice, but the Justices who made them and continue to abide by them must have had, and must still have, in mind at least some such conceptions.

Yet beyond the bare fact that there is some significant subset of speech and religious exercise that is simply deemed beyond the pale of constitutional protection, there is an additional conceptual puzzle. As Berns put it, “different speeches have different consequences and different speakers aim at different ends,” so that the only polity that actually could foster speech without any discrimination whatsoever is Babel.<sup>131</sup> Which, then, are the ends aimed at by the Supreme Court’s approach toward First Amendment free speech? Berns believed that they were those of a polity “without a public good” and if this were true, it might tell in favor of the thesis that the American state remains neutral as to any particular view of the virtuous life. But there are reasons to doubt that he was right about this.

Consider the second arch-justification for free speech of the conventional account: its truth-seeking function. The very idea that hard-won truths are accorded no respect at all, no deference whatsoever, but are thrown right back into ceaseless competition with new ideas in the “market,” itself reflects a distinctive view of political and moral virtue. It is not a neutral perspective on truth. It either means that whatever ideas are accepted by the market are simply labeled “truth” or that truth has some sort of intrinsic advantage over falsehood that allows it to prevail under free market conditions. If the latter, then, as Berns observed, “persecution is illogical because it is unnecessary.”<sup>132</sup> And if the former, the assumption must be that the only truths are relative and ephemeral, since these are the only sort that can capture market

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127 *Id.* at 126.

128 BERNs, FAFAD, *supra* note 108, at 193.

129 *See* Davis v. Beason, 133 U.S. 333, 334 (1890).

130 *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

131 BERNs, FAFAD, *supra* note 108, at 194.

132 *Id.* at 154.

preferences as consumer desires change. As a general civic approach to the question of truth, this is hardly the same as “keeping an open mind” to new ideas. It is active disrespect of all existing truths. The idea of truth in such a society recedes into the background. Or perhaps it is more accurate to say that the only truth—and it is one held to with supreme tenacity—is the impermanence of any truth obtained and the relentless imperative of change at the prompting of individual choice and consumer taste. As Gerhart Niemeyer once observed:

It seems good and desirable to keep talking, while the result of the talk becomes something of secondary importance, a by-product which is destined to be discarded as soon as it has been obtained. In this way, the quest for truth is turned into an exciting game rather than a serious and exacting endeavor, a game in which, like the Caucus Race in “Alice,” all are winners and receive the prize of official recognition.<sup>133</sup>

“Recognition” is indeed an apt general description of the virtues toward which the Supreme Court reoriented the First Amendment during the twentieth century. Berns traces the development of free speech doctrine in precisely this direction in discussing two mid-century decisions, *Beauharnais v. Illinois*<sup>134</sup> and *Terminiello v. Chicago*.<sup>135</sup> In *Beauharnais*, the president of the White Circle League of America was convicted of distributing pamphlets calling on the City of Chicago to devote resources to stopping the “rapes, robberies, knives, guns and marijuana of the negro” and to prevent the “mongreliz[ation]” of the white race.<sup>136</sup> The Illinois statute, Berns argued, needed to be understood and evaluated in light of the factual conditions in Chicago, which had experienced the evil of massive racial strife in the years preceding the statute’s enactment.<sup>137</sup> *Beauharnais*, moreover, was not punished for any criticism of the government or its public officials; he was not punished, as the conventional account’s first justification has it, for calling the government to account for its misconduct; rather, he was punished for advocating illegal action against fellow citizens and for disturbing the peace of those citizens (that is to say, their liberty). There may be prudential reasons to tolerate *Beauharnais*’s speech but the question at least merited a thorough discussion of the competing private and civic interests at stake. Yet to hear the dissenting Justices, one would think that the decision to uphold the conviction was the act of an unabashedly tyrannical government.<sup>138</sup> The commitment to freedom takes no cognizance of social facts; any restriction on individual expression, no matter the context, is anathema for “all legisla-

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133 Gerhart Niemeyer, *A Reappraisal of the Doctrine of Free Speech*, 25 THOUGHT: FORDHAM U. Q. 251, 255 (1950).

134 343 U.S. 250 (1952).

135 337 U.S. 1 (1949).

136 *Beauharnais*, 343 U.S. at 252.

137 See BERNs, FVFA, *supra* note 108, at 61–64, 148–55 (discussing *Beauharnais*).

138 *Beauharnais*, 343 U.S. at 270 (Black, J., dissenting) (“State experimentation in curbing freedom of expression is startling and frightening doctrine in a country dedicated to self-government by its people.”).

tion of this type [is] the act[ ] of tyrants.”<sup>139</sup> The only political problem in view—the only one thought to be important in evaluating these disputes—is the state’s authority as against the individual’s, and the state’s denial to the individual of his “say in matters of public concern.”<sup>140</sup> To deny a person his “say” is nothing less than an act of tyranny.

*Terminiello* represents one bright bloom in the flowering of this approach to speech protection under the First Amendment. In a 5-4 decision authored by Justice Douglas, the Court overturned the conviction for breaching the peace of a Catholic priest whose expression was intended to whip up a crowd inside an auditorium into a frenzy against a second crowd pressing to enter the auditorium and hurling bricks, rocks, bottles, and icepicks.<sup>141</sup> The speech was clearly intended to incite the disturbance of a mob and was laced with fascist epithets of hate and vilification aimed at particular classes and races of people. In characterizing the nature of the free speech interest at stake in *Terminiello*, Justice Douglas offered this:

The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Accordingly, a function of free speech under our system of government is to invite dispute. . . . 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.<sup>142</sup>

The passage is remarkable. First, Douglas says that Chicago was wrong to punish *Terminiello* not merely because “his speech did not produce a danger of substantive evil”<sup>143</sup> but because it was positively civically healthful—it was precisely the sort of speech that lies at the heart of the First Amendment. Second, the path from the neutrality of toleration to the non-neutrality of promotion was thereby illuminated: the ideal society actually ought to promote and celebrate speech like *Terminiello*’s because of the crucial civic function it performs. This is full-bloodedly virtuous speech, not the sort of ineffectually vicious speech (or what Justice Frankfurter at one time called “[w]holly neutral futilities”)<sup>144</sup> that should not be regulated. Third, there may even be a possibility that *Terminiello*’s advocacy of race and class hatred and massive bloodletting in the streets actually will persuade market actors of its truth and of the falsity of their contrary “prejudices and preconceptions.” Since such a possibility exists, the state is powerless to restrict *Terminiello*’s

139 BERNES, *FVFA*, *supra* note 108, at 154.

140 *Beauharnais*, 343 U.S. at 270.

141 See the description in *Terminiello v. Chicago*, 337 U.S. 1, 13–18 (1949) (Jackson, J., dissenting).

142 *Id.* at 4–5 (majority opinion).

143 BERNES, *FVFA*, *supra* note 108, at 156.

144 *Winters v. New York*, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting).

speech. The implication is that it is better to be governed by fascist ideas than to regulate the market consumer's taste for them. Finally, if "inviting dispute" even in this manner is the central function of free speech protection, then it seems to have far more to do with Terminiello's own authority to do so in the manner he chooses as measured against the state's authority to regulate it—and the extent to which, as Niemeyer put it, the state must "recognize" his authority—than with "free debate and free exchange of ideas" among the rabble to whom, and against whom, Terminiello's self-expression was aimed.

The course of free speech protection has run fairly smooth ever since. Many of the types of arguments in *Terminiello* concerning public debate and the capacity of speech to influence the public have been advanced as the core reasons to protect speech in several more contemporary cases that seem to have absolutely nothing to do with public debate. Speech, as Chief Justice Roberts has said, "can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain."<sup>145</sup> Yet to speak of Cohen's speech, or Westboro Baptist Church's speech, or Stevens's speech, or EMA's speech, as speech that attempts to "persuade" others of some controversial position on a matter of public concern, as the Court often does, seems quite irrelevant.<sup>146</sup> If "persuasion" is defined, as David Strauss has argued, as "a process of appealing, in some sense, to reason"<sup>147</sup>—then it verges on the farcical to suggest that animal crush videos, visual depictions of the titillating slaughter of Black people and Jews, and lies about easily verifiable facts such as the earning of military honors perform this function. But First Amendment protection of speech of this kind does perform the function simultaneously of revindicating claims of individual recognition by state authority and stimulating ever more appalling expressive aggressions.<sup>148</sup>

By placing such speech squarely within the realm of First Amendment protection, the law exercises an instructional function that is anything but neutral. It teaches that there is no difference between disinterested ideas and self-interested ideas, and that the former are not publicly acknowledged to deserve any preference whatsoever over the latter. The suggestion is that civic virtue as well as truth (the first two justifications of the conventional account) will emerge more readily from the clash of self-interested "market" concerns—concerns, that is, implicating the self's "recognition"—than from a rational public debate among "scholars and saints."<sup>149</sup> All are equally virtu-

145 *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011).

146 See BERNs, DC, *supra* note 108, at 128 ("[A]nger provokes anger, as it did in this instance, not agreement or accommodation.").

147 David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 335 (1991).

148 In reflecting on *Texas v. Johnson*, 491 U.S. 397 (1989), Berns notes that "deprived now of flag-burning—because it is no longer illegal—Johnson and his friends would have to find new and, of necessity, more egregious ways to aggress against the symbols, the conventions, or the mores which, as Tocqueville argued, provide the foundation of America's laws and its political life." BERNs, DC, *supra* note 108, at 130.

149 Niemeyer, *supra* note 133, at 255–57.

ous and equally meritorious of public acknowledgment. It teaches that “men must at least threaten the use of private force in order to vindicate their private rights,”<sup>150</sup> which is not an implausible way to understand the upshot of the *Stolen Valor Act* case, in which the Court suggested that lies about factual matters are protected speech unless they are conjoined to some specific private legal claim such as fraud or defamation.<sup>151</sup> And it teaches that the only real threat to the virtuous society is the dictator, and that justice is “merely the absence of governmental tyranny.”<sup>152</sup> As Justice Breyer noted in his *EMA* dissent: “This case is ultimately less about censorship than it is about education. Our Constitution cannot succeed in securing the liberties it seeks to protect unless we can raise future generations committed cooperatively to making our system of government work.”<sup>153</sup> Citizenship, Breyer seems to mean, implies “public-spiritedness, which is akin to patriotism, and has to be cultivated.”<sup>154</sup> But the hour was late for Breyer’s appeal; nearly sixty years earlier, the Court pronounced that “[w]hat is one man’s amusement, teaches another’s doctrine.”<sup>155</sup>

One may be somewhat briefer as to state neutrality under the religion clauses. Consider only one prominent issue implicating establishmentarian concerns: the relationship of religion and the education of American citizens. From the very beginning, the state never was neutral as to the sort of religion that was consistent with civic education and the sort that was a threat to it. The history of American public education may be told as a history of gradual secularization driven not by religious neutrality but religious enthusiasm. In the American colonies and well into the nineteenth century, the churches took primary charge of education. Even where public schools were established, their curriculum was distinctively Christian. Early nineteenth-century Massachusetts schools were at first colored by a kind of pietistic Calvinism, after which there was an effort to diminish their distinctive Congregationalism. Horace Mann, that emblem of the early development of the government school, himself supported “religious instruction in our schools to the extremest verge to which it can be carried without invading those rights of conscience which are established by the laws of God and guaranteed to us by the Constitution of the State [of Massachusetts].”<sup>156</sup>

Church education was thus fitfully replaced by varieties of government-sponsored and administered Christian education. As time passed, the quality of the religious instruction became progressively diluted—less religiously specific, certainly, but not less specifically religious. Justice Frankfurter once praised the public school as “a symbol of our secular unity”<sup>157</sup> but he might

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150 BERNs, FAFAD, *supra* note 108, at 201.

151 *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012).

152 BERNs, FVFA, *supra* note 108, at 163.

153 *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2771 (2011) (Breyer, J., dissenting).

154 BERNs, DC, *supra* note 108, at 142.

155 *Winters v. New York*, 333 U.S. 507, 510 (1948).

156 LEO PFEFFER, CHURCH, STATE, AND FREEDOM 332 (rev. ed. 1967).

157 *McCullum v. Bd. of Educ.*, 333 U.S. 203, 217 (1948) (Frankfurter, J., concurring).



have more precisely described it as a symbol of our religious division. The increasing secularity of public education grew from disagreement about the properly religious character of the government school—about the sort of religion needed to sustain the republic. In the contemporary period, as the liberal Protestantism of the public school has been drained of any vestigial Protestantism,<sup>158</sup> there remains only the liberalism as the embodiment of the nation's civic ideals. Like all government organs, public schools are now bound by the Supreme Court's constitutional injunction not to "endorse" religion in ways that make non-adherents feel like political outsiders. The secular projects and aspirations of the liberal state sustain the American polity.

There is a parallel history concerning the American state's posture toward religious schools, the chief case of which is the Catholic parochial school. Catholics were driven by the government-endorsed Protestantism of the nineteenth century to adopt a separate system of privately funded schooling that by the mid-twentieth century educated millions of students. Those that opposed this divergence believed—not without reason—that a uniform, government-endorsed Protestantism was an important force of American civic acculturation for the young.

They conceived a name for the separate Catholic system—"sectarian" education—and found champions in Ulysses S. Grant and James G. Blaine, Senator from Maine, Speaker of the House of Representatives, and a Republican candidate for President in the election of 1884, who pressed for a federal constitutional amendment explicitly forbidding any financial aid to "sectarian" institutions. This was done precisely in the name of the radical "separation of church and state"—not because amendment advocates like Grant and Blaine believed that the Constitution required separationism, but because they thought it did not.<sup>159</sup> Though the federal amendment failed, proscriptions against the funding of "sectarian" schools found their way into many state constitutions in later years in so-called "Blaine amendments."

The failure of the federal constitutional amendment contributed to a new focus on constitutional interpretation and invented genealogies concerning the Establishment Clause's true or essential separationist principle. In time, this approach met with far greater success. Beginning in the late 1940s and until fairly recently, church-state separationism represented the Supreme Court's favored approach to Establishment Clause issues involving government funding of religious institutions.<sup>160</sup> Most recently, as discussed above, the Court has instead preferred a seemingly more egalitarian regime of "neutrality"—sameness of treatment for religion and non-religion.

Yet a decision by the Colorado Supreme Court provides only one fairly recent example of how decidedly partial an ostensibly neutral legal regime

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158 See generally JOSEPH BOTTUM, *AN ANXIOUS AGE: THE POST-PROTESTANT ETHIC AND THE SPIRIT OF AMERICA* (2014).

159 This history is recounted at length in PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 287–359 (2004).

160 See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

actually can be.<sup>161</sup> Colorado's Douglas County School District had instituted a program through which certain students accepted by private schools—religious and nonreligious—were eligible to receive a tuition scholarship.<sup>162</sup> The money went to the students' families, who would then pay it to the school they had chosen to attend.<sup>163</sup> Roughly ninety-three percent of participating students chose to attend a religious school.<sup>164</sup> The key issue in the case was this program's constitutionality under Colorado's 1876 Blaine Amendment, enacted at the zenith of the controversy concerning the civic and religious character of public education and the government's hostility toward Catholic education.<sup>165</sup> The law prohibits the state from making "any appropriation, or pay[ing] from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose."<sup>166</sup> Refusing to consider the extensive historical context of the word "sectarian," the court arrived at the conclusion that "sectarian" is synonymous with "religious."<sup>167</sup> The Amendment therefore prohibits the use of any state moneys that might even indirectly "support" or "sustain" religious schools by facilitating students' attendance, seemingly including payments for infrastructure and basic safety measures.

And yet, in light of this result, "sectarian" does not sound particularly neutral; or, to the extent it does, it sounds in the rather counterintuitive neutrality of state-endorsed religious hostility. Yet even this perspective on the question of neutrality passes over the colossal non-neutrality of the government's systematic and exclusive funding of its own putatively religion-neutral schools, to the detriment of able students—many of them from poor and educationally underserved communities—who would greatly benefit from private religious schooling. Neutrality between religion and non-religion seems to demand a plainly partial allocation of resources, as the first revised thesis has already argued. Or, one variety of government neutrality—no funding of religious schools—obstructs the achievement of another—educational opportunity.<sup>168</sup>

True, American education is only one issue impacted by the First Amendment's religion clauses. Yet at least as to that issue, the place of religion in American educational life—whether in the nation's public schools or in its position on private religious schools—will not be answered by First Amendment neutrality talk, for the fundamental reason that nothing in the projects of American education is or ever has been neutral toward religion.

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161 *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015).

162 *Id.* at 464.

163 *Id.* at 465.

164 *Id.* at 466.

165 COLO. CONST. art. IX, § 7 (amended 1876).

166 *Douglas Cty. Sch. Dist.*, 351 P.3d at 470 (quoting COLO. CONST. art. IX, § 7 (amended 1876) (emphasis omitted)).

167 *Id.*

168 For further discussion of the multiple, clashing meanings of "neutrality" in the religion clause context, see DEGIROLAMI, *supra* note 56, at 15–33, 59–78.

From the very first, it was precisely the non-neutrality of the state toward religion that has been one of the prime catalysts of cultural and legal development in American education policy, public and private. There is an understandable tendency among some opponents of state Blaine amendments such as Colorado's to reduce them to simple expressions of non-neutral anti-Catholicism. Often they were that, but they were more.

To understand them merely in these terms—as lamentable examples of “discrimination”—misunderstands them. It consigns them to a history from which we have happily progressed now that we have entered an epoch in which the making of discriminations is said to be taboo. But to repudiate the Blaine amendments is not to rid ourselves of the very real problem they addressed. That problem—how to foster through education the common civic culture upon which the American polity, even still, depends—remains pressing. The Blaine amendments were woefully inadequate responses to that problem, but responses nonetheless. The empty bromide of religious neutrality is no response at all.

C. *The Autonomization of First Amendment Freedom Reflects a Distinctive View of the Virtuous Society Coincident with Significant Features of the Court's Post-New Deal Fourteenth Amendment Jurisprudence.*

The final thesis of the revised account concedes to the conventional account at least this much: The Supreme Court has in fact steadily autonomized the First Amendment. But it departs from the conventional account in denying that First Amendment autonomization has had the effect of increasing everyone's liberty. It holds instead that the autonomized First Amendment has reinforced and itself gained strength from significant features of the Court's post-New Deal Fourteenth Amendment jurisprudence, particularly the Court's decisions involving sex as a civil liberty. The autonomization of the First Amendment thus has rendered virtuous certain distinctive political and social commitments and greatly devalued, if not rendered vicious, others.

Two preliminary points are worth bearing in mind. First, as Berns observed, the First Amendment does not sit alone, in isolation, as the only provision of the Constitution.<sup>169</sup> It inevitably interacts with, affects, and is affected by the interpretation of other provisions. The second is Isaiah Berlin's well-known distinction between positive and negative freedom.<sup>170</sup> If freedom is understood in its positive sense, as self-realization or self-actualization, then concerns about coercion (the negative sense of freedom) may become obscured. If an individual is free just exactly to the extent that he has realized his authentic self, then others may be in a position to know better what his authentic self-fulfillment demands.

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169 BERNs, FVFA, *supra* note 108, at 46.

170 ISIAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118, 121–22 (1971).

*Cohen v. California*, we have already seen, stands for the proposition that an autonomized First Amendment is, as Justice Harlan said, the only “approach [that] would comport with the premise of individual dignity and choice upon which our political system rests.”<sup>171</sup> Justice Thomas has likewise emphasized that “the right to free speech is a right held by each American, not by Americans en masse.”<sup>172</sup> This repeated emphasis on “individual dignity and choice” is telling. Yet not all varieties of dignity and choice stand on equal footing. For example, in *Sorrell v. IMS Health Inc.*, the Court held that though a state law restricting the sale or use of pharmacy records was intended to preserve the “personal privacy and the dignity” of medical providers, that was an insufficiently important interest to limit pharmaceutical companies’ access to this information.<sup>173</sup> Some dignitarian interests are more important than others. It therefore becomes necessary to discern which sorts of dignitarian interests or interests in personal autonomy and “recognition” have been promoted and themselves reinforced by the autonomized First Amendment and which have suffered. The conventional account’s third justification for First Amendment freedom may have swallowed up the others but official, government-conferred “recognition” is, per the first revised thesis, a finite resource. It, too, requires judgment about allocation.

Here there are likely many answers, discussion of which would exceed the scope of this Article. One in particular, however, seems highly salient. The question of differential dignitarian recognition is complicated by other developments in constitutional law in the mid-twentieth century, a crucial one of which concerns the then-emerging jurisprudence of the Fourteenth Amendment’s Due Process Clause. During the period that the Court was recharacterizing the First Amendment as a “preferred position,” it was also using the Due Process Clause to incorporate the First Amendment’s several provisions against the states.<sup>174</sup> What Berns called “First Amendment substantive due process”<sup>175</sup> came to mean not that some federal protection for First Amendment freedom against state interference was “implicit in the concept of ordered liberty” protected by the Due Process Clause, but that preferred position liberty for the First Amendment was implicit in the concept of ordered liberty.<sup>176</sup> The autonomization of the First Amendment was thus conceptually conjoined to and occurred concurrently with the rise of the substantive due process values of equality and sexual autonomy in some of the Court’s most important post–New Deal jurisprudence.

In a fascinating study of the emergence of “sex as a civil liberty” in the United States, historian Leigh Ann Wheeler chronicles the pivotal role of the

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171 *Cohen v. California*, 403 U.S. 15, 24 (1971).

172 *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 420 (2000) (Thomas, J., dissenting).

173 131 S. Ct. 2653, 2672 (2011).

174 See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Gitlow v. New York*, 268 U.S. 652 (1925).

175 BERNs, *FVFA*, *supra* note 108, at 102.

176 See *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937).

American Civil Liberties Union (ACLU) in the early-mid-twentieth century in “gradually adopt[ing] sexual expression, practice, and privacy as civil liberties” and “persuad[ing] courts to do the same.”<sup>177</sup> One of Wheeler’s basic insights is that the key to unlocking the vault of sexual liberties, subsequently enshrined by the Supreme Court in the Due Process and Equal Protection Clauses of the Fourteenth Amendment, was the ACLU’s series of “carefully crafted lawsuits” defending increased scope for sexual expression under the First Amendment.<sup>178</sup> The ACLU began by defending unconventional speech about sex in court in the 1930s and 1940s, focusing primarily on regulations involving advocacy of birth control, sex education, nudism, and theater performances.<sup>179</sup> Even in these early years, one of the ACLU’s important underlying objectives was the “repeal of all birth control laws,” so that attacking regulations on the distribution of literature about birth control as a First Amendment violation was a strategic choice—it was both part of the ACLU’s “First Amendment agenda” and an effective means of achieving other aims relating to sexual conduct.<sup>180</sup>

Wheeler details how champions of sexual liberties later deployed the very same “marketplace of ideas” metaphor that represents the truth-oriented justification of the conventional account of the First Amendment in order to create consumer rights out of the First Amendment.<sup>181</sup> Sexual expression was the First Amendment consumable, and it was increasingly regarded as a fundamental feature of individual identity and autonomous choice in ways having nothing to do with democratic governance:

Political theorists had long linked citizens’ access to information with democracy, but they did so by prioritizing communitarian values that treated citizens in the aggregate as a tool for achieving and sustaining democracy. What the ACLU did, increasingly in partnership with commercial producers and other interest groups, was . . . designed to empower citizens to claim access to information and images as an individual right. As ACLU leaders and others reframed the First Amendment to include consumers’ rights, they abandoned, once and for all, their earlier commitment to defending only matter created for educational, political, artistic, or intellectual purposes and increasingly defended material produced purely for profit and pleasure.<sup>182</sup>

Though the ACLU had its setbacks—as when its position that obscenity stood at the core of the First Amendment alongside political speech was rejected by the Supreme Court in *Roth v. United States*<sup>183</sup>—even in defeat, it succeeded in convincing the Court to adopt a comparatively narrow defini-

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177 LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY 3–4 (2013).

178 *Id.* at 3–5.

179 *Id.* at 39–59; *see, e.g.*, *Parmelee v. United States*, 113 F.2d 729 (D.C. Cir. 1940).

180 WHEELER, *supra* note 177, at 50, 52–53.

181 *Id.* at 61.

182 *Id.* (footnote omitted).

183 354 U.S. 476 (1957).

tion of obscenity.<sup>184</sup> Mid-century “ACLU leaders,” Wheeler explains, “saw great promise in the potential for recent cultural and judicial developments to liberate sexual expression.”<sup>185</sup> The new First Amendment focus on the autonomized wants and choices of the consumer of expression brought “to sexual expression the gloss and respectability of constitutional rights.”<sup>186</sup>

Wheeler’s work demonstrates how the constitutional protection of autonomized sexual *practices* that took flight in the 1960s and resulted in claims of constitutional rights to “reproductive freedoms” of various kinds and eventually to sexual equality more broadly can be traced directly to the greatly enhanced and autonomized protection of sexual *expression* under the First Amendment preceding it. Indeed, the First Amendment’s penumbras were one putative textual source of the “right to privacy” held by the Court to forbid regulation of access to contraception for married couples.<sup>187</sup> The right of privacy itself was later in turn recycled by the Court to prohibit on First Amendment grounds the criminalization of the private possession of obscene material, for the First Amendment protects “the right to satisfy [one’s] intellectual and emotional needs” in the home.<sup>188</sup> And in still later decades, the mutually reinforcing connection between conduct and expression persisted and expanded as “ACLU leaders increasingly supported the efforts of homosexual rights activists—along with purveyors and consumers of sexual material—to expand access.”<sup>189</sup>

One of the book’s more refreshing features is the identification of specific losers in this generational struggle ostensibly about freedom, but in reality about the nature of the virtuous society. The losers included organized religious institutions, especially Protestant and Catholic groups, whose core tenets reflected a wildly different ethic than that pressed by advocates of the individualist, autonomous, consumer-oriented model of sexuality. They also included those citizens—religious or not—who believed that the political commonweal, as a joint civic enterprise, was ill served in various ways by the expansion of sexual liberty and by the consumerization of the First Amendment.<sup>190</sup> Their freedom from what they regarded as the folly of the ACLU’s position, a position that was increasingly embraced by the Court and held to represent the very foundation of the First Amendment, was at stake. Wheeler includes a fragment from a representative letter to the ACLU written by one of these losers—a woman who objected that “freedom is not always a matter of being able to choose what we want to do, but rather peace of mind through knowing we are doing what is right,”<sup>191</sup> a sense of right according to the common conventions of decent social behavior then extant. Yet a major

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184 WHEELER, *supra* note 177, at 71–72.

185 *Id.* at 79.

186 *Id.* at 91.

187 *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

188 *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

189 WHEELER, *supra* note 177, at 153.

190 *Id.* at 77.

191 *Id.*

part of what Wheeler celebrates as the achievement of the ACLU was to downgrade such ideas under law—to demote them as civic ideals of virtue and even perhaps to render them vicious. Once the Court had been persuaded of the “sanctity of freedom of speech and sexual privacy” as standing at “the very core of American constitutionalism,”<sup>192</sup> resistance to such rights, even in the name of First Amendment freedom, gradually became an anti-constitutional point of view.

It is difficult to devise a single, unifying description of the losers in this massive contest over the nature of American civic virtue. One plausible candidate, however, is what Roger Scruton once called the partisans of the “corporate person.”<sup>193</sup> The idea that “human individuals derive their personality,” including and especially their commitments concerning human sexuality, “in part from corporations” (particularly churches, families, social and civic groups, and other similar institutions whose function is to fix and transmit traditional ways of life) and that as a result “corporate personality should be consecrated in our feelings, and acknowledged in our law”<sup>194</sup> gradually but steadily was devalued in twentieth-century First and Fourteenth Amendment law. Those with allegiances to such corporate structures believe that they are “not a means but an end: a bond in which you are at rest, as you are at rest beside your hearth. [They are] object[s] of respect and esteem.”<sup>195</sup> People like Wheeler’s letter-writer, who would derive not only their understandings of virtue and vice but also their civic “peace of mind” through the influence of and association with corporate bodies (religious or otherwise) would suffer under the new doctrine. And, Wheeler suggests, it was right and good that they should.

Set against this background, the language of individual dignity and equality used over and again by the Supreme Court in the discussion of sex as a civil liberty comes into sharper focus. “Few decisions,” the Court would write in *Thornburgh*—a case that, *inter alia*, involved the freedom to disseminate information about abortion to women who were considering it—are “more basic to individual dignity and autonomy”<sup>196</sup> than the freedom to control one’s own role in procreation. The freedom to make such “intimate and personal choices” is “central to personal dignity and autonomy,”<sup>197</sup> the “dignity” of “free persons” that inheres “[w]hen sexuality finds overt expression in intimate conduct with another person.”<sup>198</sup> And the state is now, *pace* Justice Thomas, an active participant in these matters, bestowing dignity as well

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192 *Id.* at 224.

193 Roger Scruton & John Finnis, *Corporate Persons*, 63 *PROC. ARISTOTELIAN SOC’Y SUPPLEMENTARY VOL.* 239, 240 (1989).

194 *Id.* at 240–41.

195 *Id.* at 245.

196 *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1993) (on other grounds).

197 *Casey*, 505 U.S. at 851.

198 *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

as equality.<sup>199</sup> It must “confer[ ]” the “equal dignity” that attends marital status on same-sex couples in accordance with what the Court has constitutionalized as the “evolving understanding of the meaning of equality,”<sup>200</sup> for the Court has declared that “[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.”<sup>201</sup>

Indeed, Wheeler’s account in many ways proves too much for purposes of the connection suggested here. The book documents a concerted, deliberate, and successful effort by advocates of sexual freedom to use the First Amendment strategically to achieve their broader aims, aims that the Supreme Court steadily constitutionalized under the Fourteenth Amendment as the twentieth century drew on. It was only when the tension between ever-expanding rights of sexual freedom and broader sexual egalitarian ideals came to light—as in the late twentieth-century controversies over rape reform and sexual harassment laws—that the ACLU moderated its sexual libertarianism so as to parry accusations that it was “privileging men’s over women’s rights and liberty over equality.”<sup>202</sup> Interesting and believable as evidence of such an explicit, intentional campaign may be, it is not necessary in order to show that the First Amendment’s autonomization represents not universal maximization of freedom but a particular, non-neutral response to the problem of freedom in which certain social values are given political and legal priority and others demoted. The goods of sexual libertinism and sexual choice-making as individual consumables with legal status—sex as a civil right in all of its multifarious dignitarian and egalitarian dimensions, utterly deracinated from all traditional corporate influence—may not have been the only social and political values that achieved new constitutional status as a result of the autonomization of the First Amendment, but they certainly were primary beneficiaries of the new dispensation. They became political virtues. Opposition to them became political vices.<sup>203</sup>

Elsewhere, I have discussed at length the complex and changing status of religious freedom in the context of the rise of these far more powerful legal forces.<sup>204</sup> The autonomization of religious free exercise (first constitutionally, then statutorily) and disestablishment represents one answer to the problem of freedom in which some types of religious freedom have been successful and others either have suffered or at the very least are subject to increasingly strong challenges. Claims of religious freedom that are per-

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199 See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2639 (2015) (Thomas, J., dissenting) (“The government cannot bestow dignity, and it cannot take it away.”).

200 *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

201 *Obergefell*, 135 S. Ct. at 2599.

202 WHEELER, *supra* note 177, at 179–80.

203 Berns saw this as well: “With us, as Jean-Jacques Rousseau would have said, vice has taken on the likeness of decency. (What he did say is this: ‘Vice hardly insinuates itself by shocking decency but by taking on its likeness.’)” BERNs, DC, *supra* note 108, at 135 (quoting JEAN-JACQUES ROUSSEAU, *POLITICS AND THE ARTS: LETTER TO M. D’ALEMBERT ON THE THEATRE* 124 (Allan Bloom trans., 1960)).

204 See generally DeGirolami, *supra* note 102.



ceived not to threaten the dignitarian and egalitarian gains achieved through the powerful union of speech and sex rights remain relatively uncontroversial. Religion that is essentially powerless, marginal, isolated, and disconnected from countervailing interests in autonomy, equality, and sexual freedom—religion, for example, that gives rise to claims for exemption from general laws by prisoners and tiny, exotic groups—can win the universal approbation of the Court.<sup>205</sup> This is to the Court’s credit, of course, but it is also religious liberty whose cost has been comparatively cheap. Religion, on the other hand, that is perceived to stand athwart the new regime of individual dignity, sexual autonomy, and equality elicits violent disagreement on the Court together with a veritable political and cultural tempest.<sup>206</sup> There are parallel phenomena in the establishment area, though the situation is complicated. Separation of church and state is championed if it is perceived to support the autonomized, voluntarist conception of religious liberty and to strike at the historical and cultural connections between the American state and organized, corporate Christian traditions. But church-state separation is far more controversial when it is perceived to immunize the corporate personhood of religious groups, especially Christian ones, from government regulations forbidding discrimination on certain specific bases, including and especially sex and sexual orientation.

The next Part of this Article explores some of these developments and their implications for the relationship of virtue and freedom under the First Amendment. For now, it is sufficient to observe, with Berns, that the critical question is not “from whom and under what circumstances, is a ‘right’ to free speech withdrawn, but rather, *to whom is the freedom of speech granted.*”<sup>207</sup> The answer to this question inevitably must be that we grant the freedom of speech, as we do the freedom of religion, “to those we can trust not to misuse the privilege,”<sup>208</sup> always guided by political judgments about the sorts of virtuous uses and vicious misuses to which the freedoms may be put.

### III. THE PROBLEM OF VIRTUE AND FREEDOM REMEMBERED

It is at least some evidence in favor of the revised account and against the conventional account of the First Amendment that the problem of freedom seems to have been remembered, at least if one is to judge by the burgeoning academic literature arguing for novel and aggressive limitations on the freedoms of religion and speech. That literature vindicates the view that virtue and freedom are inextricably linked and must give rise to the problem identified and explored in the revised account of the First Amendment. Indeed, some of the very virtues facilitated and promoted by the conven-

205 See, e.g., *Holt v. Hobbs*, 135 S. Ct. 853 (2015); *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); see also *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

206 See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Priests for Life v. U.S. Dep’t Health & Human Servs.*, 772 F.3d 229 (2014).

207 BERNs, *FVFA*, *supra* note 108, at 251.

208 *Id.*

tional account of the First Amendment are now informing arguments for its limitation. This Part samples and explores some of those arguments. To this point, the Supreme Court has not accepted these arguments (though some Justices have come close), but it ought to consider them closely if judged against the First and Fourteenth Amendment doctrine that it has created.

### A. *Enumerated Rights Lochnerism*

One newly prominent category of critique contends that freedom of speech and religious freedom for corporate entities—certainly for for-profit entities but perhaps also nonprofit entities—represents the “Lochnerization” of the First Amendment.<sup>209</sup> In *Lochner v. New York*, the Supreme Court held that an unenumerated constitutional right to economic freedom, nominally located in the Due Process Clause of the Fourteenth Amendment, rendered New York’s daily and weekly hour regulations for bakers unconstitutional.<sup>210</sup> Yet “*Lochner*” as an epithet of contempt refers to the more general phenomenon of what Jedediah Purdy has called “the Supreme Court’s desultory affair with economic libertarianism”<sup>211</sup> that came to a welcome (from the perspective of most legal academics)<sup>212</sup> end in 1937. Objecting to the “market ordering” assumptions implicit in claims of corporate religious accommodation, for example, critics who take this line charge the Court with ignoring the differential power relationships between employers and employees obstructing virtuous regulation.

Consider, for example, Elizabeth Sepper’s claims with respect to corporate religious accommodation. Sepper argues that the Court in cases like *Hobby Lobby* “perceive[s] the market as a legally and economically neutral baseline” that justifies exempting religiously objecting corporations<sup>213</sup> from regulations that protect vital interests in “health, social insurance, and non-

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209 See, e.g., Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014); Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527 (2015); Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 UTAH L. REV. 659, 661; Kenneth D. Katkin, Symposium Introduction, *First Amendment Lochnerism? Emerging Constitutional Limitations on Government Regulation of Non-Speech Economic Activity*, 33 N. KY. L. REV. 365 (2006); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS. 195 (2014); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); see also Nina Totenberg, *Rare Unanimity in Supreme Court Term, with Plenty of Fireworks*, NAT’L PUB. RADIO (July 6, 2014), <http://www.npr.org/2014/07/06/329235293/rare-unanimity-in-supreme-court-term-with-plenty-of-fireworks> (statement of Akhil Amar) (“[*Hobby Lobby*] is a new *Lochner*.”). Another recent article depending on arguments ostensibly drawn from *Lochner* includes Oleske, *supra* note 9.

210 198 U.S. 45 (1905).

211 Purdy, *supra* note 209, at 196.

212 But see DAVID E. BERNSTEIN, *REHABILITATING Lochner: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011).

213 Sepper, *supra* note 209, at 1519. Sepper argues that one feature of the corporate free exercise claims she addresses is that the asserted economic and religious interests are so entangled as to be virtually indistinguishable. *Id.* at 1465 (“[B]usinesses define their

discrimination.”<sup>214</sup> As in *Lochner*, the Court in *Hobby Lobby* and courts in similar cases involving corporate free exercise regard—whether in the constitutional or statutory context—“any change from the market” as the compelled “redistribution” of rights, but this baseline is anything but neutral when it comes to the status of employee interests vis-à-vis their employers.<sup>215</sup> Thus, as “[e]conomic libertarianism becomes the baseline for constitutional and statutory analysis,”<sup>216</sup> the regulatory state is systematically disabled from redistributing rights and responsibilities in the sort of beneficent way that would “mitigate harm that the status quo impose[s] on individuals and society.”<sup>217</sup> Though the general point is claimed to apply more broadly, the redistribution of rights and responsibilities of most immediate and sustained interest to Sepper concerns “nondiscrimination” norms and “health,” nearly the exclusive explicit example of which is the purchase of birth control but that probably extends at least as far as the broader panoply of rights in reproductive freedom.<sup>218</sup>

Sepper moreover criticizes the religiously voluntaristic assumption that employees who choose to work for religious employers—and, indeed, individuals who choose to associate themselves with religious institutions—do so with the true capacity to consent to the religious conditions of association (paradigmatically, employment conditions that are rooted in religious views).<sup>219</sup> Her fundamental complaint is that utilizing the market as a neutral baseline obstructs the state from further regulation to promote sexual equality. “Sex equality and public health became irrelevant”<sup>220</sup> under existing law because the state is prohibited from interfering with the natural operations of the market in order, for example, to redistribute the burden of purchasing birth control from female employees onto their employers. Likewise, the general social good of increasing “[a]ntidiscrimination protections” is not adequately realized because such protections “become necessary only where the market fails—that is, where pervasive discrimination means ‘markets will not solve the problem’ and individuals will not find alternative providers.”<sup>221</sup> But “[t]his view implies that a competitive market inflicts no harm that justifies government intervention in the private order.”<sup>222</sup> Indeed, “Free Exercise *Lochnerism* reduces the goals of antidiscrimination law to remedy-

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religious liberty as the ability to contract and view redistribution as a burden on their free exercise.”).

214 *Id.* at 1459.

215 *Id.* at 1461.

216 *Id.* at 1471.

217 *Id.* at 1478.

218 *See, e.g., id.* at 1476 (“The contraceptive mandate litigation, in particular, reveals vigorous resistance to redistribution.”).

219 *Id.* at 1474.

220 *Id.* at 1479.

221 *Id.* at 1480–81 (quoting Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 *BROOK. L. REV.* 125, 133 (2006)).

222 Sepper, *supra* note 209, at 1481.

ing exclusion from the market,” thereby ignoring its core purpose—to rectify harms to personal dignity.<sup>223</sup>

What is of interest for this Article is not the cogency of these claims,<sup>224</sup> but instead that they vindicate several times over the revised account of the First Amendment. They constitute a distinctive view of the limits of First Amendment freedom in the light of specific commitments to promote civic virtue, and to protect against civic “harm” or vice, commitments that the conventional account itself facilitated and promoted.

First, critics of enumerated rights Lochnerism invert the traditional assumption that rights with a textual basis in the Constitution stand in a superior position of legitimacy and importance to rights that do not. *Lochner* itself dealt with an unenumerated constitutional right, a right that the Court created *ex nihilo* insofar as the constitutional text is concerned. The free exercise of religion is both an enumerated constitutional right and a statutory civil right.<sup>225</sup> The rights to cost-free contraception and against discrimination championed by Sepper are (depending on what precisely “discrimination” means) regulatory rights, statutory civil rights, or, at best, a new set of unenumerated constitutional rights in *Lochner’s* own mold. Yet by connecting *Lochner* with religious free exercise—indeed, by inventing the unheard of legal category of enumerated rights Lochnerism—Sepper shuffles the hierarchy of rights and freedoms the better to suit her own preferences. Religious freedom’s textual bases in the Constitution are irrelevant; Sepper does not even mention them. By creating enumerated rights Lochnerism, Sepper can argue that religious freedom is of at best equivalent importance to protecting individual interests in “health” and interests against “discrimination.” Sepper’s reframing of freedoms and rights suggests just the sort of resource reallocation described by the first thesis of the revised account.

Second, Sepper’s criticisms of the neutrality of the market are illuminating. Recall that the “marketplace of ideas” metaphor embodied one of the conventional account’s primary justifications for First Amendment freedom. All ideas are equal from a civic perspective; all compete utterly unrestrained and with full confidence in the Olympian neutrality of the state as to their political virtue or vice. The consumer is in full control of his speech; his freedom is the freedom of market recognition conferred and guaranteed by the state. He changes his religion as his market tastes dictate. Indeed, it was the autonomized marketization of First Amendment rights that coincided

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223 See *id.* at 1492.

224 For criticism, see for example Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 147–51 (2015).

225 True, there is disagreement about precisely what the constitutional right to religious free exercise protects. The rule since 1990 has been that neutral laws of general application that have the incidental effect of burdening religious free exercise are constitutional. But that rule is riddled with internal and external interpretive ambiguities that render it a good deal more solicitous of religious freedom than may first appear. For extensive discussion of these ambiguities, see DEGIROLAMI, *supra* note 56, at 147–66.

with and provided support for the rise of sexual autonomy and equality as a constitutional right under the Fourteenth Amendment and as a civil right in later statutes.

For Sepper, these are precisely the rights—the new civic virtues—that need government protection from claims of First Amendment freedom under market conditions, which are now claimed to be plainly non-neutral. Indeed, the market “baseline” that was of such crucial normative importance to the conventional account of the First Amendment is now intensely criticized for its skewed and malign perspective on the state’s healthy role in reallocating rights so as to further entrench the civic and social goods of sex autonomy and equality. First Amendment freedoms that threaten those goods are now decried as retrogressively libertarian and immune from salutary state “intervention.” All of this is perfectly in keeping with the revised account of the First Amendment; indeed, Sepper only really misses the mark in identifying *Lochner*, rather than *Terminiello* or *Cohen*, as the true source of the problem.

Third, Sepper’s objections to the purely voluntaristic conception of religious freedom are another key point of contact with the revised account. For the conventional account, the protection of individual and autonomous choice-making and choice-changing in response to altered circumstance represents the foundation of religious freedom. Michael Helfand has argued, for example, that “[a]t their core, religious institutions derive their authority from the consent of their members” and that the autonomous decisions of individuals to join religious institutions represent the implied consent of those individuals to abide by the chosen institutions’ rules and values.<sup>226</sup> Yet Sepper attacks Helfand’s position for its voluntarist perspective on religious freedom: individuals who join religious institutions (at the very least, employees, but possibly others too) need government protection for fundamental matters implicating “health” and “nondiscrimination.”<sup>227</sup> It must not be assumed that the market conditions leading to the individual’s association with the religious institution of his own choosing were truly within the individual’s control. Government therefore has a role in policing that association in order to ensure that the employee is not deprived of greater social and political goods in sexual autonomy and equality, goods that a decent polity must protect and that all decent individuals must want (whether they want it or not).<sup>228</sup> Religious institutions, per the third thesis of the revised account, cannot be trusted not to put their religious freedom to vicious misuses. The primary loser is the corporate person of the religious institution and those individuals who may derive a sense of social belonging by uniting themselves to such institutions.

As noted earlier, one sees kindred arguments on the establishmentarian side from scholars who object to the First Amendment’s ministerial excep-

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226 Michael A. Helfand, *What Is a “Church”? Implied Consent and the Contraception Mandate*, 21 J. CONTEMP. LEGAL ISSUES 401, 417 (2013).

227 Sepper, *supra* note 209, at 1474.

228 See Walter Berns, *Whether You Want It or Not*, NAT’L REV., Oct. 10, 1975, at 1124.

tion, albeit generally without explicit allusion to *Lochner*. The ministerial exception is illegitimate, they argue, essentially because it does not protect autonomized religious freedom; corporate persons, whether nonprofit or for-profit, simply have no rights to exercise religion that might be conceptually distinct from the autonomized claims of each of their individuated constituents.<sup>229</sup> While church-state separation must be strictly enforced when it comes to the sensibilities of particular “reasonable observers” who are offended by the state’s symbolic recognition of the country’s cultural connection to Christianity,<sup>230</sup> church-state separation plays no role at all in shielding religious groups from the government’s regulatory power to control the clerical composition of those groups. The separation of church and state has nothing to do with the misguided notion of church autonomy from government regulation.<sup>231</sup> The government, it is believed, must protect the vital interests of dissenting members of religious organizations (members who made the autonomous choice to associate themselves with such institutions) against discrimination of various kinds irrespective of any religious freedom interests at stake.<sup>232</sup> Indeed, one scholar has gone so far as to suggest that regulations prohibiting discrimination on the basis of sex ought to be applicable to all religious institutions because, by definition and self-evidently, they do not discriminate on the basis of religious belief.<sup>233</sup> Each of the three theses of the revised account—the reallocation of liberty in response to the problem of virtue and freedom, that reallocation’s patent non-neutrality, and the coincidence and mutually reinforcing character of sexual autonomy and equality with First Amendment autonomization—is reflected in this type of selective separationism.

Some scholars who do not subscribe to the *Lochner* analogy nevertheless make related claims in drawing a hard division between for-profit and non-

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229 Caroline Mala Corbin, *Corporate Religious Liberty*, 30 CONST. COMMENT. 277 (2015); Corbin, *supra* note 101, at 1988 (“[T]he constitutional significance of religious organizations depends upon what they can do for individuals.”).

230 The literature in support of this proposition is so voluminous as to overwhelm the capacity of a single footnote. For one example from a scholar who also abjures the ministerial exception, see Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545 (2010).

231 HAMILTON, *supra* note 101; Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 CARDOZO L. REV. 225 (2007).

232 See Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 994 (2013) (objecting to *Hosanna-Tabor* because the Court held that “religious freedom trumps the antidiscrimination laws” and “entitles institutions to disobey the law”).

233 Corbin, *supra* note 101, at 2014 (“Though it may sound counterintuitive at first, cases in which the defendant religious organization overtly discriminates based upon religious doctrine do not implicate religious questions. If the risk posed by a Title VII claim is that judging whether an employment decision was based on race or sex rather than true qualifications will require a court to determine a religious organization’s tenets and who best embodies them, that risk disappears where the religious organization admits that sex or race played a role.”).

profit religious institutions.<sup>234</sup> James Oleske, for example, has justified the distinction on the basis of what he calls deeply “ingrained” “American” understandings of differential religious freedom rights in the “public” and “private” domains, a distinction between what is open and commercial versus inherently selective, expressive, or intimate.<sup>235</sup> Or, as James Nelson argues, “[a]s a general matter, for-profit business norms . . . crowd out personhood interests among participants in commercial association. By contrast, norms in the nonprofit sector are more hospitable to individual identification with associations.”<sup>236</sup> Ironically, the division of public and private has sustained a concerted and largely successful assault from progressive legal academics as far back as the legal realist period. Indeed, as Morton Horwitz argues, “[t]he first challenge to the orthodox public-private distinction emerged in precisely the same area in which it had been originally formulated—the law of corporations.”<sup>237</sup> Yet the logic of these seemingly contrary positions on the public-private distinction is perfectly consistent. Just as the public-private distinction had to be discredited in order to justify the increasing scope and intrusiveness of regulation into what was formerly regarded as the private domain, so must it now be reconstituted in order to protect and expand those vital regulatory gains in the face of First Amendment challenges to new regulatory efforts. The conventional account of First Amendment freedom is thus used systematically and across the decades to delimit the corporate person’s assertion of First Amendment rights. Those rights, after all, are protected solely for the sake of the “personal identification” (or what for the conventional account was the keystone justification for First Amendment freedom—self-realization) of those individuals who might choose them.

Thus do civic ideas of virtue and vice constantly interact with and inform the scope of First Amendment freedom in the arguments of anti-enumerated rights Lochnerists. And thus do they vindicate the theses of the revised account of the First Amendment. To date, much of this new strain of criticism has focused on the religion clauses rather than the Speech Clause. There may be reasons for the greater vulnerability of religious freedom to these attacks,<sup>238</sup> but it is doubtful that those reasons will immunize freedom of speech from it for long. Now religious freedom is often written “religious freedom.”<sup>239</sup> “Free speech” may be lagging but it is not far behind.<sup>240</sup>

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234 See, e.g., James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461 (2015); Oleske, *supra* note 9.

235 Oleske, *supra* note 9, at 142–46.

236 Nelson, *supra* note 234, at 463–64.

237 MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, at 206 (1992) (describing the breakdown of the distinction in constitutional law).

238 See DeGirolami, *supra* note 102; John D. Inazu, *More Is More: Strengthening Free Exercise, Speech, and Association*, 99 MINN. L. REV. 485, 506–22 (2014).

239 See, e.g., Monica Davey & Laurie Goodstein, *Religion Laws Quickly Fall into Retreat in Indiana and Arkansas*, N.Y. TIMES (Apr. 2, 2015), [http://www.nytimes.com/2015/04/03/us/rights-laws-quickly-fall-into-retreat.html?ref=todayspaper&\\_r=0](http://www.nytimes.com/2015/04/03/us/rights-laws-quickly-fall-into-retreat.html?ref=todayspaper&_r=0); Editorial, *G.O.P. Anti-Gay Bigotry Threatens the First Amendment*, N.Y. TIMES, (Sept. 12, 2015), <http://www.nytimes.com/2015/09/13/opinion/sunday/gop-anti-gay-bigotry-threatens-first->

### B. *Dignitarian Delimitation*

A second category of judges and scholars has argued for novel and aggressive limits on First Amendment freedom. In several contexts, they use the dignitarian justification for the First Amendment emphasized by the conventional account to make claims about new curtailments of speech and religious freedom. Some of those dignitarian arguments connect directly to the issue of sex as a civil right while others do not.<sup>241</sup> Yet like critics of enumerated rights Lochnerism, these dignitarian delimiters have remembered the problem of virtue and freedom as well. They, too, offer some evidence in favor of the revised account.

One of the revised account's arguments concerned the need to make judgments about what sort of speech was truly in the public interest. According to the conventional account, the clash of self-interested market concerns in the marketplace of ideas is the surest avenue to truth, and there is no difference for the health of the civic polity, as far as the state is concerned, between self-interested speech and disinterested speech—between, in Niemeyer's fine phrase, the speech of sinners and that of "scholars and saints."

In the speech context, perhaps the most important case of dignitarian delimitation of the First Amendment by a Justice of the Supreme Court is Justice Stevens's dissent in *Citizens United v. FEC*.<sup>242</sup> Stevens first emphasizes that speech can in fact be regulated based on the "identity" of the speaker and that the "Government's interests may be more or less compelling with respect to different classes of speakers";<sup>243</sup> "society could scarcely function," he notes, if every public interest were "an illegitimate basis for qualifying a speaker's autonomy."<sup>244</sup> He then notes that "corporations" as a class have the "distinctive potential . . . to corrupt the electoral process" even when corporations exercise their expressive freedom on strictly political matters.<sup>245</sup> Citing Robert Bork (who was himself summarizing and citing to Walter

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amendment.html (arguing that arguments for religious freedom are in reality "using the idea of religious freedom as cover" for discrimination); Ashby Jones & Mark Peters, *Indiana Governor Wants to Clarify Religious Freedom Law*, WALL ST. J. (Mar. 31, 2015), <http://www.wsj.com/articles/indiana-governor-wants-to-clarify-religious-freedom-law-1427817080>; James F. McGrath, "Religious Freedom" (with Correctly-Used Scare Quotes), PATHEOS, (Apr. 27, 2015), <http://www.patheos.com/blogs/exploringourmatrix/2015/04/religious-freedom-with-correctly-used-scare-quotes.html>.

240 But see the inroads already made on several university campuses and by the likes of, for example, Amanda Taub, *The Truth About "Political Correctness" Is that It Doesn't Actually Exist*, VOX (Jan. 28, 2015, 4:00 PM), <http://www.vox.com/2015/1/28/7930845/political-correctness-doesnt-exist>.

241 As noted above, rights of sexual autonomy and equality are one particularly important set of rights promoted by the conventional account of the First Amendment, but not the only one.

242 558 U.S. 310, 393 (2010) (Stevens, J., dissenting).

243 *Id.* at 420–21.

244 *Id.* at 422.

245 *Id.* at 423.



Berns's views on this precise point), Stevens emphasizes that "the Framers and their contemporaries conceived of speech more narrowly than we now think of it"<sup>246</sup> and proceeds to discuss civil society's "anti-corruption" interest in curtailing corporate speech: "When private interests are seen to exert outsized control over officeholders solely on account of the money spent on (or withheld from) their campaigns, the result can depart so thoroughly 'from what is pure or correct' in the conduct of Government."<sup>247</sup> Finally, he observes:

[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their "personhood" often serves as a useful legal fiction. But they are not themselves members of "We the People" by whom and for whom our Constitution was established.<sup>248</sup>

That degraded constitutional status justifies degraded First Amendment protection because, as Stevens explains, regulations of corporations (or at least those at issue in the case) cannot affect anybody's "autonomy, dignity, or political equality," which are the core reasons for protecting freedom of expression at all.<sup>249</sup>

The issue again is not the persuasiveness of Stevens's dissent, but that it is a near-perfect exemplar of revised account thinking. Not all speech is equally civic-minded; some speech is politically virtuous and other speech is vicious. Indeed, civil society itself would collapse if its government could not reasonably regulate certain kinds of speech by certain actors even as to matters of political content. Corporate speech is often vicious speech: it is a corrupting and dangerous influence on the health of the democratic polity. And, in any case, the dignitarian, autonomizing, egalitarian functions of First Amendment speech protection that apply so forcefully to the likes of Cohen (whose speech had no civically corrupting tendencies but represents unadulteratedly virtuous free speech) have no meaning for corporate persons, which are simply a "proxy"<sup>250</sup> for fulfilling the "self-realization"<sup>251</sup> that is the ultimate object of the protection of individual speech. The state's conferral and recognition of the speaker's "dignity" thus delimits the scope of the Speech Clause. And the corporate person, once again, is the loser.<sup>252</sup>

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246 *Id.* at 426 (citing Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971) (citing Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109)).

247 *Id.* at 450 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 512 (1966) (defining "corruption")).

248 *Id.* at 466.

249 *Id.* at 467.

250 *Id.* at 466.

251 *Id.* (quoting Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 594 (1982)).

252 *See, e.g.*, Adam Schiff, Opinion, *The Supreme Court Still Thinks Corporations Are People*, ATLANTIC (July 18, 2012), <http://www.theatlantic.com/politics/archive/2012/07/the-supreme-court-still-thinks-corporations-are-people/259995/>; Editorial, *The Court's Blow to*

Several scholars have also taken up arguments for dignitarian delimitation in other Speech Clause contexts. Alexander Tsisis, for example, has recently argued that free speech rights should be subject to a “balanc[ing]” approach in which courts measure the speech rights against competing “social values of equality, dignity, creativity, and public peace.”<sup>253</sup> Speech protection, Tsisis argues, must be linked specifically to “the broader constitutional value of equal dignity secured by a system of government whose aim should be the common good,”<sup>254</sup> that is, within the context of “other constitutional interests.”<sup>255</sup> When it comes to defining what the “common good” demands with respect to speech limitation, Tsisis mentions vague interests in “national normativity,” “the regulatory needs of civil society,” and “the principle of liberal equality,” but he later notes that corporate speech does not serve the same dignitarian ends as speech that “giv[es] each person the ability to assert her self-identity as an autonomous being and a member of a deliberative society.”<sup>256</sup>

Likewise, Andrew Koppelman invokes the conventional account’s first justification for free speech—the promotion of civic and political deliberation—to argue that “revenge pornography” (“the online posting of sexually explicit photographs without the subject’s consent”) should be categorically excepted from First Amendment protection.<sup>257</sup> He claims that if the goal of free speech protection is the formation of “a citizenry with the confidence to participate in public discussion,” then revenge pornography is harmful to that interest because “[t]raumatized, stigmatized women are not the kind of people that a free speech regime aims to create.”<sup>258</sup> Though Koppelman does not use the word “dignity,” his arguments for First Amendment limitation in this context depend on a highly autonomized conception that prizes the Millian character ideal of a virtuous liberal society—that “[e]very individual has an obligation to respond to an inwardly felt calling, which if courageously pursued will bring him closer to the ultimate good.”<sup>259</sup> And there is a “tight causal connection” between revenge pornography and the harm of obstructing this character ideal.<sup>260</sup>

It is interesting that Koppelman does not extend the claim to pornography proper, which arguably inflicts many of the same harms on women’s dignity and equality, albeit perhaps in a slightly less tightly causally connected way. But it is not surprising in light of the tension that he, like the ACLU lawyers of Wheeler’s account before him, must negotiate between what are

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*Democracy*, N.Y. TIMES (Jan. 21, 2010), <http://www.nytimes.com/2010/01/22/opinion/22fril.html>.

253 Alexander Tsisis, *Balancing Free Speech*, 96 B.U. L. REV. 1, 16 (2016).

254 *Id.* at 20.

255 *Id.* at 24.

256 *Id.* at 29, 53.

257 Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 661 (2016).

258 *Id.* at 663.

259 *Id.* at 680.

260 *Id.* at 686.

felt to be the important gains in constitutional and other rights of sexual freedom (which were themselves achieved through operation of the autonomized First Amendment) and the primacy of rights of sexual equality. As Koppelman peremptorily declares, “our ideal is an egalitarian one.”<sup>261</sup> Where he derives the notion that the single ideal animating American constitutionalism is egalitarian is a mystery; he simply announces it. And yet whether the civic ideal he champions is successful depends on the character of the people constituting the republic. The Supreme Court has proceeded in “blissful ignorance” of these arguments in promoting pornography in the name of free expression and in “casting aside, as so many irrational encumbrances, the conventions of decency that used to govern public discourse.”<sup>262</sup> It is rather late in the day to reverse course, particularly in the sort of partial and fecklessly half-hearted fashion Koppelman proposes. Nevertheless, the basic structure of Koppelman’s arguments for First Amendment curtailment reflects the theses of the revised account much more closely than those of the conventional account. He has remembered the problem of virtue and freedom (surely he had never forgotten it), and is reallocating First Amendment freedom accordingly.<sup>263</sup>

One final group of dignitarian delimiters deserves to be mentioned: those who argue that religious accommodations that impose substantial or significant harms on identifiable third parties violate the Establishment Clause.<sup>264</sup> The catalyst for an assertion of third-party harms as independent grounds for an Establishment Clause claim in a case like *Hobby Lobby* was the government’s assumption of power to mandate the cost-free provision of contraceptive coverage by private employers. Once it did that, the non-receipt of cost-free contraceptive coverage could be restyled by the theory’s exponents as the deprivation of an “entitlement” and the shifting of a “burden” to a

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261 *Id.* at 687.

262 BERNS, FAFAD, *supra* note 108, at 232. See also the extensive criticisms of pornography by third-wave feminists including Catherine MacKinnon and Andrea Dworkin. ANDREA DWORIN & CATHERINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN’S EQUALITY (1988); CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

263 See also Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. (forthcoming 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2645869](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2645869) (arguing that the harms caused by the First Amendment freedom of speech, and especially harms resulting from revenge pornography, must be balanced against the consequentialist benefits of freedom of speech).

264 See, e.g., Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014); Frederick Mark Gedicks & Rebecca G. Van Tassel, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014); Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL’Y REV. 25 (2015); Nelson Tebbe, Richard Schragger & Micah Schwartzman, *The Establishment Clause and the Contraception Mandate*, BALKINIZATION (Nov. 27, 2013), <http://balkin.blogspot.com/2013/11/the-establishment-clause-and.html>.

third party.<sup>265</sup> And resistance to the government's distension of its powers on the ground that it violates a statutory claim of religious freedom is itself unconstitutional.

Third-party-harms theorists are not always clear about which sorts of harms rise to the level of substantiality or significance. But one sort of harm that unquestionably does seem to meet the standard is the injury to individual dignity that attaches to persons who are denied cost-free contraceptive coverage by their employer on the basis of religious objections, because what attends those objections is a judgment about the immorality of certain sexual behavior. Thus, for example, Reva Siegel and Douglas Nejaime write that these sorts of denials, and their accommodation through law, are deeply injurious to individual dignity because they “stigmatize and demean” those whose own sexual morality deviates from “traditional morality.”<sup>266</sup> The feeling of being “judged” by those who raise religious objections to certain conduct, and the indignity of knowing that the state has countenanced that judgment by permitting a religious accommodation, are independent harms affecting the sexual autonomy and equality of the listener.<sup>267</sup> Indeed, these harms are so serious that accommodating any contrary religious interest might itself be a violation of the First Amendment.

In concluding this Part, it may be worth simply recalling some of the basic claims of the revised account: All First Amendment freedom—whether of speech or religious exercise—that anybody might want to regulate imposes harms on third parties.<sup>268</sup> The harm is not mitigated by assurances that the hearer need not agree; it is consummated in the act of expression itself and the hearer's internalization of it. The expression that any society elects not to protect reflects what it believes is unendurably vicious (or “substantially” “harmful”). The First Amendment's autonomization—its increasing dependence on arguments from individual “recognition,” self-realization, marketization, and egalitarianism of self-expression—have helped to generate, reinforce, and even constitutionalize rights in sexual autonomy, dignity, and equality. Those rights now stand as bedrock principles of the Constitution. Indeed, claims of religious liberty that are believed to threaten them are now said to be violations of the First Amendment itself; dignitarian delimitation of religious freedom, when it serves the ends that third-party-harms theorists have in mind for it, is in consequence required by the First Amendment.

To this point, the Supreme Court has been largely unmoved by these scholarly criticisms and proposals to curtail freedom of speech and religion. And yet, as Berns observed, “Civil society is impossible if every man retains an

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265 Gedicks & Koppelman, *supra* note 264, at 59–60 (“Common sense tells us that a RFRA exemption of Hobby Lobby from the Mandate deprives employees of a valuable legal entitlement.”).

266 Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2548, 2576 (2015).

267 *Id.* at 2576–77.

268 See *supra* Section II.A.

absolute freedom” of expression.<sup>269</sup> If the Court is true both to the autonomized First Amendment and to the rights of sexual liberty and equality that it has created and installed at the foundation of the Constitution, it at least ought to confront them. Perhaps it even ought to accept them.

#### CONCLUSION

Why is freedom good? It is good if the ends it promotes are good.<sup>270</sup> Once we accept that response, the path is open to explore those ends—ends that neither begin nor end with indefinitely expanding rights of sexual autonomy and equality. The Supreme Court’s more particular answers to the question of the ends of free speech and religious exercise over the past century have transformed American society—even as the Court and many in the academy have emphatically denied that it was answering the question at all. The political morality that the autonomized First Amendment has facilitated, promoted, and entrenched is not neutral on the question of virtue and vice. It is neck deep in it. The Court’s doctrine reflects specific and highly partial views of virtue and vice whose effect has been to educate and form the character of American citizens—to move American political mores away from one set of basic commitments and toward another. There is therefore no completely libertarian First Amendment, no plausible account of it that expands and maximizes liberty of speech and religious exercise for everybody—for all people and groups. There is only the society that America was before the rise of the conventional account of the First Amendment, and the society it is becoming after it. For the “problem we have discussed in these pages is not really the problem of [freedom] at all; it is the problem of virtue.”<sup>271</sup>

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269 BERNES, *FVFA*, *supra* note 108, at 252.

270 *See generally* JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1996).

271 BERNES, *FVFA*, *supra* note 108, at 255.