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Questioning the Value of Dissent and Free Speech More Generally: American Skepticism of Government and the Protection of Low-Value Speech

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Comment on Chapter 5
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American Skepticism of Government and the Protection of Low-Value Speech

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Professor Tushnet asks us to consider whether dissent reliably serves any useful social function and suggests that the answer to this inquiry is no. As he states his thesis in the context of judicial opinion writing, "[d]issents can be good, in which case dissent is good, or they can be bad, in which case dissent is bad."[1] Tushnet posits that judicial dissents, particularly in statutory interpretation cases, "often have the air of self-indulgence about them."[2] If such dissents are merely a form of self-indulgence that clutters the pages of the *U.S. Reports* or the *Federal Reporter*, "perhaps we should talk of some displays of romantic dissent in similarly disparaging terms."[3] From this initial starting point, Tushnet then considers whether, in general, dissent predictably produces sufficient public goods to merit special constitutional solicitude and he concludes, on balance, that it does not.[4]

To be sure, this is a contrarian thesis that runs against a great deal of free speech theory, doctrine, and mythology. For example,

I acknowledge the generous financial support of the University of Alabama Law School Foundation, which provided a summer research grant that facilitated my work on this comment.

[1] Mark Tushnet, Chapter 5, this volume, at 192.

[2] *Id.* at p. 193.

[3] *Id.*

[4] *Id.* at pp. 196–208.

Professor Steven Shiffrin's entire theory of the First Amendment places dissent at the very heart of the democratic deliberative project – *Dissent, Injustice, and the Meanings of America*[5] and *The First Amendment, Democracy, and Romance*[6] advance these ideas in a sustained fashion.

Shiffrin argues that "the First Amendment spotlights a different metaphor than the marketplace of ideas or the richness of public debate; instead, it supports the American ideal of protecting and supporting dissent by putting dissenters at the center of the First Amendment tradition."[7] From this perspective, the value of dissent arises from its relationship to the process of democratic self-government; indeed, the legitimacy of a democratic government requires that all ideas and viewpoints, and particularly ideas and viewpoints advanced by relatively disempowered minority groups (however defined), must receive at least an airing, if not a hearing.[8] As Shiffrin explains, "The dissent model assumes that in large-scale societies powerful interest groups and self-seeking politicians and bureaucrats are unavoidable" and, in consequence, "[d]issenters and the dialogue that follows will always be necessary."[9]

For Shiffrin, dissent has an important instrumental value separate and distinct from its ability to facilitate self-expression or to advance personal autonomy: "The value of dissent, then, in this context is not that it fosters individual development or self-realization, or even that it exposes injustice and brings about change."[10] Instead, Shiffrin posits that dissent serves as a kind of "cultural glue" that effectively helps to bind the community

[5] Steven H. Shiffrin, *Dissent, Injustice, and the Meanings of America* (Princeton, NJ: Princeton University Press, 1999).

[6] Steven H. Shiffrin, *The First Amendment, Democracy, and Romance* (Cambridge, MA: Harvard University Press, 1990).

[7] Shiffrin, *supra* note 5, at 128.

[8] See Ronald J. Krotoszynski Jr., "Dissent, Free Speech and the Continuing Search for the 'Central Meaning' of the First Amendment," *Michigan Law Review* 98 (2000): 1613, 1614–16, 1619–25.

[9] Shiffrin, *supra* note 5, at 17–18.

[10] *Id.* at 18.

together.[11] As he puts it, "The dissent perspective would argue that policies, prescriptions, and privileges of the elite need to be challenged on a regular basis by enough people to make a difference."[12]

Along similar lines, Professor Stephen Carter has argued that dissent about matters of fundamental importance is a non-negotiable constitutive element of democratic self-government:[13] "Civic life requires dissent because it requires differences of opinion in order to spark the dialogues from which the community thrives and grows."[14]

For Carter, the very legitimacy of the government depends on its tolerance for and acceptance of dissenting voices:

> Perhaps governments – good and fair ones anyway – do not after all derive their powers from the *consent* of the governed. Perhaps they derive their powers instead from the *dissent* of the governed. For the fairness and decency of any state should be assessed not alone through a study of whether its majorities examine it and find it good, but through a study of whether its minorities examine it and find it good. Another way to look at the matter is this: the justice of a state is not measured merely by its authority's tolerance for dissent, but also by its dissenters' tolerance for authority.[15]

If the voices of dissenting minorities are suppressed and, accordingly, go unheard, Carter warns that "disaffection may turn to disallegiance."[16] It necessarily follows that, in Carter's view, if individuals are not permitted to engage in public dissent about matters of fundamental importance, a serious question will arise as to whether those who find themselves shut out from the public

[11] *Id.* at 17–18, 42–45; *see also* Krotoszynski, *supra* note 8, at 1620–21 (discussing Shiffrin's dissent-based theory of the free speech clause of the First Amendment).

[12] Shiffrin, *supra* note 5, at 45.

[13] *See* Stephen L. Carter, *The Dissent of the Governed: A Meditation on Law, Religion, and Loyalty* (Cambridge, MA: Harvard University Press, 1998).

[14] *Id.* at 16.

[15] *Id.* at 97.

[16] *Id.* at 18.

discourse must refrain from other means of drawing attention to their cause, up to and including acts of violence.[17]

Without further belaboring the point, it suffices to note that a very strong tradition exists in the relevant First Amendment literature that claims dissent should be valued as the highest and most important subset of speech falling within the protection of the First Amendment. From this perspective, dissenting speech has a fundamental – and crucial – instrumental value for the project of democratic self-government. In this tradition, as represented by the scholarship of legal academics like Shiffrin and Carter, dissent enjoys robust protection because it secures important social benefits that more than offset its social cost.

Tushnet seriously questions the validity of these instrumental theories of dissent, asking, reasonably enough, whether dissent really does generate social benefits fully commensurate with its social costs.[18] If people wish to dissent from empirically verifiable facts, for example, Tushnet sees little, if any, social value in the expression.[19] He notes, correctly, that "dissent has costs" and that "[t]his implies . . . that we can't value dissent as such, because doing so seems to disregard those costs."[20]

If one views freedom of speech in wholly instrumental terms, then the outcome of a cost-benefit analysis should significantly prefigure the value we place on particular forms of expression. Tushnet argues that "free expression theory is [not] centrally about dissent" but rather "about getting things right."[21] From these premises, he concludes that "[d]issent from correct factual and normative views isn't valuable as such, and so society doesn't need dissent as such."[22]

[17] *See id.* at 53–99.

[18] Tushnet, this volume, at pp. 205–08.

[19] *See id.* at p. 202 ("It's one thing to say that regulators should not seek to suppress dissent contending that the Affordable Care Act is dreadful policy and another to say that they should not attempt to suppress racially identified fascist policies, especially in societies – which may include all those in the world – that have experienced the disastrous effects of that normative position.").

[20] *Id.* at pp. 205–06.

[21] *Id.* at p. 208.

[22] *Id.*

In the balance of this response, I consider and critique Tushnet's claim that dissent lacks much objective social value. At the outset, I think his claim is likely true. Accordingly, if we value dissent, or free speech more generally, only because doing so reliably generates positive social rents, we probably should rethink our commitment to protecting dissent. However, one does not have to adopt an instrumentalist stance with respect to the value of dissent in particular or speech more generally. Mistaken or misguided dissent deserves protection not because society derives any substantial benefits from such expression but rather "because a government empowered to silence racist dissenters is equally empowered to silence progressive dissenters."[23]

I. Dissent – Indeed Most Speech – Lacks Much Objective Social Value

At the risk of free speech heresy, I cannot say that I find much objectionable in Tushnet's thesis. Frankly, I would be prepared to posit and defend an even broader thesis – most free speech, in general, has relatively little social, much less political, value. For example, are advertisements for new erectile dysfunction drugs or photographs of a Kardashian or Britney Spears emerging from a stretch limousine in Las Vegas, and without traditional undergarments, really at the heart of democratic self-government? Do these materials possess any significant social value? Probably not.

Indeed, I would cheerfully assent to the proposition that, in point of fact, much political speech has relatively little social value. Think about most speeches on the floor of Congress or at the national presidential nominating conventions. How many of them are objectively important to setting or changing existing government policy, influencing elections, or facilitating democratic self-government?

At a more general level of analysis, we could begin by asking an even broader question than the question Tushnet suggests, namely: why should we protect free speech at all? If most speech

[23] Krotoszynski, *supra* note 8, at 1631.

has little social value, as an empirical fact, what is the point? Indeed, protecting speech that helps to produce objectively bad policy outcomes seems affirmatively counterproductive, at least if viewed through a cost-benefit or utilitarian lens.

II. Pervasive Fear Rather Than Intrinsic Value Undergirds the Protection of Expressive Freedom in the United States

To borrow Justice John Marshall Harlan's wonderful language in *Cohen* v. *California*,[24] we protect dissent, including offensive dissent, out of a fear of vesting government with the power to declare truth. As Justice Harlan so perceptively noted, "[I]t is nevertheless often true that one man's vulgarity is another's lyric";[25] moreover, a government empowered to declare and enforce truths is a government empowered to ensure its own survival.

In *Cohen*, Justice Harlan explains:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[26]

This represents the affirmative, or positive, case for protecting freedom of expression. Harlan is invoking democratic self-government and autonomy as positive values that protection of freedom of expression secures and safeguards.[27]

[24] 403 U.S. 15 (1971).

[25] *Id.* at 25.

[26] *Id.* at 24.

[27] For comprehensive theories of freedom of expression premised on these objectives, see C. Edwin Baker, *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1989) (self-realization and human

But this is only one side of the free speech coin – freedom of expression also has an important prophylactic role to play. We could denominate this aspect of expressive freedom as the negative voice of the free speech clause of the First Amendment. Justice Harlan emphasizes that free speech must enjoy protection regardless of whether truth ultimately prevails:

> [W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.[28]

Consistent with this understanding, Harlan concludes:

> That is why "[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons," Winters v. New York, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting), and why, "so long as the means are peaceful, the communication need not meet standards of acceptability," *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971).[29]

Justice Harlan observes that a government empowered to declare truth opens the door to tyranny and totalitarianism, "grave results" that the First Amendment exists to prevent.

In summary, Justice Harlan posits both an aspirational, instrumental goal for the First Amendment (the notion that it will facilitate and advance the project of democratic self-governance) and a negative theory for protecting the freedom of expression (avoidance of totalitarian censorship of the sort featured prominently

liberty); Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper, 1948) (democratic self-government theory); Martin H. Redish, *Freedom of Expression: A Critical Analysis* (Charlottesville, VA: Michie, 1984) (personal autonomy).

[28] *Cohen*, 403 U.S. at 26.

[29] *Id.* at 25.

in George Orwell's dystopian masterpiece 1984).[30] The case for protecting low-value speech rests not so much on the idea that all speech has intrinsic value or plays a discernible role in the process of democratic deliberation but rather on the theory that empowering the government to adopt and enforce civility norms would entail a nontrivial risk that government would abuse this power to advance its own interests.[31]

As Tushnet notes, historical facts exist and public denial of these facts contributes little of value to public discourse.[32] For example, the "Auschwitz lie" has little to recommend it in terms of substantive contributions to public debate – as he puts it, "The Holocaust is not a myth fabricated by Zionists and their supporters."[33]

Nevertheless, as Professor Lidsky has eloquently, and persuasively, stated the counterargument, "[E]ven if First Amendment theory's faith in the fundamental rationality of public discourse is misplaced, distrust of government still may be a strong enough basis, standing alone, to warrant declaring any attempt to punish Holocaust denial unconstitutional."[34] She also correctly observes that "[p]ast governmental attempts to 'prescribe what shall be orthodox' have resulted in suppression of truth and enshrinement

[30] George Orwell, 1984: *A Novel* (New York: New American Library, 1985).

[31] *See Cohen*, 403 U.S. at 25 ("Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."); *id.* at 26 (noting that "one of the prerogatives of American citizenship is the right to criticize public men and measures – and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation" (internal quotations and citations omitted)); *see also* Lyrissa Barnett Lidsky, "Where's the Harm?: Free Speech and the Regulation of Lies," *Washington and Lee University Law Review* 65 (2008): 1091 (arguing that protection of false speech relates to the dangers inherent in a government empowered to censor speech and declare historical truth rather than in the objective value of false statements of fact).

[32] *See* Tushnet, this volume, at pp. 202–05.

[33] *Id.* at p. 202 (citing Frederick Schauer, "Facts and the First Amendment," *University of California Los Angeles Law Review* 57 (2010): 897).

[34] Lidsky, *supra* note 31, at 1097.

of error."[35] This deep-seated distrust of government, and particularly government in the role of censor, has a profound influence on the warp and weft of contemporary free speech jurisprudence and theory.

To a very large degree, to borrow a phrase from Gary Wills, the U.S. government and its institutions are predicated on a model of distrust.[36] As Wills sarcastically observes, "[I]nefficiency is to be our safeguard against despotism."[37] In the United States, we embrace very inefficient structures of government because "a government unable to do much of anything will be unable to oppress us."[38]

In a similar vein, Professors Atiyah and Summers argue quite cogently that distrust serves as the animating principle of our national government's very structure:

> For whereas the English legal and political machine is a well integrated machine in which the various constituent parts operate with a high degree of trust for each other's functions and role, the American legal and political machine is to a large extent based on a contrary principle, a principle of *distrust* for other constituent parts.... It could, indeed, be said that the American system of government has even institutionalized its distrust to a considerable degree. The people distrust all government, so the powers of government are limited, divided, checked, and balanced.[39]

Fear of government acting in an arbitrary or tyrannical fashion undergirds much of the structural design of the federal government, including the use of a bicameral legislature, the requirement of presentment of bills to the president for signature or veto, and the process of judicial review. To this list, one could

[35] *Id.*

[36] Gary Wills, A *Necessary Evil: A History of American Distrust of Government* (New York: Simon & Schuster, 1999), 318–19.

[37] *Id.* at 319.

[38] *Id.*

[39] P. S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Oxford, U.K.: Clarendon Press, 1987), 40.

add federalism and the notion of the states and federal government coexisting as dual sovereigns.[40] These design elements all reflect and respond to a fear of government oppression on the part of the framers.[41] Indeed, as Professor Marty Redish and his coauthor Elizabeth Cisar have suggested, "[I]t would be difficult to deny that in establishing their complex structure, the Framers were virtually obsessed with a fear – bordering on what some might uncharitably describe as paranoia – of the concentration of political power."[42]

If the prime objective in devising a scheme of government is to avoid any risk of tyranny by creating a government incapable of acting with force or speed, then annexing a project of broad-based protection of speech makes perfect sense. This is not because speech has any particular value but rather because a government empowered to censor speech is a government capable of acting tyrannically. Free speech plays an important structural role by limiting the ability of government to seize control of the political process to perpetuate itself. Nor is that fear entirely unjustified – one need only look to contemporary examples of this phenomenon in places like China, Iran, and North Korea to see precisely how control of the marketplace of political ideas can sustain despotic forms of government over relatively long periods of time.[43]

Thus, we protect worthless dissenting speech not out of a mistaken belief that such speech possesses even a modicum of value

[40] See Ronald J. Krotoszynski Jr., "The Shot (Not) Heard 'Round the World': Reconsidering the Perplexing U.S. Preoccupation with the Separation of Legislative and Executive Powers," *Boston College Law Review* 51 (2010): 1, 1–20.

[41] *Id.* at 7–20.

[42] Martin H. Redish and Elizabeth J. Cisar, "'If Angels Were to Govern': The Need for Pragmatic Formalism in Separation of Powers Theory," *Duke Law Journal* 41 (1991): 449, 451.

[43] *See* Ronald J. Krotoszynski Jr. "The Irrelevant Wasteland: An Exploration of Why *Red Lion* Doesn't Matter (Much) in 2008, the Crucial Importance of the Information Revolution, and the Continuing Relevance of the Public Interest Standard in Regulating Access to Spectrum," *Administrative Law Review* 60 (2008): 911, 936–37, and 937 n.104.

but rather as a defense against an overbearing government that seeks to perpetuate itself and its incumbent officers through active censorship programs. With respect to demonstrably false speech, for example, Lidsky observes that "it still seems doubtful that American citizens really want the government to get into the business of sanctioning an official version of history."[44] Moreover, "[t]he dangers of allowing courts or other government bodies to determine historical truth arguably outweighs the potential harm that Holocaust victims will suffer from official silence."[45] This negative theory of free speech, premised on a pervasive distrust of government, goes a long way toward explaining why low-value, objectively false speech falls under the aegis of the First Amendment.

III. The Wider World Does Not Share the Pervasive U.S. Concern with Abusive Use of Government Power and Reposes Greater Trust in the State

Other nations, in which citizens repose greater levels of trust in their national government, and do so more reflexively, do not privilege speech in general or dissent in particular – at all.[46] Without belaboring the point, Germany is a militant democracy that prohibits advocacy of the overthrow of the existing democratic social order. Antidemocratic parties and their candidates may not contest elections, and the German Federal Constitutional Court is empowered to ban them – and antidemocratic parties have, in fact, been banned from participating in the electoral process.[47]

Moreover, the Federal Constitutional Court has upheld criminal prohibitions on, for example, Holocaust denial, or the "Auschwitz lie," because, in its view, there is simply no value

[44] Lidsky, *supra* note 31, at 1098.

[45] *Id.* at 1099.

[46] See Ronald J. Krotoszynski Jr., *The First Amendment in Cross-Cultural Perspective: A Comparative Legal Analysis of the Freedom of Speech* (New York: New York University Press, 2006).

[47] *See id.* at 96–98, 124–30.

in false speech about a matter of historical record.[48] Rejecting the defendant's claim that a commitment to respecting the freedom of speech must, of necessity, encompass the right publicly to deny the Holocaust, the Federal Constitutional Court held that false factual assertions "cannot contribute anything to the constitutionally presupposed formation of opinion" and, accordingly, do not enjoy any protection as "speech" under Article 5(1) of the Basic Law (the German constitutional analogue to the U.S. First Amendment).[49] The Court explained that "[v]iewed from this angle, incorrect information is not an interest that merits protection."[50]

Freedom of speech in Germany does not extend to anti-Semitic speech; to antidemocratic speech; or to speech that transgresses civility norms designed to secure personal honor, reputation, and dignity.[51] Professor James Whitman's scholarship demonstrates this point rather convincingly – Germany maintains mandatory civility norms that seem utterly foreign to baseline U.S. notions of freedom of expression and, in point of fact, constitute "a body of law that shows, in many of its doctrines, a numbness to free-speech concerns that will startle any American."[52]

Moreover, Germany is hardly alone in maintaining a government empowered to declare and enforce truth, even via the strictures of the criminal law – Canada, France, and the United Kingdom, to one degree or another, have adopted and enforce rules punishing dissent that advocates false ideas – such as racism, religious hatred, gender bias, and homophobia. In other words,

[48] *See id.* at 126–27; *but cf.* Lidsky, *supra* note 31, at 1095–100 (arguing that sound reasons exist for prohibiting government from proclaiming historical truths and defending such truths through criminal sanctions and arguing, from a practical perspective, that such regulations are not likely to convince those who deny the Holocaust and "may have the unintended and paradoxical consequence of strengthening the beliefs of Holocaust deniers, rather than weakening them").

[49] Krotoszynski, *supra* note 46, at 127.

[50] *Id.*

[51] *Id.* at 93–130.

[52] James Q. Whitman, "Enforcing Civility and Respect: Three Societies," *Yale Law Journal* 109 (2000): 1279, 1312.

the notion that dissent, or more aptly, a government disallowed the power to punish dissent, is an essential condition for political freedom to exist is, if not a uniquely American idea, very close to it.

The question then becomes: why do us citizens distrust government and on such a reflexive basis? Why does the United States more or less absolutely prohibit government from declaring political truth – particularly when dissent resting on demonstrably false premises potentially imposes very high social costs? I argue that our diversity, our pluralism, explains in large part our long-term love affair with dissent and free speech in general.[53]

If you do not know who will be running city hall, the state government, or Congress, you might be wary of government power if you consider yourself in a political minority or an outsider (however defined).[54] For example, a Polish American person living in Chicago might have very real misgivings about an Irish American mayor running city hall – the assumption might be that Polish neighborhoods will suffer inferior city services, from roads to public schools, police protection, and trash collection. We are a nation divided by lines of region, religion, urban-rural divisions, race and ethnic ancestry, among other things: it is only natural that a heterogeneous people – lacking unifying ties of kinship; culture; religion; and even for relatively long periods of time in U.S. history in some communities, language – might view government with pervasive distrust.

IV. The Distrust Principle in Action in the Supreme Court's Modern Free Speech Jurisprudence

As explained in the preceding section, the strongest case for protecting dissent has nothing to do with a cost-benefit analysis but

[53] *See* Krotoszynski, *supra* note 40, at 28–34; *cf.* Claire L'Heureux-Dube, "Outsiders on the Bench: The Continuing Struggle for Equality," *Wisconsin Women's Law Journal* 16 (2001): 15, 17–18 (noting that in Canada, most citizens do not view the government with distrust, contempt, or disdain and generally assume that government acts reliably to promote the common good).

[54] Krotoszynski, *supra* note 40, at 30–32.

instead rests on structural concerns about the dangers associated with a censorial government. The value of the speech does not prefigure the scope of its constitutional protection (as might be the case under some sort of balancing system); instead, the U.S. Supreme Court's approach incorporates and reflects the notion that the dangers associated with a government empowered to declare political truths must be categorically resisted, even if doing so means lending constitutional protection to low-value speech.

In other words, the notion of a cost-benefit analysis, or some form of overt balancing of the value of speech against its social cost as a precondition for protecting speech, is largely foreign to the Supreme Court's modern free speech jurisprudence. *New York Times v. Sullivan*[55] and *Brandenburg v. Ohio*[56] protect false or racist speech not because such speech has genuine social value but rather because a government empowered to censor "bad" speech is very likely to censor "good" speech too.

Two recent decisions of the Supreme Court of the United States have significantly expanded and amplified this concept. First, in *Snyder v. Phelps*,[57] the Supreme Court held as protected highly offensive speech targeted at individuals in a particularly vulnerable context, namely protests picketing the funerals of deceased U.S. military personnel. The Westboro Baptist Church's protests offend grieving families at a particularly vulnerable moment, do so intentionally for maximum shock value (and hence media attention), and use highly offensive rhetoric (e.g., "Gods Hates Fags," "Pope in Hell," "Thank God for Dead Soldiers").[58] There is plainly little, if any, objective social value in such speech. So, why did the Supreme Court protect it?

[55] 376 U.S. 254 (1964).
[56] 395 U.S. 444 (1969).
[57] 131 S. Ct. 1207 (2011).
[58] *Id.* at 1213–14; *see id.* at 1222 (Alito, J., dissenting) ("Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case."); *id.* (arguing that the right to freedom of speech should not mean that the Westboro Baptist Church members "may intentionally inflict severe emotional injury on private persons at a time of

Writing for the majority, Chief Justice Roberts held that permitting a civil jury to impose liability based on the perceived outrageousness of speech violates the First Amendment because of the risk of a "heckler's veto"[59] – the use of the jury's power to stifle unpopular or offensive expression through the imposition of potentially bankrupting civil monetary awards. "Such a risk is unacceptable; in public debate [we] must tolerate insulting, even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[60] This result obtains because "[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate," and this "choice requires that we shield Westboro from tort liability for its picketing in this case."[61]

In most respects, despite its controversial nature, *Phelps* simply builds on prior jurisprudential baselines established in the *New York Times v. Sullivan* line of cases, notably including *Hustler v. Falwell*.[62] Essentially, *Phelps* simply extends *Falwell* to encompass nonpublic figures when the underlying offensive speech relates to a matter of public concern. One also should keep in mind that *Falwell* was a unanimous decision and that the vote in *Phelps* was nearly so (with only Justice Alito dissenting from the majority's ruling).

Citizens United v. Federal Election Commission,[63] however, provides an even better exemplar of the Supreme Court's commitment to freedom of expression as a kind of structural check on the government. In *Citizens United*, the Supreme Court invalidated major provisions of the Bipartisan Campaign Reform Act of 2002 (commonly called the McCain-Feingold Campaign Reform

intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate").

59 *See* Harry Kalven Jr., *The Negro and the First Amendment* (Chicago: University of Chicago Press, 1965), 140–41, 145.

60 *Phelps*, 131 S. Ct. at 1219 (internal quotations and citation omitted).

61 *Id.* at 1220.

62 Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50–51 (1988).

63 130 S. Ct. 876 (2010).

Act).[64] Along the way, the majority overturned prior precedents that had sustained restrictions on direct corporate expenditures favoring or opposing particular candidates for public office.[65] To be sure, the decision leaves in place prior rulings that permit limits, including flat bans, on direct contributions to particular candidates and on coordinated campaign expenditures.[66] *Citizens United* also seems to signal that mandatory disclosure rules could be adopted and applied to uncoordinated corporate campaign expenditures.[67]

Nevertheless, the most important aspect of the *Citizens United* opinion is its broad endorsement of publicly traded corporations as full beneficiaries of the First Amendment, entitled to speak about candidates and questions of public policy under the same terms and conditions as individual citizens. "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."[68]

To invalidate the proscriptions against corporations making uncoordinated campaign expenditures, the *Citizens United* majority, speaking through Justice Kennedy, overruled *Austin*,[69] a prior precedent that sustained limits on direct corporate expenditures to influence elections under an antidistortion rationale. Justice Kennedy explained that "[b]y suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."[70]

[64] *See* 2 U.S.C. §§ 434, 441b (2006).

[65] *See Citizens United*, 130 S. Ct. at 912–15.

[66] *Id.* at 915–16 (expressly upholding the Bipartisan Campaign Reform Act's disclaimer and disclosure requirements on the authority of *Buckley v. Valeo*, 424 U.S. 1, 75–76 (1976)).

[67] *See id.* at 913–16.

[68] *Id.* at 898.

[69] Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), *overruled*, 130 S. Ct. 876 (2011).

[70] *Citizens United*, 130 S. Ct. at 907.

Justice Kennedy was quite explicit in grounding the Court's holding on an overt antigovernment rationale:

> When Government seeks to use its full power, including the criminal law, to command where a person may get his information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.[71]

Clearly, this is not a positive instrumental rationale for protecting speech; a rationale that relates the protection of free speech to securing particular public goods, such as facilitating democratic self-government, enabling a search for truth, or even freeing individual citizens to engage in autonomous self-expression. Instead, the rationale for invalidating statutory proscriptions against direct corporate expenditures in federal election campaigns rests largely, if not entirely, on the fear that government, if permitted to claim this power, would inevitably abuse it to degrade the project of democratic self-government.

In my view, it would be a gross oversimplification to say that *Citizens United* gutted or destroyed any and all federal or state efforts to control or constrain the role of corporate money in election campaigns. The federal government continues to enjoy the power to regulate, and even prohibit, direct contributions or expenditures coordinated with a political campaign and to require public disclosure of uncoordinated expenditures. A more limited ban, on uncoordinated expenditures by foreign corporations, also might pass constitutional muster.[72] Even so, however, the decision represents a sea change in the ability of publicly traded domestic corporations to participate directly in federal and state elections.

The notion that threats to freedom of speech do not arise from concentrations of private power (a point ably and

[71] *Id.* at 908.

[72] *Cf. id.* at 911 ("We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process.").

persuasively contested by Professor Owen Fiss[73]) but rather solely from the government serves as the linchpin of the *Citizens United* majority opinion. Government, and government alone, constitutes the threat that the First Amendment exists to counteract.[74]

At the risk of undue repetition, decisions like *Phelps* and *Citizens United* would be unthinkable in most democratic polities, including, for example, virtually all of Western Europe, Canada, and South Africa. In other words, in most societies, freedom of expression can and regularly does give way to other social and constitutional values. The idea that targeted hate speech must be tolerated or that corporations may use company profits to elect or defeat a particular political party's candidates for public office would be utterly foreign to the polity's conception of freedom of expression.

At least arguably, this state of affairs should be anticipated because categorical rules do not take social costs into account, whereas balancing tests do.[75] And in the United States, unlike Europe, Canada, or South Africa, we generally approach free speech issues from a categorical perspective. Rules against content and viewpoint discrimination, for example, are categorical; we do not generally ask whether society benefits from permitting the Ku Klux Klan or the Nation of Islam to spout racist rhetoric on the public streets or sidewalks, or in public parks. Most nations committed to protecting freedom of expression overtly and regularly engage in balancing exercises to determine, on the facts

[73] *See, e.g.*, Owen M. Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of States Power* (Boulder, CO: Westview Press, 1996); Owen M. Fiss, "Why the State?" *Harvard Law Review* 100 (1987): 781; Owen M. Fiss, "Silence on the Streetcorner," *Suffolk University Law Review* 26 (1992): 1.

[74] *See Citizens United*, 130 S. Ct. at 907–08.

[75] See Aharon Barak, *The Judge in a Democracy* (Princeton, NJ: Princeton University Press, 2006), 164–66; Aharon Barak, "Foreword, A Judge on Judging: The Role of a Supreme Court in a Democracy," *Harvard Law Review* 116 (2002): 16, 93–97; Aharon Barak, "Proportionality and Principled Balancing," *Law and Ethics of Human Rights* 4 (2010): 1.

presented, whether particular speech ought to enjoy protection in a particular context.[76]

By way of contrast, in the United States, once a reviewing court determines that speech falls under the protection of the First Amendment, the game is basically over.[77] And whether or not the emperor's clothes are *très chic* or tragic, hecklers enjoy a near-absolute right to share their views of the matter, however accurate or mistaken, with their fellow citizens. The emperor's power to censor constitutes an unacceptable threat to the maintenance of the democratic social order;[78] only an absolute regime of freedom of political speech may be relied on to facilitate the conditions necessary for free and fair elections.[79]

As I have previously noted, however, most polities do not feature populations that reflexively distrust their government more than they distrust concentrations of individual or corporate power and, accordingly, are less suspicious of overt interest balancing in cases involving expressive freedom. As Justice Claire L'Heureux-Dube, of the Supreme Court of Canada, explained the point,

[76] *See* Barak, *Judge in a Democracy*, *supra* note 75, at 166–68, 170–71, 255–56.

[77] On the importance of definitional boundaries in enforcing the free speech clause of the First Amendment, see Frederick Schauer, "The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience," *Harvard Law Review* 117 (2004): 1765.

[78] *See* Tushnet, this volume, at pp. 195–96, 204.

[79] In France, for example, the law strictly and flatly prohibits private electoral advertising in the mass media, whether by an individual citizen or a corporation. *See* Robert Badinter and Stephen Breyer, eds., *Judges in Contemporary Democracy: An International Conversation* (New York: New York University Press, 2004), 155. In France, "you cannot buy TV time" to support or oppose a candidate for political office and "[n]either a trade union nor anyone else has the right to engage in political advertising." *Id.* Significantly, this rule proscribing such private electioneering does not seem to generate much controversy in France. *See id.* Given the existence of such a ban on private electioneering and the existence of free and fair elections in France, the underlying central premise of *Citizens United* seems to be not only contested but also flatly rejected in other Western democracies that share the U.S. commitment to protecting the freedom of speech as an incident of deliberative democracy.

"Whereas Americans have always distrusted government, Canadians seem to have inherited from Great Britain a certain faith in both the role and the nature of the state."[80] In the United States, unlike the rest of the world, freedom of expression constitutes a kind of structural check on government; the U.S. conception of freedom of speech serves as a bulwark against a perceived risk or threat of government tyranny.

This fixation on the risks presented by the exercise of government power to the free functioning of the marketplace of ideas has left the field relatively open to distortions that can and will arise through the exercise of private power over the marketplace of ideas. Private corporations, such as Microsoft, Google, and Comcast, all have the ability to exert extraordinary control over information flows and could do so in very nontransparent ways.[81] In this specific context, government regulation of privately controlled information bottlenecks might well enhance, rather than degrade, the scope of expressive freedoms in the United States.

To be clear, I am not suggesting that government regulation of corporate speech is always and necessarily a good thing. Instead, it seems to me that Fiss is quite correct to ask whether, in the contemporary United States, the greater threat to expressive freedoms arises from a benighted local police officer or county clerk, on the one hand, or the company that provides your Internet service or your Web browser, on the other hand.

V. Conclusion

Tushnet is quite right to question whether dissent is, in itself, of particular value. Moreover, most democratic polities maintaining a serious commitment to safeguarding expressive freedoms would be inclined to adopt Tushnet's instrumental approach to assess whether particular forms of dissent should enjoy constitutional protection. The United States, however, maintains a strong form of free speech exceptionalism, and our commitment to protecting

[80] L'Heureux-Dube, *supra* note 53, at 18.

[81] *See* Krotoszynski, *supra* note 43, at 935–42.

dissent has little to do with the social value or utility of dissent as a social phenomenon. For me, this suggests a larger question to consider when theorizing and explaining U.S. free speech exceptionalism: why would a rational polity reflexively refuse to credit the idea that government should be permitted to declare and protect objective truths, particularly when governments in places like Canada, France, Germany, and the United Kingdom do so every day and without any discernible overall trend toward general tyranny, fascism, or oppression of their people?

To be clear, I do not suggest that people in the United States are right to suppose that it is essential to democratic self-government to disallow government the power to proscribe objectively false dissenting speech; nor do I make the opposite claim, namely that governments should be empowered to protect the body politic from objectively false speech. Rather, I suggest that our U.S. free speech exceptionalism probably reflects deep-seated cultural, political, and ideological characteristics rather than being a mere historical accident or an unjustifiable faith in the ability of truth, in Milton's metaphor, to bring falsehood to book.[82]

[82] *See* John Milton, *Areopagetica, A Speech for the Liberty of Unlicensed Printing, To the Parliament of England* (1644), reprinted in Milton Sanford Mayer, ed., *The Tradition of Freedom* (New York, NY: Oceana Publications, 1957), 22, 28. As Milton famously stated the proposition "[l]et [Truth] and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter." *Id.* at 28.