CHAPTER TWO

Why Is Free Speech Important?

THE controversy over free speech on campuses can be understood only in the context of the history of free speech. In the United States, that context is inseparable from the First Amendment.

Freedom of expression—which includes verbal and nonverbal behaviors that express a person's opinion, point of view, or identity—is considered a fundamental right within our political system. The Supreme Court has called it "the matrix, the indispensable condition, of nearly every other form of freedom"[1] and has ruled that it occupies a "preferred place"[2] in our constitutional scheme.

Such phrases reflect the assumption within American constitutional law that speech claims should be treated as weightier than the reasons typically used to justify the suppression or punishment of speech. In other words, before the

debate even starts, speech has an advantage, even against some very good reasons to limit it.

And there may be good reasons to limit speech. It has been used to mock and bully, and to question the dignity of entire groups of people in ways that put them at risk. It has been used to objectify women, sexualize children, and glorify violence. Speech can invade privacy or ruin a reputation. People have said or published things that threaten national security. Speech can fuel hatred among people, and—as we have seen all too often recently—it can incite people to commit horrific acts of violence against innocents.

There is constant tension between free speech and other values—national security, safety, public morality, privacy, reputation, dignity, equality. The current debate about free speech on college campuses is one example of a long-standing discussion of the best way to reconcile these competing considerations.

Yet despite the real and potential harms and risks, we believe that freedom of expression is an indispensable condition of all other freedoms and deserves a preferred place in our system.

Why believe this?

The history of freedom of speech in the United States provides a longer answer. But first we want to mention the three most common moral and practical reasons why expressive activity deserves broad protection: freedom of speech is essential to freedom of thought; it is essential to democratic self-government; and the alternative—government censorship and control of ideas—has always led to disaster.[3]

Freedom of Thought

First, freedom of speech is essential to freedom of thought because a person cannot develop an independent point of view about the world unless he or she is exposed to different ideas about what is important and what beliefs are most meaningful, and is permitted to converse with others about their experiences or beliefs. Just as totalitarian societies are premised on complete control over people's actions and beliefs, free societies are premised on freedom of thought and freedom of conscience—the right to have beliefs without risking punishment for "thoughtcrime" (the holding of unapproved beliefs and ideas).[4] This freedom can develop only in a society that protects a broad and diverse range of opinion.

This protection is necessary not for those whose beliefs and actions are consistent with dominant opinion (people seldom try to oppress what is accepted and popular), but for those who insist on asserting their individuality against dominant opinion. As Justice Oliver Wendell Holmes put it, "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[5] In this sense, free speech and freedom of thought are essential components of any truly diverse society. Without them, the pressure for conformity will overwhelm potential iconoclasts and outcasts, and there will be no true diversity of experiences, perspectives, or identities within the community.

Moreover, there is little value in allowing people to develop their own conscience, their own commitments, and their own identities if the society then criminalizes the ability to express them to others. To hide who you are and what you believe, for fear that the mere act of expressing yourself risks punishment, is an exceedingly cruel and oppressive circumstance. The rights of conscience and free expression are designed to prevent such a torment.

Free Speech and Democracy

Second, freedom of speech is essential to democratic self-government because democracy presupposes that the people may freely receive information and opinion on matters of public interest and the actions of government officials. The act of voting still occurs in many autocratic societies where speech is severely limited and government officials punish people who criticize the government. Many dictators brag about receiving over 90 percent of the vote, not realizing that such numbers cast doubt on their own validity. It is not the act of voting that creates a self-governing society but rather the people's ability to formulate and communicate their opinions about what decisions or policies will best advance the community's welfare. The right to be informed about matters of public interest is considered so fundamental to democracy that Benjamin Franklin called it the "principal pillar of a free government."[6] As Thomas Jefferson put it, "Were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."[7]

Another way of saying this is that freedom of expression is the major bulwark against tyranny in any political system. All successful autocrats start by punishing dissenters, criminalizing speech that might threaten their power, and dominating those institutions that would otherwise be dedicated to incubating independent thought—including newspapers and (especially) universities. A citizenry that is not free to share its common experiences and hear dissenting views is hard-pressed to challenge those who oppress and immiserate them.

In free societies, meanwhile, rights of free expression allow a diverse political community to work through its different views without always succumbing to violence. Political systems are more stable when individuals feel as if they have had a fair chance to have their say, and even if they lose in the short run, will have more opportunities to convince their fellow citizens of the wisdom of their views.

Censorship and Society

Third, history shows that the alternative to freedom of speech—government censorship and control of ideas—is disastrous for a society. These methods have been used throughout history to prevent challenges to people in power, to secure the place of dominant social groups against people considered less worthy of respect, and to prevent the circulation of new ideas that are the essential engine of social progress. To make progress in our thinking about important matters, we need an extraordinary amount of tolerance for wrong hypotheses and strange-sounding ideas, because (as Steven Pinker observes), "everything we know about the world—the age of our civilization, species, planet, and universe; the stuff we're made of;

the laws that govern matter and energy; the workings of the body and brain—came as insults to the sacred dogma of the day."[8]

If one does not know the history of the struggle for free speech, one might think that restrictions on speech can be a force for protecting the vulnerable. But history tells us the exact opposite: censorship has always been on the side of authoritarianism, conformity, ignorance, and the status quo, and advocates for free speech have always been on the side of making societies more democratic, more diverse, more tolerant, more educated, and more open to progress.

This helps us understand why the protection of free speech has been so rare in human history, and is still rare today. Support for free speech is synonymous with a genuine commitment to democracy, diversity, and change. If you value social order and conformity more highly than you value liberty and democracy, then you will not support free speech no matter what else we say. Unfortunately, the prevailing stance of most political systems has been authoritarian, and the prevailing organization of most societies has favored rigid views about how people should behave. Free speech as an idea has developed—slowly, tenuously, over many centuries—only when there have been opportunities to break down more authoritarian and homogeneous structures of government and society. Free speech thrives when members of society agree that individuals should be free to make their own choices about what to believe and how to behave. It thrives when people agree that they should be able to challenge government leaders and advocate for social change. It is valued when people are open to new ideas about how the world works,

how society should be organized, and what values are most important.

The history of free speech in America illustrates these points and provides an essential backdrop to today's debate over free speech on college campuses.

FREE SPEECH IN AMERICA BEFORE THE TWENTIETH CENTURY

There is some evidence that ideas of free speech existed during the short reign of Athenian democracy some 2,500 years ago, and among some leading orators of the troubled Roman Republic. But the first major free speech controversies in western history occurred in England, during the debates over the so-called Licensing Acts of 1643 and 1662, and these debates shaped the views of the generation that ratified the First Amendment to the United States Constitution.

Earlier, in the fifteenth century, European political and social elites had to come to grips with the creation of the printing press, which for the first time made it easy to circulate information and ideas without going through the existing hierarchy of the church and monarchy. The immediate response of the Roman Catholic Church was to impose severe restrictions on the use of the printing press. Pope Alexander VI, explaining in 1501 that the printing press could be "very harmful if it is permitted to widen the influence of pernicious works," determined that "full control over the printers" was necessary.[9] He required that a person obtain an official "license" from a proper authority in order to distribute materials printed on a printing press. If one wanted to print copies of the Bible, one would

receive a license. If one was interested in printing works of dissent or criticism, the license would be denied.

In the spirit of the times, the English Licensing Acts of the 1600s required all persons to obtain official permission before publishing any material, and required the licenser to attest that the manuscript did not criticize Christianity or the government.[10]

The printing press forced political and social elites to make it clear that people could express themselves only if they did not challenge political and social elites. But it also led to the revolutionary idea that the publication of dissent and criticism should be tolerated rather than punished or censored.

The first great expression of this idea came from John Milton, the author of *Paradise Lost*, whose 1644 pamphlet *Areopagitica* is the seminal statement on free speech rights in Anglo-American history. Written just as the English Civil War was heating up, at a time when there were many challenges to existing political and religious authority, Milton (who sided with the Puritans against Charles I and the Church of England) emphasized the value of free speech for discovering truths. He used this argument to explain why it was not appropriate for the government to predetermine what ideas were and were not acceptable for free human beings to hear.[11]

Milton's most famous passage focused on how the licensing laws would have the effect of discouraging "all learning" and undermine the ability of people to understand truth:

> Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to

> the worst in a free and open encounter? . . . [Since] the knowledge and survey of vices is in this world so necessary to the constituting of human virtue, and the scanning of error to the confirmation of truth, how can we more safely, and with less danger, scout into the regions of sin and falsity than by reading all manner of tractates and hearing all manner of reason?[12]

An important assumption underlying Milton's view is that individual persons should be respected enough to decide for themselves whether a particular view was worthy of their support. Rather than have the government decide in advance what was or was not truthful or worthy of attention, Milton, like many English political and religious reformers of the time, wanted that authority given to every person. In support of this view he beseeched the "Lords and Commons of England" to treat their subjects not as "slow and dull, but of a quick, ingenious and piercing spirit, acute to invent, subtle and sinewy to discourse, not beneath the reach of any point the highest that human capacity can soar to."[13]

Parliament refused to renew the Licensing Act when it expired in 1694. By the middle of the eighteenth century, both English and American authorities agreed that freedom of the press meant that government could not pass what became known as "prior restraints." Moveover, increasing numbers of Enlightenment thinkers began to advocate for a world that was more democratic, more tolerant of diverse views, and more supportive of free inquiry. John Locke's "A Letter Concerning Toleration" (1689) made the case that the government should tolerate the proliferation of different religious practices rather than force everyone to accept only the official

religion, and this helped set the stage for broader arguments about freedom of conscience.[14] In the early 1700s prominent English dissenters John Trenchard and Thomas Gordon, writing a series of "letters" under the pseudonym Cato, attacked what they considered to be the increasing corruption of British politics and made a special point in their essay "Of Freedom of Speech" to build on Milton's views:

> Without freedom of thought, there can be no such thing as wisdom; and no such thing as public liberty, without freedom of speech: Which is the right of every man, as far as by it he does not hurt and control the right of another. . . . That men ought to speak well of their governors, is true, while their governors deserve to be well spoken of; but to do public mischief, without hearing of it, is only the prerogative and felicity of tyranny: A free people will be showing that they are so, by their freedom of speech.[15]

While the founders of the American Republic agreed that licensing acts created too strong a choke hold on the expression of innovative or dissenting ideas, they also believed that society had a right to protect itself against dangerous speech. This had become the dominant opinion in English law at the time the U.S. Constitution was written. As the English legal commentator William Blackstone put it in his *Commentaries*, "Every freeman has an undoubted right to lay what sentiments he pleases before the public . . . but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity."[16] In the language of constitutional law, prior restraints were prohibited but not "subsequent punishment" of bad speech.

What speech was "improper, mischievous, or illegal"? The main category of speech that could lead to punishment

was "seditious libel," with "sedition" meaning an act designed to subvert lawful authority and "libel" defined as an expression that undermines reputation or brings someone or something into hatred or contempt.[17] Seditious libel was thus a statement or writing about the government or a government official—whether true or false—that would undermine authority and perhaps lead to a breach of the peace. While the American founders disagreed over whether truthful criticisms of the government deserved protection, most believed that "false, scandalous, and malicious" criticism should be punished.

This is one of the reasons why, despite the ratification of the First Amendment just a few years earlier, Congress could pass the Alien and Sedition Acts in 1798, making it harder for an immigrant to become a citizen, allowing the president to imprison or deport noncitizens who were deemed dangerous, and criminalizing false statements that were critical of the federal government.[18] Because the presidency and the Congress were at the time controlled by the Federalist Party, the prohibition against criticizing the government was most enforced against members of the opposition Democratic-Republican Party, led by Thomas Jefferson and James Madison. Using the law, the Adams administration shut down several prominent Jeffersonian newspapers, imprisoned Jeffersonian members of Congress, and even arrested Benjamin Franklin's grandson for libeling President Adams.

In the end, the partisan prosecutions generated enough outrage that the Federalists lost control of the federal government in 1800. After Jefferson became president, he allowed the Sedition Act to expire and pardoned those who had been convicted.

As a result of the controversy surrounding the Sedition Act, notions of free speech rights further developed to shield more people who criticized the government or government officials. But throughout the nineteenth century, United States law still allowed censorship or prosecution of people who engaged in "dangerous or offensive writings."

The most dramatic and important example of this censorship involved anti-slavery advocacy. When abolitionists in the 1830s began insisting on the emancipation of slaves, slaveholders decried their speech as dangerous because it might incite slave rebellions. Some efforts to silence anti-slavery advocacy took the form of mob justice, destroying abolitionist presses and murdering the editors of abolitionist journals. But the censors also used the power of law. While Northern states refused to formally punish abolitionist advocacy, Southern states made it a crime for anyone to express an anti-slavery position.[19] When the American Anti-Slavery Society mailed abolitionist pamphlets to prominent Southern citizens in 1835, Amos Kendell, the U.S. postmaster general, informed local postmasters that they had no obligation to deliver abolitionist literature, explaining that the federal government had a responsibility to protect "States from domestic violence."[20]

The other prominent nineteenth-century example of the suppression of speech was the passage of the Comstock Law in 1873. Pushed by groups such as the New York Society for the Suppression of Vice (led by Anthony Comstock), the law targeted the "Trade in and Circulation of, obscene literature and Articles for immoral use" and made it illegal to send any "obscene, lewd or lascivious" materials or any information or "any article or thing" related to contraception or abortion

through the mail. The passage of the federal law encouraged many states to add laws of their own, and heavy-handed restrictions on contraceptive information and sexually oriented materials continued for many years.

Working as an unpaid special agent of the U.S. Post Office from 1874 until 1915, Comstock presided over the confiscation of some 130,000 pounds of obscene literature and 194,000 lewd pictures and photos. Among the works that would eventually fall under the Act's censorship net were Aristophanes' *Lysistrata*, Chaucer's *Canterbury Tales*, and books by Ernest Hemingway, Honoré de Balzac, Oscar Wilde, F. Scott Fitzgerald, Eugene O'Neill, and John Steinbeck. James Joyce's *Ulysses* was banned in the United States throughout the 1920s after the New York Society for the Suppression of Vice had the work declared obscene. Not until the 1930s, after the development of greater protections for speech and the press, did a court declare the book to be protected by the First Amendment.[21]

By the end of the nineteenth century it was acknowledged that people should have the freedom to criticize the government, government officials, and candidates for office, and to express a range of views on matters of public debate. Yet it was still commonplace to allow the censorship or punishment of speech that was considered "blasphemous," that harmed the reputation of a private individual, or (most expansively) that had a "tendency" to injure "public morals or safety." This last category in particular gave the government extraordinary opportunities to prosecute people for expressing unpopular or dissenting opinions, as became dramatically clear at the turn of the twentieth century.

In the years leading up to World War I,[22] many Americans feared that the new wave of immigrants from eastern and southern Europe would bring "anti-American" practices and ideas into the country, including socialism and anarchism. These fears were heightened when anarchists at the turn of the century assassinated several heads of state (including President William McKinley in 1901), the Socialist Party in the United States gained an increasing share of the vote in many urban communities, and militant labor leaders threatened mass strikes. Even before the United States entered the war, many Americans were calling for legislation to restrict "disloyal" utterances, usually associated with immigrants. In his State of the Union address in 1915, Woodrow Wilson warned that the increasing presence of American citizens who were "born under other flags" and "have poured the poison of disloyalty into the very arteries of our national life" was making it "necessary that we should promptly make use of the processes of law by which we may be purged of their corrupt distempers."[23]

Views such as these inspired the passage of the Espionage Act of 1917, the Sedition Act of 1918, and many similar state statutes. The Espionage Act made it a federal crime for a person to make a false report that attempted to cause insubordination, disloyalty, mutiny, or refusal of duty, including obstruction of the draft. The Sedition Act extended the range of offenses to cover speech that cast the government or the war effort in a negative light or interfered with the sale of government bonds. It forbade the use of "disloyal, profane, scurrilous,

or abusive language" about the United States government, its flag, or its armed forces, or that caused others to view the American government or its institutions with contempt, and it allowed the postmaster general to refuse to deliver mail containing such language.[24]

Following passage of these laws, more than two thousand persons were arrested for violating federal restrictions on speech, and more than a thousand were convicted. They generally received sentences of five to twenty years' imprisonment.

In sustaining these convictions, the United States Supreme Court initially relied on traditional understandings of government power to regulate speech. *Schenck v. United States* (1919) turned on the question of whether Charles Schenck, the general secretary of the American Socialist Party, had a right to distribute pamphlets condemning the Wilson administration and arguing that the draft was unconstitutional.[25] Among other things, the pamphlet urged readers, "Do Not Submit to Intimidation" and "Assert Your Rights." Schenck was arrested, charged with violating the Espionage Act, and sentenced to ten years in prison. In upholding his conviction, Justice Oliver Wendell Holmes asserted:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent. . . . It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced.[26]

On this view, just as the government had the power to prosecute people for physically obstructing the draft, it also had the power to prosecute people for using words that had the same effect.

That decision was announced on March 3, 1919. A week later, the Court sustained the conviction of the prominent Socialist leader Eugene V. Debs—who had expressed admiration for three draft evaders and had told a crowd that "you need to know that you are for something better than slavery and cannon fodder"—also under the Espionage Act. Holmes again wrote the majority opinion; this time he asserted that persons could be constitutionally convicted when "the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting services."[27]

The Red Scare that followed World War I inspired continued restrictions on political dissent, especially the advocacy of socialist or anarchist views. In April 1919, authorities discovered a plot for mailing thirty-six bombs to prominent political and business leaders, including J. P. Morgan, John D. Rockefeller, Justice Oliver Wendell Holmes, and Attorney General A. Mitchell Palmer. On June 2, 1919, eight bombs simultaneously exploded in eight different locations, including Palmer's house. Afterward, Palmer ordered what became known as the "Palmer Raids," a lawless dragnet designed to capture, arrest, and deport radical leftists from the United States. Over 10,000 persons were arrested; 556 were eventually deported.[28]

Many establishment figures felt that Palmer had gone too far. One result of their outrage was the founding of the American Civil Liberties Union, which published a *Report Upon the Illegal Practices of the United States Department of Justice*.[29]

Prominent legal scholars also began to write treatises advocating for a better approach to free speech protections.[30]

At this point, two Supreme Court justices began to articulate a different understanding of free speech rights. Through a series of dissenting opinions, Justice Oliver Wendell Holmes—who just months earlier had upheld the prosecution of dissenters—and Justice Louis Brandeis began a revolution in the thinking and practice of free speech rights in the United States.[31]

They started late in 1919, in a case where a majority of Supreme Court justices ruled that Jacob Abrams could be sentenced to ten years for urging American workers to protest American intervention against the Bolsheviks in the Russian Revolution.[32] The most famous passage of Holmes and Brandeis' dissent in *Abrams v. United States* asserted the following:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by a free trade of ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. . . . We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[33]

When it comes to restricting or punishing speech, in other words, it was not enough for the government to think that certain expressions have a "tendency" to cause bad outcomes. The traditional "bad tendency" basis for limiting speech meant, as a practical matter, that there could be no protection for controversial speech. Holmes and Brandeis argued that any concerns over the harmful effects of speech should be addressed by the "marketplace of ideas"—that is, by people exercising their speech rights to expose the harmful idea's dangers—rather than by government censorship or punishment. The major exception to this rule involved speech that created an "imminent threat" of lawlessness or real danger, such that there was no time for "more speech" to solve the problem (as with, for example, falsely shouting fire in a crowded theater in order to start a panic).

Brandeis reinforced this approach in his opinion in *Whitney v. California* (1927).[34] The case involved Charlotte Anita Whitney, an organizer with the California branch of the Communist Labor Party. She had advocated peaceful political change, but was convicted under the California Criminal Syndicalism Act of 1919 because of her association with the Communist Party. A majority of Supreme Court justices agreed that her actions presented a "danger to the public peace and the security of the State."[35] Brandeis disagreed. "Fear of serious injury," he wrote,

> cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of speech there must be a reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to

> believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. . . . If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.[36]

This claim—that in almost every circumstance the best approach to combat the potential harm of speech "is more speech, not enforced silence"—has become the most common argument used by free speech advocates in response to those today who urge censorship and punishment of speech considered offensive or harmful.[37]

THE BENEFICIARIES OF FREE SPEECH PROTECTION

Over the next half century, judges and civil libertarians worked to move American culture and practices toward the views expressed by Holmes and Brandeis in dissent. It was not a steady march of progress, and the full story is long and complicated. Today, judges and analysts still struggle and disagree over how to balance free speech against other important interests.

Yet between the 1930s and 1970s there was a revolution in thinking and practice about freedom of expression in the United States. Not surprisingly, the most important beneficiaries of this new conception of free speech were the most vulnerable members of society and those who most strongly advocated for social change, especially labor unions, religious minorities, political radicals, civil rights demonstrators, antiwar protestors, and nonconformists.

In 1937 the Supreme Court ruled that states could not prosecute people merely for belonging to the Communist Party or speaking at public meetings sponsored by the Communist Party.[38] That same year, Justice Benjamin Cardozo became the first justice to characterize freedom of speech as "the matrix, the indispensable condition, of nearly every other form of freedom."[39] During World War II this newly indispensable liberty was invoked to prevent states from punishing the children of Jehovah's Witnesses for refusing to pledge allegiance to the American flag. As Justice Robert Jackson explained in *West Virginia Board of Education v. Barnette* (1943), "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."[40] In *Keegan v. United States* (1945), the Court also ruled that persons could not be convicted of obstructing the draft merely for counseling others that the draft was unconstitutional—exactly the offense that sent Charles Schenck to jail in 1918.[41] By 1945, the justices were talking about "the preferred place given in our scheme to the great, indispensable democratic freedoms secured by the First Amendment."[42]

But there were dramatic setbacks in the protection of free speech. In the months before the United States entered World War II, Congress passed the Smith Act of 1940, which made it illegal "to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing" the United States government by force.[43] The Second Red Scare of the late 1940s and early 1950s—embodied in Senator Joseph McCarthy's destructive witch

hunts against real and imagined communists and communist sympathizers—led to the Internal Security Act of 1950. This law required communist organizations to register with the Justice Department and established a Subversive Activities Control Board to investigate people suspected of promoting "totalitarian dictatorship."

In the 1951 case of *Dennis v. United States*, decided during the height of McCarthyism, a divided Supreme Court sustained the main anti-communist measures of the 1940s and 1950s.[44] Eugene Dennis was the general secretary of the American Communist Party. In 1948, he and ten other party leaders were indicted for violating the Smith Act of 1940. They were not charged with directly conspiring to overthrow the government but rather with conspiracy to organize "a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence." Dennis and nine of his peers were sentenced to five years in prison, and by a 7–2 vote the justices ruled that their conviction was constitutional.[45]

Not until after McCarthy's downfall did the justices reextend protections for political dissenters. In *Yates v. United States* (1957), the Court held that a person could not be prosecuted for "advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end."[46] Justice Hugo Black's concurring opinion reiterated the logic of extending broad protections to speech:

> Doubtlessly, dictators have to stamp out causes and beliefs which they deem subversive to their evil regimes. But government suppression of causes and beliefs seems to be the very antithesis of what our Constitution stands for. . . . The

> First Amendment provides the only kind of security system that can preserve a free government—one that leaves the way open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.[47]

In the 1950s and 1960s, the most important beneficiaries of newly expanded free speech protections were participants in the civil rights movement. The messages of civil rights protestors were considered deeply offensive, harmful, and dangerous to many southern government officials, and citizens considered the ideas of civil rights protestors "subversive" to southern life in the same way that communist and anarchist ideas were considered subversive to the country as a whole. In fact, much of the language used against protestors minimized their actual concern about civil rights and attempted instead to associate movement leaders with radical, destructive elements in society. J. Edgar Hoover's FBI tried to link Martin Luther King Jr. and other civil rights leaders to communism.[48] Under any standard that allowed the government to censor or punish speech that was offensive or had a tendency to cause harm or danger, the civil rights movement could not have gotten off the ground.

Civil rights leaders were able to maintain the movement because the federal courts were willing to apply stronger free speech principles to stop southern governments from repressing protestors. Many southern political leaders tried vigorously to suppress African American protests by forcing the NAACP to identify its members (so that they could then be targeted for harassment or worse),[49] forbidding NAACP lawyers from soliciting clients for cases attacking the constitutionality of

racial segregation,[50] charging protestors with disturbing the peace,[51] suing civil rights leaders for libeling pro-segregationist community leaders,[52] and limiting speakers' access to public property.[53] The Supreme Court declared all these measures unconstitutional. Given that much of the movement's political strategy depended on exposing repressive southern practices to northern opinion, the free flow of information was fundamental to the movement's success. The extension of First Amendment protections allowed Martin Luther King Jr. and other civil rights leaders to build the national support needed to pass such laws as the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

The Supreme Court was also remarkably protective of speech during the Vietnam War. Although the justices did not extend free speech protection to the act of burning a draft card,[54] there was no repeat of the prosecutions of anti-war speech that occurred during World War I. Presidential candidate Eugene McCarthy made the same kinds of statements in 1968 that got presidential candidate Eugene Debs sentenced to prison after he expressed them in 1920.

By the late 1960s the Supreme Court had formally adopted the views of "Holmes and Brandeis in dissent" as the new constitutional standard for evaluating government's authority to censor or punish speakers whose words might be considered a threat to public order, safety, or morality. In *Brandenburg v. Ohio* (1969), the Court overturned the conviction of a Ku Klux Klan member who said during a speech that "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [*sic*] taken."[55] The

justices ruled that the government cannot "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[56] And to finally bury the older way of thinking, the justices held: "The contrary teaching of *Whitney v. California* . . . cannot be supported, and that decision is therefore overturned."[57]

Two years later, California prosecuted nineteen-year-old Paul Robert Cohen for disturbing the peace in the corridor of a courthouse by wearing a jacket bearing the words "Fuck the Draft."[58] In *Cohen v. California* (1971) the justices overturned his conviction, asserting that it was not within the power of government to "remove this offensive word from the public vocabulary."[59] Justice John Marshall Harlan acknowledged that this ruling would create a marketplace of ideas that included "verbal tumult, discord, and even offensive utterance," but these were "necessary side effects of the broader enduring values which the process of open debate permits us to achieve."[60] He added, "one man's vulgarity is another's lyric."[61]

The Court's embrace of free speech had other beneficiaries. Historically, people who spoke out against religion could be convicted of "blasphemy," but in 1952 the justices in *Joseph Burstyn, Inc. v. Wilson* ruled that "it is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine."[62] In 1957, copies of Allen Ginsberg's poem "Howl" were seized by customs officials, and a San Francisco bookstore manager was arrested for selling a published copy to an undercover police officer; this would not happen again after the free speech revolution of

the 1960s. (The 2010 film *Howl*, starring James Franco, dramatizes the subsequent trial.) Counterculture celebrities such as the comedian and social critic Lenny Bruce, who was arrested in the early 1960s for using the word "schmuck" (a Yiddish word for penis), eventually benefited from the Court's willingness to accommodate "even offensive utterances" that posed no immediate danger of violence or lawlessness.[63] While obscenity law is not entirely a thing of the past,[64] the contemporary legal and cultural environment is tremendously accommodating of forms of expression that would have landed many people in jail in the era of the Comstock Act.

If today we take for granted that the government cannot put people in jail for asserting "countercultural" attitudes or identities—including forms of expression that challenge traditional religion, prevailing social mores, familiar lifestyle choices, inherited views about sexuality, or historic gender roles—then it is good to keep in mind that this was made possible by the twentieth-century revolution in free speech rights.

The expansion of free speech protection does not prevent the law from addressing many of the harms that can result from speech acts. A person can be censored or punished for revealing national security secrets. A person can be held liable for speech that is an invasion of privacy. There are also narrowly drawn categories of speech that the law treats as unprotected, including incitement of illegal activity, defamation, fighting words, true threats, harassment, and speech that creates an unsafe or discriminatory working or learning environment. Still, all of these categories are bounded in a way that ensures they cannot be used to censor or punish people just for expressing ideas.

Many of today's advocates for censorship believe that denying free speech is a way of protecting vulnerable groups. But social progress has come about not as a result of silencing certain speakers, but by ensuring that previously silenced or marginalized groups are empowered to find their voice and have their say. Our country became better, more just, and more inclusive in the twentieth century in part because of the contributions of expanded protections for free speech. That is why sturdy protection for the expression of ideas should be considered one of the past century's most important accomplishments.

THE LESSONS OF HISTORY

Each generation brings new calls to suppress speech, for reasons that appear noble at the time. Today it is to help create inclusive learning environments for students, and also to stop speech that might help terrorists. Not long ago, it was to stop pornography on the ground that it was discrimination against women. From the 1920s until the 1960s, it was to stop communism. During World War I, it was to preserve the draft and win the war. The specific issues vary, but the underlying question is always the same: when to stop speech that is perceived as harmful. One of the key lessons of history is that almost always, on reflection, society concludes these efforts were misguided. As Justice Holmes put it, "time has upset many fighting faiths."[65]

We cannot think clearly about free speech on campuses today unless we understand this history of freedom of expression. As we continue to debate this issue, it is vital that participants

appreciate the rise of a free speech tradition as a truly historic accomplishment. And as important as free speech is to society as a whole, there are additional reasons why it deserves an even higher degree of protection within institutions of higher education.