



THE UNFORTUNATE CONSEQUENCES OF A MISGUIDED FREE SPEECH PRINCIPLE

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For at least the past half-century, Americans have been committed to a “free speech principle,” holding that speech is to be encouraged because it serves to produce knowledge, to enable the development of personal autonomy, and to facilitate the self-governance of the nation. In this essay, I argue that any such abstract free speech principle is fundamentally misguided. The value of speech is instead the value of the social practice within which speech occurs. Speech is to be encouraged when it advances the purpose of the social practice in which it is embedded. For constitutional purposes, the most important social practice established by communication is the public sphere, whose development in the eighteenth century made possible democratic self-governance. The health of a democracy depends upon whether its public sphere can produce a public opinion capable of legitimating the state. This turns on the quality of a nation’s politics, not on the quantity of its speech. Americans who conceptualize the current crisis as requiring rededication to the free speech principle thus essentially misdiagnose the nature of our contemporary emergency. We need to repair our politics, not our speech.

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INTRODUCTION

There is growing pessimism about the future of free speech in the United States. Crusaders from all sides of the political spectrum seem intent on suppressing objectionable discussion.¹ The worry is that Americans may be losing their appetite for candid and constructive dialogue. It has become too costly to participate in public discourse. We fear that incorrect speech will be canceled by the left or bullied by the right.

This is surely a troubling state of affairs. But it can be cured only if we first correctly diagnose its causes. There is a widespread tendency to conceptualize the problem as one of free speech. We imagine that the crisis would be resolved if only we could speak more freely. But this diagnosis puts the cart before the horse. The difficulty we now face is not one of free speech, but of politics. Our capacity to speak has been disrupted because our politics has become diseased. We misconceive the problem because American culture is obsessed with what has become known as the free speech principle. It is a principle that is widely misunderstood. Our misconceptions are as deep and as they are consequential.

I shall take as my text a representative and much-discussed 2022 opinion piece by the editorial board of *The New York Times* entitled “America Has a Free Speech Problem.” In its first sentence, the editorial warned that Americans “are losing hold” of the “fundamental right” to “speak their minds and voice their opinions in public without fear of being shamed or shunned.”² The editorial did not focus its attention on government regulation of speech, which is the particular domain of

¹ If there is so-called cancel culture on the left—for example, see Philip W. Magness, “The Suicide of the American Historical Association,” American Institute for Economic Research, August 20, 2022, <https://www.aier.org/article/the-suicide-of-the-american-historical-association—there-is-outright-state-censorship-on-the-right>. See Rashawn Ray and Alexandra Gibbons, “Why Are States Banning Critical Race Theory?” Brookings Institution, November 2021, <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/>; and Keith E. Whittington, “Professorial Speech, the First Amendment, and the ‘Anti-CRT’ Laws,” August 12, 2022, <https://ssrn.com/abstract=4188926>. The hypocrisy of the latter, given the right’s recent insistent campaign to enforce free speech within schools, cannot be overstated. See Tennessee Campus Free Speech Protection Act, Tenn. Rev. Code Ann., Title 49, Chapter 7, § 2–9 (passed May 9, 2017).

² New York Times Editorial Board, “America Has a Free Speech Problem,” *The New York Times*, March 18, 2022, <https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html>.

the constitutional law of the First Amendment, but instead on the more basic question of free speech itself. It urged Americans to extend to each other the fundamental right to say whatever is on their minds. The editorial suggested that the more speakers could express their thoughts, the more our politics would heal. It implied that the current dislocation of our politics could be solved by more speech.

The editorial's framing of the issue is not idiosyncratic.³ Advocates of a free speech principle abound. Yet the editorial rests on a misguided understanding of free speech. Whatever freedom of speech might signify, it does not mean that unrestrained expression is inherently desirable. It does not mean that more speech is always better. One can see this clearly if one imagines the limit case. Those who cannot stop talking, who cannot exercise self-control, do not exemplify the value of free speech. They instead suffer from narcissism. Unrestrained expression may be appropriate for patients in primal scream therapy, but scarcely anywhere else.

Normal persons ordinarily feel constrained to speak discreetly. I might detest my friend's wife, but I will refrain from telling him so in ways that might hurt his feelings. Speech is the foundation of all human relationships, but no human relationship can exist without tact or discretion. No friendship can survive unrestrained communication that ruptures elemental norms of mutual respect. More speech is not always better.

No doubt friendship also requires candor and spontaneity. Sometimes friends must articulate to each other truths that are unpalatable and difficult to express. How then do we balance the need to speak freely against the need for tact? The answer is that we should choose to speak in ways that will make our friendship as good as it can be. We speak when it improves the quality of friendship; we exercise self-restraint when it improves the quality of friendship.⁴ The relevant good we seek to achieve is friendship, not more speech.⁵

³ Erin L. Miller, *Amplified Speech*, 43 *CARDOZO L. REV.* 1 (2021); and Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 *BYU L. REV.* 553.

⁴ In such contexts, it does not help much to say that we do not value the freedom to speak, but instead value the freedom or the liberty that allows us to speak. Freedom and liberty are no doubt important human goods. But in this essay, I am evaluating freedom of speech—the liberty to speak—which is to say the exercise of a certain kind of freedom or liberty.

⁵ This formulation of the issue adopts a first-person point of view. In deciding whether we ourselves ought to speak, we typically pursue the good of the social practice within which we seek to

The same logic applies to almost all human relationships. We do not value speech from the solipsistic perspective of the speaker. Instead, speech that contributes to the excellence of a relationship is valued; speech that undermines the value of a relationship is suppressed. Consider, for example, the lawyer who speaks to a court or a client. The lawyer does not simply say what is on her mind, nor would it be a good thing if she did. The lawyer's goal is not to produce the maximum number of words. The goal of the lawyer is instead to produce the best possible results for her client. To achieve that goal, a lawyer must balance candid expression against tactful self-restraint.

In my own capacity as a professor of law, I would never assess the success of my classes by the number of words I have expressed. I rarely simply blurt out what is on my mind. I instead try to speak in ways that maximize the educational value of my classes. This means that I always balance self-restraint against spontaneous self-expression. There is no principle of free speech that can override this simple, essential, and universal logic.

This suggests that the premise of the *New York Times* editorial, while familiar from continuous iteration, is fundamentally misguided. Abstract principles of free speech tend to rest on unstated and undefended premises about the desirability of an uninhibited and unrestrained flow of words. But in actual life, we know full well that human speech always transpires in the context of concrete relationships. This means that we never value speech *as such*. We instead prize the good of the relationships within which speech is embedded. We do not honor the speech of friends; we honor friendship. The eloquence and advice of lawyers are not important except insofar as they advance the rule of law. Classroom discussion is not significant in itself; it is only valuable insofar as it facilitates education. And so on. All such judgments are substantive and contextual.

express ourselves. A more complicated analysis attaches to third-party contexts. If I evaluate the speech of my friend, I might conclude that she was mistaken to express herself, but I might also conclude that her speech does not deserve condemnation. To condemn my friend's speech would signify that I regard her speech as inconsistent with the practice of friendship itself. In third-party contexts, punitive reactions characteristically define and police the boundaries of the social practices within which speech transpires. For a discussion, see footnotes 12–15. The boundaries of social practices are typically wide enough to tolerate much speech that is merely mistaken.

I.

When we speak about freedom of speech in the abstract, however, we tend to lose touch with this basic insight. Like the *New York Times* editorial, we almost imagine that the more we speak, the more we vindicate the principle of freedom of speech. This is a confusion that nicely illustrates the deceptive allure of abstraction. If we think only of speech, and if we lose track of the context of speech, it sometimes seems as if speech itself produces many important goods. It is often said, for example, that freedom of speech is required to increase our knowledge of the world.

In the context of American legal thought, this understanding of freedom of speech originated in the pathbreaking 1919 dissent of Oliver Wendell Holmes, Jr., in *Abrams v. United States*, which virtually invented modern First Amendment doctrine.⁶ Holmes argued:

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 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, 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. It is an experiment, as all life is an experiment.⁷

The echoes of Holmes can be heard in the *New York Times* editorial, which asserts that “Freedom of speech and expression is vital to human beings’ search for truth and knowledge about our world.” Yet if we think carefully about this assertion, we can see that it is only a half-truth that obscures how we actually talk when we seek to add to the store of human knowledge. When we aspire to new knowledge, we do not merely speak our minds. We speak in ways guided by the norms of persuasive intellectual discourse.

In modern society, universities are institutions that increase the scope of human knowledge. Professional scholars do not believe that more speech is necessarily better. They do not simply say whatever is on their minds. Instead, they try to express themselves in ways that comply with the best possible applicable disciplinary standards. In modern society, contributions to knowledge do not depend

⁶ *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Oliver Wendell Holmes, Jr., dissenting).

⁷ *Ibid.*, 630. On Holmes’s dissent, see Robert C. Post, *Writing the Dissent in Abrams*, 51 SETON HALL L. REV. 21 (2021).

upon popular acclaim. Speech can be fashionable on the internet and yet be worthless as scholarship. Influencers do not produce knowledge. The best test of truth, it turns out, is not the marketplace, but instead the judgment of those trained to assess intellectual quality. And intellectual quality is inseparable from compliance with relevant disciplinary standards. Of course, those who seek to acquire new knowledge must be free to criticize received truths. They must be free to speak from their beliefs. But the value of this speech depends upon whether it meets accepted scholarly standards. Those who merely invoke a free speech principle, who are determined to express their minds without regard to the criteria by which the merit of scholarship is evaluated, do not contribute to knowledge. They are simply cranks.

It follows that an abstract principle of freedom of speech will not tell us much about how to advance knowledge. Any such principle will always miss half the equation. It will ignore the self-restraint required by norms of professional scholarship. That is why “academic freedom” does not rest upon any simple principle of freedom of speech. The boundaries of academic freedom are always determined by reference to the baseline of professional competence.⁸

An abstract free speech principle is misguided because it obscures these boundaries. The point becomes plainly visible when the free speech principle is defended by those who celebrate the value of personal autonomy. We are often told that free speech is necessary for authentic self-fulfillment.⁹ The influence of this approach is visible in the *New York Times* editorial when it argues that “human beings cannot flourish without the confidence to take risks, pursue ideas and express thoughts that others might reject.”¹⁰

A healthy society will no doubt encourage its members to be creative, to take risks, to pursue their own ideas. And the achievement of these values surely requires a certain freedom of expression. But it is a non sequitur to conclude that these values require for their vindication an abstract principle of free speech. All societies encourage individual autonomy and initiative up to the point that it contributes to

⁸ On academic freedom and its relationship to freedom of speech, see Robert Post, *Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State* (New Haven, Conn.: Yale University Press, 2012); and Matthew W. Finkin and Robert C. Post, *For the Common Good: Principles of American Academic Freedom* (New Haven, Conn.: Yale University Press, 2009).

⁹ For example, see Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

¹⁰ New York Times Editorial Board, “America Has a Free Speech Problem.”

the success of relevant social practices, and they discourage individual autonomy to the extent that it undermines these practices.

Consider, for example, the profession of scholarship. We encourage scholars to take the initiative to express their own individual insights. But when a scholar's autonomy prompts him to speak in ways that are incompetent, the scholar is sanctioned. He may not receive a job or tenure; his manuscripts will not be accepted for publication by scholarly journals; his grant proposals will be rejected. These sanctions are not a bug of academic freedom; they are a feature. Without them, academics would be merely *prima donnas*, divas captivated by the sounds of their own voices.

Professional speech follows an analogous logic. Doctors are encouraged to find authentic expression in their work. But any doctor whose autonomy leads her to the incompetent practice of medicine will be sanctioned. It does not matter that a doctor may sincerely believe, and in fact stake her personal identity, on the belief that hydroxychloroquine cures COVID-19.¹¹ No doctor's need for personal autonomy will ever trump her responsibility to competently practice medicine.

This point can be generalized. All social practices are defined by boundaries that distinguish unacceptable from acceptable behavior.¹² These boundaries apply to speech as well as to action. To privilege the individual autonomy of speakers and to insulate their communication from the enforcement of these boundaries is to undermine the practices. The speech of the *New York Times* editorial board illustrates the point. However much it might celebrate freedom of speech, I am confident that the *Times* editorial board does not itself feel free to publish whatever comes into its mind. The board instead carefully curates its own speech so as to maintain credibility with its readers. It disciplines its own autonomy so as to participate competently in the social practices that endow it with persuasive authority.

¹¹ Dickens Olewe, "Stella Immanuel—The Doctor Behind Unproven Coronavirus Cure Claim," BBC News, July 29, 2020, <https://www.bbc.com/news/world-africa-53579773>.

¹² Peter Winch, *The Idea of a Social Science and Its Relation to Philosophy* (London: Routledge, 2008).

Consider what it means to treat others with respect.¹³ We accord “dignity” to those around us by complying with relevant norms.¹⁴ These norms apply to speech as well as to action. I demean the dignity of those around me when I speak to them in abusive or outrageous ways. We ordinarily enforce these norms through social disapproval.¹⁵ I can expect to arouse indignation and condemnation if I spew shocking and shameful insults. All well-socialized persons are cognizant of the boundaries that distinguish acceptable from unacceptable forms of speech. It is therefore puzzling why the *New York Times* editorial board might complain that we are losing the “fundamental right” of speaking our minds “without fear of being shamed or shunned.”¹⁶ No such right exists in any well-ordered society. If I walk into a room shouting outrageous slurs, I should expect to be shamed and shunned. Only a demoralized community would passively accept irresponsibly hurtful speech.¹⁷

It is possible, however, that the *New York Times* editorial board is concerned less with the *existence* of a boundary between acceptable and unacceptable speech than it is with the *location* of that boundary. Perhaps the board members are worried that we are being shamed for the wrong kind of speech. Or perhaps they are alarmed that the distinction between appropriate and inappropriate speech has become so confused and ambiguous that we have become fearful of saying anything at all. These are of course serious matters that deserve careful attention.

¹³ On the nature and enactment of these norms, see Erving Goffman, *Interaction Ritual: Essays on Face-to-Face Behavior* (Chicago: Aldine Publishing Co., 1967).

¹⁴ Charles Taylor refers to “dignity” as rooted in “our sense of ourselves as commanding (attitudinal) respect.” Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, Mass.: Harvard University Press, 1989), 15. See also Joel Feinberg, “The Nature and Value of Rights,” *The Journal of Value Inquiry* 4 (4) (1970): 243, 252.

¹⁵ We use law to sanction violations of the most important of these norms, which I have elsewhere called “civility rules.” See Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989); and Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986).

¹⁶ New York Times Editorial Board, “America Has a Free Speech Problem.”

¹⁷ The argument in text is distinct from that made in Thomas Healy, *Social Sanctions on Speech*, 2 J. FREE SPEECH L. 21 (2022), which is that social sanctions are themselves a form of speech that deserve protection. Like much modern scholarship, Healy takes as a given the existence of an abstract principle of free speech against which the constructive contributions of social sanctions are to be weighed.

The norms by which any society distinguishes acceptable from unacceptable speech typically evolve in time, and, in moments of extreme polarization, can become subject to intense and unresolved social conflict.¹⁸ The *Times* editorial suggests how deeply unsettling such controversies can be. But this is not ultimately a point about freedom of speech. It is instead a point about the need for social relations to be governed by clearer or more defensible substantive principles of respect than those that now seem to be paralyzing our public discourse.

II.

The thrust of my argument so far is that, in most instances, an abstract principle of freedom of speech does little work.¹⁹ We balance self-restraint against the need for candor by reference to the goods of the social practice in which we happen at any given moment to be engaged. It is plainly important to discuss the nature of these goods, as well as the many ways in which freer speech will advance or undermine these goods. But any such discussion is not ultimately about free speech as such. It is instead about the social practices that create most of the social goods that we value in our lives.²⁰ The difficulty with an abstract free speech principle is that it purports to set the value of speech, as well as the goods obtainable by speech, independently of the social context of speech.

Does it follow that a century of obsession with freedom of speech has been simply a delusion? I think not. There is one social practice that we have not yet discussed and that is of immense relevance to how we understand freedom of speech. The nature of that practice is indicated by the fact that the *New York Times*

¹⁸ Robert C. Post, *Law and Cultural Conflict*, 78 CHICAGO-KENT L. REV. 485 (2003); and Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 475–76 (1997).

¹⁹ It might be possible to conceptualize the free speech principle as a simple heuristic designed to remind us of the value of speech in any given situation, a value we might perhaps otherwise be inclined to ignore or underestimate due to a persistent bias in favor of the status quo. I should stress that the free speech principle is not usually understood in this way; it is instead conceived, as it is in the *New York Times* editorial, as a substantive standard that determines when speech should and should not be tolerated. But if the free speech principle were advanced as a simple heuristic, its value would depend upon whether it focuses our attention on a constructive framework for reaching the best possible conclusions. The subject of this essay is the unnoticed tendency of the free speech principle to mislead us.

²⁰ Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame, Ind.: University of Notre Dame Press, 1981).

editorial is especially concerned to protect the right to speak one's mind *in public*.²¹ This seemingly innocuous qualification is of great importance. Although the *Times* editorial is systematically blurry on the point, those who invoke the principle of freedom of speech frequently have in mind a very specific social practice: the freedom to engage in public discourse.

Although the concept of public speech goes back to the ancient classical world of Greece and Rome, it acquired a different character after the invention of printing. The printing press gave rise to an entirely new form of social organization: the "public sphere."²² What we now call the "public"²³ emerged within the public sphere. It was created by "the circulation of texts among strangers who become, by virtue of their reflexively circulating discourse, a social entity."²⁴

The public sphere, and its corresponding "public," are maintained by an infrastructure of media, like newspapers or museums, that connect strangers to each other. To speak "in public" is to speak to those one doesn't otherwise know, but whom one expects to reach through the media that underwrite the public sphere. In our own time, social media and the internet have created a vast and comprehensive virtual public sphere that is intimately connected to our everyday lives.²⁵

What we call "public opinion" arises within the public sphere. Public opinion has in turn facilitated new forms of political governance. For the past century, it has been common to observe that democracy is best understood as "government by

²¹ New York Times Editorial Board, "America Has a Free Speech Problem."

²² On the public sphere, see Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger (Cambridge, Mass.: The MIT Press, 1989); and Charles Taylor, *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press, 1995), 257–287.

²³ John B. Thompson, *The Media and Modernity: A Social Theory of the Media* (Redwood City, Calif.: Stanford University Press, 1995), 126.

²⁴ Michael Warner, *Publics and Counterpublics* (New York: Zone Books, 2002), 11–12. Warner adds that "one of the most striking features of publics, in the modern public sphere, is that they can in some contexts acquire agency. . . . They are said to rise up, to speak, to reject false promises, to demand answers, to change sovereigns, to support troops, to give mandates for change, to be satisfied, to scrutinize public conduct, to take role models, to deride counterfeits." *Ibid.*, 122–123.

²⁵ See Robert Post, *Data Privacy and Dignitary Privacy: Google Spain, The Right to be Forgotten, and the Construction of the Public Sphere*, 67 *DUKE L.J.* 981 (2018).

public opinion.”²⁶ The public, in the words of sociologist Michael Schudson, is “the fiction that brings self-government to life.”²⁷

Public discourse is the medium through which modern societies create a public opinion capable of controlling state institutions. If the seventeenth century witnessed the creation of modern states powerful enough to be charged with the elemental task of imposing social peace, those states had by the eighteenth century become so successful that nations struggled to ensure their accountability to civil society.²⁸ During the age of constitutionalism, the ambition was to find a way to use politics to cabin state power.

As Hannah Arendt has taught us, politics shifts “the emphasis . . . from action to speech, and to speech as a means of persuasion”; “to be political” is to reach decisions “through words and persuasion and not through force and violence.”²⁹ The upshot is that for modern societies, the public sphere has become a distinctive social organization, oriented around forms of communication that we carefully distinguish from action. The hope is that the public sphere will produce a public opinion capable of exercising political control over state power.

Nothing like this social practice has ever existed before in history. Modern theories of freedom of speech are basically efforts to understand the principles that ought to govern this new and enormously important social practice. The basic structure of America’s First Amendment doctrine can best be understood as an effort to work out rules for restraining state control over public discourse in a nation in which “authority . . . is to be controlled by public opinion, not public opinion by

²⁶ Carl Schmitt, *Constitutional Theory*, ed. and trans. Jeffrey Seitzer (Durham, N.C.: Duke University Press, 2008), 275. Democracy is “the organized sway of public opinion.” Charles Horton Cooley, *Social Organization: A Study of the Larger Mind* (New York: Charles Scribner’s Sons, 1909), 118. For an account of the emergence of this concept of democracy, see Robert C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (Cambridge, Mass.: Harvard University Press, 2014).

²⁷ Michael Schudson, “Why Conversation Is Not the Soul of Democracy,” *Critical Studies in Media Communication* 14 (4) (1997): 297, 304–305. On the relationship between the development of printing and the creation of the nation-state, see Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso Books, 1991).

²⁸ The great seventeenth-century theorist Hobbes argued that the essential task of the state was to preserve peace and prevent what otherwise would be a war of all against all.

²⁹ Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), 26.

authority.”³⁰ At the heart of these rules is the strange and counterintuitive separation of speech from action that Arendt theorized must characterize all political participation.³¹

The tug of the political is plainly apparent in the *New York Times* editorial. The *Times* argues that

freedom of speech is the bedrock of democratic self-government. . . . When speech is stifled or when dissenters are shut out of public discourse, a society loses its ability to resolve conflict, and it faces the risk of political violence. . . . Every day, in communities across the country, Americans must speak to one another freely to refine and improve the elements of our social contract: What do we owe the most vulnerable in our neighborhoods? What conduct should we expect from public servants? . . . When public discourse in America is narrowed, it becomes harder to answer these and the many other urgent questions we face as a society.³²

These are powerful arguments. The essential point, however, is that they are not arguments about freedom of speech. They are instead arguments about how a robust and free public discourse is necessary to legitimate the American state. The basic thought is that those excluded from public discourse have little incentive to abide by the rules of the political game.³³ Toleration of widely divergent views and forms of address within public discourse is necessary if the American state is to maintain legitimacy throughout its wildly diverse population. This insight lies at the root of much contemporary First Amendment doctrine.³⁴

It is important to emphasize that arguments usually proposed for freedom of speech in fact apply much more naturally and convincingly to public discourse. Although the marketplace of ideas may not produce knowledge, it does accurately

³⁰ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1943). See Post, *Citizens Divided*; and Robert C. Post, “The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University,” in *The Free Speech Century*, ed. Lee C. Bollinger and Geoffrey R. Stone (Oxford: Oxford University Press, 2019).

³¹ Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990).

³² New York Times Editorial Board, “America Has a Free Speech Problem.”

³³ Robert C. Post, “The Legality and Politics of Hatred,” in *Hate, Politics, Law: Critical Perspectives on Combating Hate*, ed. Thomas Brudholm and Birgitte Schepelern Johansen (Oxford: Oxford University Press, 2018).

³⁴ Post, *supra* note 31.

describe the endless debate out of which public opinion continuously emerges.³⁵ Although the value of individual autonomy is not persuasive with regard to speech *qua* speech, it does carry traction within public discourse. The whole point of public discourse is to express the independent and voluntary views of the demos. Within public discourse, the state must treat citizens as self-determining and sovereign.

What are characterized as theories of freedom of speech, in other words, are far more convincing as theories of public discourse. Yet even in this context, such theories can be highly misleading. They occlude the fact that public discourse is itself a practice that we have adopted in order to govern ourselves through communication in the public sphere. By focusing abstractly on speech instead of on the concrete purpose of this practice, our theories of free speech encourage us to forget that the fundamental point of public discourse is the political legitimation of the state. Our public discourse is successful when it produces a healthy public opinion capable of making state power answerable to politics.³⁶ Our public discourse is not successful merely because every speaker expresses his thoughts in an uninhibited way. Standard theories of free speech mistake means for ends.

III.

Although as a general matter greater participation in public discourse is more desirable than less participation, there may be circumstances in which certain kinds of speech can hinder, rather than advance, the successful formation of healthy public opinion.³⁷ We cannot begin to identify and analyze these circumstances until we first grasp that public discourse is not a mere collection of individual speech acts. It is a purposive social practice whose object is to produce a healthy politics. Suppose, for example, that the speech of the rich has come to so dominate public discussion during elections that people no longer believe that *their* opinion is fairly represented. In such circumstances, the function of public discourse will be undermined. But we will not recognize this problem if we focus only on the freedom of individual

³⁵ Post, *Citizens Divided*.

³⁶ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Mass.: The MIT Press, 1996).

³⁷ These circumstances are analyzed in Robert C. Post, "Between Democracy and Community: The Legal Constitution of Social Form," in *Democratic Community: NOMOS XXXV*, ed. John W. Chapman and Ian Shapiro (New York: New York University Press, 1993), 163.

speakers. We will lose sight of the systemic function of the practice of public discourse.³⁸

The appropriate balance between freedom and restraint must always be determined by the social practice within which communication is embedded. Public discourse is no exception to this generalization. At the present time, American courts have lost track of this basic insight. They have developed strict trans-substantive First Amendment doctrines that restrict speech regulation regardless of its context. They have even begun to apply to ordinary commercial and professional transactions First Amendment doctrines designed to protect public discourse. It should be obvious, however, that political discussion merits different forms of protection than does, for example, the professional speech of a doctor.³⁹ Our courts have lost their way because their focus has been distracted by what Justice David Souter once called “speech as such.”⁴⁰

One of the very great dangers hanging over the future of free speech in the United States is the present tendency of the Supreme Court to extend to all speech the protections properly due only to public discourse, and thus to use the First Amendment to impose a libertarian, deregulatory agenda on ordinary social and economic regulations.⁴¹ In the long run, the only sound defense against such abuse is to conceptualize the value of free speech squarely in terms of the discrete social practices that speech constitutes.

Within the context of public discourse, Americans have been confident for more than a century that merely by participating in public debate we could some-

³⁸ The failure to understand this point is the essential flaw in the Court’s notorious opinion in *Citizens United v. FEC*, 558 U.S. 310 (2010). For a discussion, see Post, *Citizens Divided*.

³⁹ Our current Supreme Court, with its aggressively libertarian agenda, seems perversely unable to understand this seemingly obvious point. See *National Institute of Family & Life Advocates* [“NIFLA”] *v. Becerra*, 138 S. Ct. 2361 (2018). See also Robert C. Post, *NIFLA and the Construction of Compelled Speech Doctrine*, 97 IND. L.J. 1071 (2022). As a federal court recently, candidly, and naively affirmed when analyzing restrictions on the professional speech of physicians: “Simply put, speech is speech, and it must be analyzed as such for the purposes of the First Amendment.” *King v. Governor of the State of New Jersey*, 767 F.3d 216, 229 (3d Cir. 2014).

⁴⁰ *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 478 (1997) (David Souter, dissenting).

⁴¹ See Post, *supra* note 39; and Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133.

how overcome sharp differences of opinion and produce a democratically legitimate political will. The remedy for disaffection has been more participation, more engagement, and more speech. By conceptualizing our current crisis as one of speech, the *Times* editorial doubles down on this traditional understanding. The problem can be solved, it intimates, if only Americans could more freely speak their minds.

An entirely different perspective on the crisis emerges, however, if public discourse is seen as a distinct social practice designed to produce a democratic and healthy politics. The problem of radical polarization, which has become so deep and so rancid that Americans now no longer seem to inhabit the same factual or normative universe, is not a simple question of speech. It is the corrosive dissolution of the political commitments by which Americans have forged themselves into a single nation. If we conceptualize public discourse as a social practice, we can see that its failures stem from this fundamental problem. The clear implication is that curing public discourse is not just a matter of speaking more freely.

Politics is possible only when diverse persons agree to be bound by a common fate.⁴² Lacking that fundamental commitment, politics can easily slide into an existential struggle for survival that is the equivalent of war.⁴³ We can too easily come to imagine our opponents as enemies whose victory would mean the collapse of the nation.⁴⁴ In such circumstances, political debate can no longer produce a healthy and legitimate democratic will. However inclusive we may make our public discourse, however tolerant of the infinite realms of potential diversity we may become, the social practice of public discourse will fail to achieve its purpose so long as we no longer experience ourselves as tied to a common destiny. Politics always

⁴² For a discussion, see Robert C. Post, *Theorizing Disagreement: Reconceiving the Relationship between Law and Politics*, 98 CALIF. L. REV. 1319 (2010).

⁴³ Chantal Mouffe, *On the Political* (London: Routledge, 2005).

⁴⁴ For a perfect example, see Michael Anton, "The Flight 93 Election," *The Claremont Review of Books*, September 5, 2016, <https://claremontreviewofbooks.com/digital/the-flight-93-election>. Anton's essay begins with the sentence: "2016 is the Flight 93 election: charge the cockpit or you die." The essay embodies Nazi political theorist Carl Schmitt's notorious concept of politics as an existential battle between friends and enemies. Schmitt's concept of politics may accurately describe the orientation of the Nazi Party, but it is inconsistent with the practice of politics in any modern, peaceful democracy. See Post, *Theorizing Disagreement*, *supra* note 42.

requires that participants remain faithful to some shared ideal that is larger and more important than any particular issue that may separate them.

It follows that those who care about American democracy ought to think, first and foremost, about how we can revive our experience of a shared fate. This is a political challenge, not a problem of free speech. Its solution will require political interventions of a kind that we have not yet begun to imagine. The editorial board at *The New York Times* is undoubtedly correct to fear that we cannot generate the political will to support these interventions if we cannot speak to each other in ways that authentically communicate our priorities and values. But the board confuses a symptom with a cause.

CONCLUSION

We cannot now speak to each other because something has already gone violently wrong with our political community, which is to say with our antecedent commitments to a common political destiny. To conceptualize this problem as one of free speech is to imagine that the cure is simply to encourage more speech. It is to fantasize that the ties that bind us together will somehow be refreshed merely because we speak to each other more freely. But this is an illusion, a cruel mirage cast by the allure of a free speech principle that has somehow floated free from the social practices in which it should be embedded.

Now more than ever we need to understand why we have come to distrust each other, to mistrust political authority, and to imagine ourselves as tribal groups at war with one another. More speech of the wrong kind can exacerbate, not heal, these terrible divisions. The underlying issue is not our speech, but our politics. So long as we insist on allegiance to a mythical free speech principle that exists immaculately distinct from concrete social practices, we shall look for solutions in all the wrong places.

Our country is now so fragile, our democratic future so precarious, that every such misstep is fraught with danger. It is imperative that we arrive at a clear and accurate diagnosis of the disease that each day further corrodes our precious polity. It is time to open our eyes.