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a clear-headed guide through difficult terrain."—*Washington Post Book World*

FREE
SPEECH
IN AN
OPEN
SOCIETY



RODNEY A. SMOLLA

C H A P T E R 1

The Case for an Open Culture

And 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 worse, in a free and open encounter?

JOHN MILTON

Areopagitica (1644)

*Tell all the truth but tell it slant,
Success in circuit lies,
Too bright for our infirm delight
The truth's superb surprise;
As lightning to the children eased
With explanation kind,
The truth must dazzle gradually
Or every man be blind.*

EMILY DICKINSON

(1868)

Freedom of speech is a human yearning—inistent, persistent, and universal. Speech may be uplifting, enlightening, and profound, but it is often degrading, redundant, and trivial. Speech may be abstract and theoretical, a near cousin to thought, but it is often concrete and immediate, filled with calls to action, intertwined with conduct. Speech may be rational, contemplative, orderly, organized, and soft, but it is often emotional, raucous, chaotic, untidy, and loud. Speech may be soothing and comfortable, but it is often vexatious and noisome. Speech may confirm and affirm; it may be patriotic and supportive of prevailing values and order; but it may also be challenging, threatening, and seditious, perhaps even treasonous.

This is a propitious time to ponder the future of freedom of speech in an open culture. We are challenged by events around the world to consider

what is meant by freedom of speech in the emerging international community. We are challenged by breathtaking developments in communications technology, developments as technically revolutionary as the printing press, developments that promise to alter dramatically the ways in which we gather, store, organize, and communicate information. And we are challenged by the great questions of philosophy, as we ponder when it is appropriate for the state to control public discourse for the perceived greater good.

A nation committed to an open culture will defend human expression and conscience in all its wonderful variety, protecting freedom of speech, freedom of the press, freedom of religion, freedom of association, freedom of assembly, and freedom of peaceful mass protest. These freedoms will be extended not only to political discourse, but to the infinite range of artistic, scientific, religious, and philosophical inquiries that capture and cajole the human imagination.¹

A society that wishes to adopt openness as a value of overarching significance will not merely allow citizens a wide range of individual expressive freedom, but will go one step further and actually open up the deliberative processes of government itself to the sunlight of public scrutiny. In a truly open culture the normal rule is that government does not conduct the business of the people behind closed doors. Legislative, administrative, and judicial proceedings should, as a matter of routine, be open to the public.²

Governments in all places at all times have succumbed to the impulse to exert control over speech and conscience. Censorship is a social instinct. Neither an open culture nor an open government comes easily. It is in the nature of government to be jealous of secrets and confidences: it is in the natural reflex to penalize speech perceived as inimical to national security, social order, or public civility. Recent examples of the impulse to suppress speech perceived as dangerous or offensive abound: the American military imposed substantial restrictions on press coverage of the Persian Gulf War, Cincinnati attempted to prosecute its art museum for exhibiting the homoerotic photographs of artist Robert Mapplethorpe, in Florida, criminal obscenity charges were brought against the rap group 2 Live Crew, and a record store owner was prosecuted for selling one of the group's recordings.³ In Congress, the National Endowment for the Arts was under siege, with intense efforts being made to place restrictions on its artistic freedom, by prohibiting it from underwriting projects deemed offensive; and in the United States Supreme Court, freedom of speech found itself arrayed against the most formidable and improbable of enemies, the American flag.⁴

A society that wishes to take openness seriously as a value must therefore devise rules that are deliberately tilted in favor of openness in order

to counteract the inherent proclivity of governments to engage in control, censorship, and secrecy.

The case for an open culture begins with the case for elevated protection for freedom of speech.⁵ It is customary to place the initial "burden of persuasion" on speech. Since speech is contending for uniquely favorable treatment, it seems fair to force speech to justify its distinctive importance. In the United States, however, the text of the First Amendment, which declares unequivocally that Congress "shall make no law" abridging freedom of speech, arguably places the burden on government to justify its encroachments on free expression, rather than placing the burden on speech to justify itself. At its most general level, freedom of speech in the United States needs no functional theories like "the marketplace of ideas" or "the self-fulfillment of the speaker" to support it, but rather is justified by the elegantly simple rationale that what speakers say or journalists print should be decided by speakers and journalists, and not by governments. As the Supreme Court put the matter in *Miami Herald Publishing Co. v. Tornillo*,⁶ the "choice of material to go into a newspaper, and the decisions made as to public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." It has yet to be demonstrated, the Court continued, "how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." The initial question is thus not whether any particular expression is appropriate, but *who decides* what is appropriate.⁶ In an open culture, that decision presumptively rests with speakers, not government officials, high or petty.⁷

Speech need not be afraid to take up the burden of persuasion, however, for the arguments in favor of robust protection for free expression are numerous and compelling.⁸ Many classic rationales have been advanced over the years to support the "preferred position" of speech in the hierarchy of social values.⁹ These rationales are sometimes put forward as if they were mutually exclusive. By singling out only one of them as the justification for freedom of speech, the theorist tends to build a model of free speech limited to advancing that one rationale. If, for example, one sees "democratic self-governance" as the only explanation for elevating free speech above other social values, then one will tend to treat the First Amendment as guaranteeing freedom of speech only when the speech relates to politics.

There is no logical reason, however, why the preferred position of freedom of speech might not be buttressed by multiple rationales.¹⁰ Acceptance of one rationale need not bump another from the list, as if this were First Amendment musical chairs.¹¹ As more justifications for the

transcendent importance of free expression are included in the mix, a society will embrace principles protecting a richer range of expression.¹²

THE MARKETPLACE THEORY

We may start with the rationale that humankind's search for truth is best advanced by a free trade in ideas.¹³ In the words of Oliver Wendell Holmes, "the best test of truth is the power of the thought to get itself accepted in the competition of the market."¹⁴ The "marketplace of ideas" is perhaps the most powerful metaphor in the free speech tradition.¹⁵

The poetic power of the marketplace image, however, is tempered by experience. The marketplace theory, like all other theories of free speech, must be subjected to rigorous testing—not even the marketplace metaphor should escape the marketplace metaphor. When subjected to severe cross-examination, no single justification for freedom of speech is likely to come through perfectly unscathed, and the marketplace rationale is no exception.¹⁶

The marketplace of ideas is a marketplace, and like all markets, it may experience positive and negative cycles. The marketplace image is grounded in *laissez-faire* economic theory.¹⁷ Even if we are to accept the apparent lesson of *perestroika* that on the whole, free economic markets perform more efficiently than controlled economies, almost all governments utilize some controls on markets to correct for excesses and imperfections that lead to violent economic swings. The theoretical purity of the models in economic textbooks is not matched by the actual performance of markets in the mundane commercial world. Economists widely concede the necessity of using governmental regulation to trim the freedom of markets at the edges, correcting for their deficiencies in the real world of commerce.¹⁸

The marketplace of ideas, no less than the marketplace of commerce, will inevitably be biased in favor of those with the resources to ply their wares. The ideas of the wealthy and powerful will have greater access to the market than the ideas of the poor and disenfranchised.¹⁹ The billions of dollars spent each year by advertisers flood the intellectual marketplace with speech calculated to influence consumers.²⁰

The marketplace of ideas rationale is also ostensibly contradicted by our everyday experience. There are as many shoddy ideas circulating as there are shoddy products and worthless junk bonds. The marketplace does not seem to produce truth, not at least with any consistency, and so we are left with the nagging suspicion that good ideas have precious little capacity to drive out bad ones.²¹

The hope that the marketplace will lead to truth is further eroded by the

infiltration of emotional distortions into the realm of "ideas." Irrational appeals to hate and prejudice have, throughout the experience of man, often overwhelmed thoughtful tolerance and understanding, leading to orgies of violence and destruction.²² Nazis and the Ku Klux Klan continue to parade in America, and racial separatism in South Africa, though slowly giving ground under heavy pressure, remains as a still-pervasive reality. The belief in racial and ethnic superiority is still in wide currency throughout the world; it is apparent in ethnic strife in the Soviet republics and in the tense racial politics of New York City and Washington, D.C. Institutions and individuals across the globe continue to espouse and practice the domination and exploitation of women. Even if we accept the marketplace of ideas model, therefore, it remains to be decided what should count as an "idea." Should the marketplace be open to appeals to hate that shortcut the mind and speak from heart to heart, or should it be limited to speech that appeals to reason?

Despite these infirmities and uncertainties, the marketplace rationale has much to commend it.²³ It is possible to be both a realist and an optimist. That combination, indeed, may be the most important legacy of the framers of the First Amendment. The marketplace metaphor thus appeals to our optimism that good will finally conquer evil. As long as this optimism is not blind naïveté but is rather a motive force that encourages us to keep the faith in the long view of history, it can be a self-fulfilling prophecy. Just as we often have nothing to fear but fear, hope is often our best hope. Humanity may be fallible and truth illusive, but the hope of humanity lies in its faith in progress. The marketplace metaphor reminds us to take the long view. Truth has a stubborn persistence. Persecution may eliminate all visible traces of a truth, like the scorched earth after a napalm bombing. Yet truth somehow comes back, because its roots are in the soil or its seeds in the air. Cut down again and again, truth will still not be stamped out; it gets rediscovered and rejuvenated, until it finally flourishes.

Our hope that truth will prevail should be combined with pragmatic measures to give it its best fighting chance. If anything, our doubts about the purity of the marketplace should lead us to be more protective of free speech, not less, out of concern for its vulnerability. As John Locke wrote in 1689 in *A Letter Concerning Toleration*, truth "is not taught by laws, nor has she any need of force to procure her entrance into the minds of men. Errors indeed prevail by the assistance of foreign and borrowed succors. But if truth makes not her way into the understanding by her own light, she will be the weaker for any borrowed force violence can add to her."²⁴

The marketplace theory has other reservoirs of strength. The marketplace of ideas metaphor, properly understood, is not linked to self-righteous certitude that what *actually* emerges from the market is inviolable "truth." If by truth were meant certainty, the metaphor could not rest

quely on the modern mind.²⁵ The puzzle is nicely captured in the intellectual personality of Oliver Wendell Holmes, who was so fond of the marketplace, but did not believe in truth. "Certainty is generally illusion," Holmes admonished, "and repose is not the destiny of man."²⁶ Truth for Holmes, whether in politics or law, was always provisional. "Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place."²⁷ And so for Holmes the benefit of the marketplace was not the end but the quest, not the market's capacity to arrive at final and ultimate truth but rather the integrity of the process. To return to his famous phrase, but rather the market was its capacity to provide "the best test of truth."

There is, indeed, a curiously inescapable irony to the marketplace image. We can never empirically test the proposition that truth will triumph over error, because that would itself require some objective measure of what ideas are true and what ideas are false—a measurement that the marketplace theory itself forbids.²⁸ The leap of faith thus required by the marketplace image, however, is not its weakness, but its deepest strength, for it spurs us to accept the noblest challenge of the life of the mind: never to stop searching. As John Stuart Mill eloquently instructed, even when we are relatively confident in the truth of received opinion, "If it is not fully, frequently, and fearlessly discussed, it will be held as dead dogma, not a living truth."²⁹ The marketplace metaphor is thus specially relevant in the modern world, which grows suspicious and weary of eternal verities in the wisdom that the "truths" of science, art, or politics are subject to constant revision. The truth concerning the ultimate forces of the universe: mutate from Euclid to Newton to Einstein to Stephen J. Hawking, as the seeming absolutes of geometry give way to non-Euclidean planes and curves, time succumbs to the speed of light, matter to antimatter.³⁰ When conflicting dogmas offer themselves to the market as truth, the modern mind is most comfortable subjecting each to the intellectual acid bath of adversarial contest, for our intuition and experience reveal that truth may lie somewhere between them. And so the concrete gray truth of the Berlin Wall eventually crumbles, as Germans look for a more vibrant truth somewhere between Karl Marx and Adam Smith.

While the marketplace of ideas is far from perfect, in the long run it is overwhelmingly superior to a system of regulated expression, and is by itself enough to make the case for a preferred position in an open culture. When combined with other rationales for free speech, the case is proved beyond a reasonable doubt.

FREE EXPRESSION AND HUMAN DIGNITY

The marketplace theory justifies free speech as a means to an end. But free speech is also an end itself, an end intimately intertwined with human autonomy and dignity. In the words of Justice Thurgood Marshall, "The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression."³¹ Free speech is thus specially valuable for reasons that have nothing to do with the collective search for truth or the processes of self-government, or for any other conceptualization of the common good. It is a right defiantly, robustly, and irreverently to speak one's mind just because it is *one's mind*.³² Even when the speaker has no realistic hope that the audience will be persuaded to his or her viewpoint, even when no plausible case can be made that the search for truth will be advanced, freedom to speak without restraint provides the speaker with an inner satisfaction and realization of self-identity essential to individual fulfillment.³³

The human dignity rationale, however, may appear to have an almost unseemly ring of hedonism. Speakers claim protection for the sheer pleasure of speaking. To ground freedom of speech in self-fulfillment appears to indulge selfish gratification. Society, after all, frequently places restrictions on activities through which people derive pleasure. Individuals may seek pleasure or diversion by taking cocaine or having sex with a prostitute, but those two activities have not, traditionally, been deemed outside the legitimate regulation of the state. If protection of speech is linked to the pursuit of pleasure, the argument goes, the state should be permitted to regulate speech in the same manner as it regulates other pleasure-seeking activity. Judge Robert Bork takes this view.³⁴ It leads him to the position that only speech connected to self-governance is deserving of special First Amendment protection, because only such political speech can be distinguished as serving ends over and above any other form of self-gratification.

There are two responses to this argument. The first is a broad libertarian attack on the underlying premise that government may control most activities of human life if it can simply point to reasonable grounds for doing so. A libertarian would argue that the presumption should be exactly the opposite: government may normally not intervene in an individual's affairs. Interference should require more than a mere determination by majority vote that intervention is "reasonable." The government must instead leave people alone unless it can demonstrate compelling justifications for its intrusion, as when necessary to prevent one individual from harming another.³⁵ This means that many pleasure-seeking activities are

beyond the legitimate jurisdiction of the state altogether, because they harm only the individual who undertakes them.

For the true libertarian the "harm requirement" may not be satisfied merely by the outrage or moral opprobrium that a majority of the populace attaches to the activity. Crimes must have victims—victims other than the perpetrator—and the victimization must be palpable, something beyond generalized disgust or disquiet over another's conduct. In a society organized under strict libertarian principles, speech is protected from government interference for the same reasons that many other forms of activity are protected: because government is unable to point to any palpable harm caused by the activity.³⁶

One need not adopt the complete libertarian platform, however, to defeat the position that the self-fulfillment that comes from the exercise of free expression is mere self-indulgence, and thus subject to any "reasonable" restraints that may be approved by a majority. A second, more modest argument treats the self-realization that comes from speech as qualitatively different from other forms of pleasure-seeking. A persuasive case can be made that speech is different in kind from most other forms of self-gratification, and therefore deserving of special solicitude.

We may start with some quibbles on terms. To articulate the theory in terms of "pleasure" and "gratification" is to trivialize it. The term "self-fulfillment" connotes much more than hedonistic pleasure and gratification. The words "pleasure" and "gratification" emphasize those aspects of life that human beings and animals have in common; the term "self-fulfillment" emphasizes those aspects of human life that distinguish human beings from other species.

The fulfillment that comes from speech is bonded to man's capacity to think, imagine, and create. Conscience and consciousness are the sacred precincts of mind and soul. The linkage of speech to thought, to man's central capacity to reason and wonder, is what places speech above other forms of fulfillment, and beyond the routine jurisdiction of the state.³⁷

It might, however, be maintained that even *thought* deserves no special protection from the state as a matter of right. The precincts of the mind are not sacred but merely inaccessible; men have been able to get away with free thinking in those precincts because up to now no state has devised a means of patrolling them. Men enjoy perfect freedom of thought because the state lacks the technological devices to read minds and control thinking. Men have never enjoyed perfect freedom of speech, however, because when thought "escapes" the brain and moves outside the human skull, thereby becoming "speech," the state instantly gains the physical capacity to read the message and respond to it. Technology, of course,

might someday change that; it is possible to imagine a world in which thoughts can be monitored like radio transmissions, and thought police could presume to intercept and regulate thought transmissions as the Federal Communications Commission now regulates broadcasting. If, through such a technological "breakthrough," thought could be monitored, a case for regulating "potentially harmful thought" could be made on the same grounds that cases are today made for regulating "potentially harmful speech." Indeed, the line we now instinctively recognize between "speech" and "thought" could itself begin to dissolve.

But *why* would defend the prerogative of the state to censor thought? Only by accepting that man is a creature of the state and that even the intimate internal processes of mind that distinguish human existence are enjoyed at the state's sufferance could such a monstrous and awesome intrusion be justified. To accept the proposition would be to accept the extinction of thousands of years of moral evolution, in which the world has come slowly and painfully to recognize that men possess certain entitlements to dignity and autonomy by sheer virtue of their humanity. Descartes's statement "I think therefore I am" is an assertion about existence. If we add "I think therefore I am *somebody deserving of respect*," we have an assertion about humanity.

Once the inviolable primacy of freedom of thought is accepted, the preferred position of freedom of speech follows. This does not mean that freedom of speech is an absolute, or that government may no more regulate speech than thought, but it *does* mean that because speech is connected to thought in a manner that other forms of gratification are not, it is proper to place special burdens on the state when it ventures to regulate speech that would not exist when it regulates other aspects of human activity.³⁸ It is no answer to insist that thinkers keep their thoughts to themselves, for the human urge to think includes an urge to think out loud. Thought and speech are complementary, reinforcing freedoms, freedoms that partake at once of the private and social aspects of personality. The human spirit is nourished by both thought and speech, as the body is nourished by both food and water.

The First Amendment both protects and provokes the expressive spirit. On its surface it is a negative restraint on government. But beneath the surface lies a more vexing voice, one that affirmatively *encourages* Americans to speak, to take stands, to demand to be heard, to demand to participate.

DEMOCRATIC SELF-GOVERNANCE

Free speech is an indispensable tool of self-governance in a democratic society. The Supreme Court has stated that "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."³⁹ Justice Louis Brandeis wrote that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."⁴⁰

Freedom of speech is related to self-governance in at least five ways. First, speech is a means of participation, the vehicle through which individuals debate the issues of the day, cast their votes, and actively join in the processes of decision-making that shape the polity. This participatory value, it should be emphasized, is a value focusing on the fulfillment of the individual—free speech serves the individual's right to join the political fray, to stand up and be counted, to be an active player in the democracy, not a passive spectator. The participatory interest served by freedom of speech in a democracy thus grows out of the entitlement of the citizen, not the needs of the state. Political participation is an avenue of individual fulfillment, and the dignity of the individual is enlarged by recognition of the right to participate in collective self-governance.⁴¹

The second self-governance interest served by free speech is the pursuit of political truth.⁴² This interest serves both the collective and the individual, and is a derivative of the broader marketplace-of-ideas rationale. If in the long run the best test of truth is the power of the thought to gain acceptance in the competition of the market, then in the long run the best test of intelligent political policy is its power to gain acceptance at the ballot box.

The third self-governance interest served by free speech is the facilitation of majority rule. This is related to the pursuit of political truth, but is less grandiose, emphasizing instead the importance of speech as a means of ensuring that collective policy-making represents, to the greatest degree possible, the collective will. As constitutional scholar Alexander Bickel asserted, the value of free speech is that "the country may better be able to adopt the course of action that conforms to the wishes of the greatest number, whether or not it is wise or founded in truth."⁴³

A fourth self-governance interest served by free speech is the restraint on tyranny, corruption, and ineptitude.⁴⁴ For most of the world's history the state has presumed to play the role of benevolent but firm censor, on the theory that the wise governance of men proceeds from the wise government of their opinions.⁴⁵ But the United States was founded on the more cankerous revolutionary principles of John Locke, who taught that

under the social compact ultimate sovereignty always rests with the people, who never surrender their natural right to protest, or even revolt, when the state exceeds the limits of legitimate authority.⁴⁶ Locke cautioned, however, that rebellion, particularly violent rebellion, should be only a last and desperate resort.⁴⁷ It is through nonviolent speech that the people may ferret out corruption and discourage tyrannical excesses, keeping government within the metes and bounds of the charter through which the people first brought it into existence.

The fifth self-governance value served by free speech is stability.⁴⁸ Ironically, democratic values and openness values are at times in conflict. For while openness is an aid to democracy, the democratic process will on occasion produce majority decisions that squelch the speech of the minority. When this conflict of values occurs, a society will be both more stable and more free in the long run if openness values prevail. This is an extremely difficult principle to accept. Why shouldn't the concept of majority rule always prevail in a democracy, even on questions of freedom of expression? How can protecting a minority viewpoint against the wishes of the majority actually be better for stability and order?

No better answer has ever been supplied than the words of Justice Louis Brandeis, who wrote that the framers of the Constitution "knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones."⁴⁹ If societies are not to explode from festering tensions, there must be valves through which the citizens may blow off steam. Openness fosters resiliency, peaceful protest displaces more violence than it triggers, free debate dissipates more hate than it stirs.

There are, of course, respected scholars who doubt the validity of these rationales. Judge Robert Bork, for example, agrees that political speech deserves special First Amendment protection, but on the very narrowest of grounds. Judge Bork does not accept individual self-fulfillment, even when related to political participation, as an adequate basis for treating speech as a preferred value. As to the capacity of speech to promote political stability, he argues that this benefit merely raises questions of expediency that are for the political branches to resolve. Political speech advocating the overthrow of the government—even in abstract generalities—is not protected, because it cannot contribute to self-governance. For Judge Bork, whether it is a good or bad idea to let the citizenry "blow off steam" in the interest of stability is simply a question of peace-keeping strategy for the government, not a right of the citizen.⁵⁰ Yet even a scholar with as limited a conception of free speech as Judge Bork is willing to concede that free

speech contributes to democratic self-governance in ways that justify placing at least some types of expression on a pedestal of heightened constitutional protection—and while on the bench he at times wrote opinions that granted generous protection to political free-expression.⁵¹

There is, indeed, virtually unanimous endorsement of the proposition that the relationship of free speech to self-governance is a major justification for treating free speech as a preferred constitutional value. The controversy over this rationale centers on whether it should be regarded as the exclusive basis for elevated protection for speech.

Some argue that somehow nonpolitical speech topics do not really count—at least not enough to merit any unique constitutional protection. Because political speech is vital to a democratic society, it is treated as the only speech meriting heightened protection. But this is illogical and unconvincing. There are at least four sound reasons to treat self-governance as a rationale for specially protected speech, but not as the exclusive rationale.

First, no one maintains that nonpolitical speech is intrinsically less valuable than political speech. No serious student of free speech has ever been so unimaginative as to argue that nonpolitical topics of human inquiry and expression are not an essential part of what makes life worth living. Those who created the First Amendment may not have left us with any precise definition of "freedom of speech," but they certainly did leave us with marvelous examples of how rich and eclectic intellectual life can be. There were renaissance minds, engaged by science, art, literature, philosophy, morality, religion, architecture, horticulture, law, business, and politics.⁵² A culture that treats politics as somehow more vital than art, science, sex, or religion is a culture with an intellectual landscape that is barren, sterile, and gray, probably designed by bureaucrats and tended by lawyers. The *Sunday New York Times* is more than the government and op-ed sections; only the most cramped and niggardly understanding of free expression would treat those sections alone as worthy of the protection of the First Amendment. Chief Justice Earl Warren was fond of explaining that he always read the sports pages first, for it is on the sports pages that man's achievements are recorded; the news pages merely record man's failures.

Second, there is no logic internal to the self-governance theory that demands exclusivity. Nothing in the self-governance rationale "knocks out" the marketplace of ideas rationale or the self-fulfillment rationale. Nothing in those theories is limited to politics. The collective search for truth and the individual quest for intellectual fulfillment embrace the full life of the mind. Indeed, the argument that the self-governance theory is alone a sufficient justification for heightened protection for speech is limited to an exceedingly narrow view of the self-governance theory itself—

the view that it derives from the needs of the state alone. But free speech is also an individual right standing on its own foundation, serving the citizen's interests in participation, truth-seeking, and checking official abuse of power. There is, in sum, nothing inside the self-governance theory that disqualifies the marketplace or fulfillment theories; and nothing outside those two theories that limits them to self-governance issues.

Third, even when considered on its own terms, the self-governance theory proves incapable of supporting a principled limitation to conventional "political" speech, because in modern life it is virtually impossible to identify any topic that might not bear some relation to self-governance. Those who advocate limiting First Amendment protection to political speech are usually inclined to soften that position by admitting the need to protect a wider circle of speech to provide a "buffer zone" for political speech, because it is so difficult to extract the political from the nonpolitical.⁵³ Theorists who advocate relatively narrow protection for "political speech" are, in fact, plagued by a certain "rebound effect" that inevitably accompanies their general willingness to apply a lax "reasonableness" test in measuring the constitutionality of most speech regulation. The more that they emphasize how nonpolitical speech should be subject to the routine "reasonable basis" tests applicable to routine governmental regulation of most of the affairs of life, the more they highlight how virtually all affairs of life are relevant to self-governance. They cannot have it both ways. Government has "reasonableness" its way into regulating most aspects of economic and social life; a ubiquitous cover of "reasonable" law envelops modern existence like a *Bleed House* fog. If laws get passed on all aspects of culture, then it is vital that freedom of speech extend to all aspects of law. Even in those rare cases in which law has not yet permeated some nook or cranny of life, free speech is still essential to self-governance, to enable the citizenry to debate intelligently whether to permit the law's entry.

The fate of Alexander Meiklejohn's attempts to hold the line on a narrow conception of political speech is illustrative. Meiklejohn's influential 1948 book *Free Speech and Its Relation to Self-Government* began with a narrow definition of relatively "hard-core" political speech.⁵⁴ The view was sharply criticized by, among others, Zechariah Chafee;⁵⁵ another enormously important figure in the free speech tradition, and Meiklejohn retreated. In 1961, Meiklejohn conceded that "there are many forms of thought and expression within the range of human communications from which the voter derives knowledge, intelligence, sensitivity to human values; the capacity for sane and objective judgment which, so far as possible, the ballot should express."⁵⁶ For Meiklejohn these included "education, in all its phases," the "achievements of philosophy and the sciences in creating knowledge and understanding of men," "literature and the arts," and

"public discussions of public issues."⁵⁷ This later Meiklejohn view gave away most of the store, and rendered his self-governance theory almost indistinguishable from the marketplace and self-fulfillment rationales.

Fourth, there is a dangerous habit of mind that permeates efforts to treat political speech alone as meriting exalted First Amendment status, a combination of statism and elision that sends the message: "Only that speech useful to the enterprise of government will be granted special protection by the government, and it will be for the government to define what is useful." One of Alexander Meiklejohn's most famous statements in *Free Speech and Its Relation to Self-Government* was "What is essential is not that everyone shall speak but that everything worth saying shall be said."⁵⁸ Meiklejohn could not have been more wrong.

To the individual seeking the catharsis, fulfillment, and participation that comes from free expression, it is important that he be heard, even if only to second another's views. More profoundly, the state lacks the moral entitlement to presume to dictate what is "worth saying" and when "everything worth saying" has been said.⁵⁹ Meiklejohn improperly drew his model of free speech from the town meeting. In a meeting, of course, some rules of order are needed, and moderators may need to draw discussions to an end when it appears that all viewpoints have been heard, even though some hands may still be waving, seeking recognition.

But the general marketplace of discourse is not a massive town meeting, and government is not empowered to act as a pandemic moderator. Outside special settings in which the "meeting" analogy is appropriate, the Meiklejohn thesis puts the government in precisely the position that First Amendment doctrines should be designed to prohibit. There may, of course, be instances in which speech is not part of the general marketplace of discourse, but rather takes place in unique settings in which lower levels of First Amendment protection should apply. In those settings, which represent situations that are outside normal First Amendment principles, it may often be that what is important is that everything relevant be said, and not that everyone be heard. The First Amendment must be adjusted in a courtroom or a classroom, for example. Judges must have the power to determine what evidence is relevant and what is repetitious, and teachers the power to decide when to draw discussions to a close. Under Meiklejohn's theory, however, the government would retain this power even in the general marketplace of discourse—a power that cannot be reconciled with the values of a truly open culture.

Self-governance, in conclusion, is an important justification for free speech, but it is by no means exclusive. The Supreme Court, quite wisely, has declined the invitation to limit First Amendment protection to political speech. While recognizing in many cases that political speech lies at the core of the First Amendment, it has nevertheless insisted that the "guaran-

tees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government."⁶⁰ The Court has declared that the free speech and free press guarantees "are not confined to any field of human interest,"⁶¹ and that it is "immaterial whether the beliefs sought to be advanced . . . pertain to political, economic, religious or cultural matters."⁶²

Freedom of thought, conscience, and expression are numinous values, linked to the defining characteristics of man. The time has come for societies around the world to embrace the ideal of an open culture as an aspiration of transcendent importance.