

The Once and Future First Amendment

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I am delighted to present the Cato Institute's sixth annual B. Kenneth Simon Lecture in Constitutional Thought, appropriately named after such a generous supporter of individual liberty and constitutionalism. It is an honor to be asked to follow in the formidable wake of such luminaries as Judges Douglas Ginsburg and Danny Boggs, and Professors Walter Dellinger, Richard Epstein, and Nadine Strossen.

While I am certainly not in their league as a scholar, I want to take up a thread that I think has been part of the continuing dialogue promoted by this lecture series. Judge Ginsburg called on students of the Constitution to refocus attention upon its text;¹ Professors Dellinger² and Epstein³ both argued, in essence, that economic, personal, and political rights are indivisible. In fact, one of Professor Dellinger's explicit premises was that disparaging the constitutional protection of economic liberties weakens the constitutional foundations of personal liberty.⁴ I agree, of course. And today I will try to complete a bit more of this tapestry by considering from a different perspective the questions that undergird each of those discussions. Those questions pertain to the constant challenge of constitutionalism: Is the Constitution merely an emanation of "transformative overarching principles" uncontrolled by the text and disconnected from the political philosophy on which the text is based? Or must

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¹ Douglas H. Ginsburg, *On Constitutionalism*, 2002–2003 *Cato Sup. Ct. Rev.* 7 (2003).

² Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2003–2004 *Cato Sup. Ct. Rev.* 9 (2004).

³ Richard Epstein, *The Monopolistic Vices of Progressive Constitutionalism*, 2004–2005 *Cato Sup. Ct. Rev.* 11 (2005).

⁴ Dellinger, *supra* note 2.

a judge's attempt to interpret constitutional text be firmly anchored in the bedrock principles underlying a fixed constitution? Our difficulty is not only with the meaning of words; it is also with the more subtle problem of how we should approach interpretation. To paraphrase John Ciardi: How does our Constitution mean?⁵ My particular focus will be on the relationship between the First and Fifth Amendments in the hope that history may show what future we need to re-invent.

I. Parallels Between the First and Fifth Amendments

For a long time I have intuited a deep connection between the First and Fifth Amendments. Although we like to think of the First Amendment as a fixed point in our constitutional frame of reference, it is even now being transformed, in a way that shares troubling parallels to the demise of the Takings Clause of the late, great Fifth Amendment. The protection of private property was seriously diminished by people eager for government to redistribute wealth. Private space is slated for the same fate by people who want to redistribute ideas. Originally, I saw those efforts as similar—sharing an identifiable *modus operandi*—but largely separate and *ad hoc* instances of constitution bending. However, after deeper examination I understand that they are profoundly connected. Indeed, Ronald Coase and Aaron Director had by the early 1970s noted not only their near perfect symmetry but their philosophical congruence.

Proponents of economic liberty sought to limit the excesses of the redistributive state by arguing that the treatment of the First Amendment ought to serve as the model for state intervention. After all, if the benefit of the *laissez faire* approach in the marketplace of ideas is obvious, why should not the same rules apply to economic markets? Director and Coase argued for parity of the economic marketplace and the intellectual marketplace. "In this respect," Director contended, "the political economists have shown better insight into the basis of all freedom than the proponents of the priority of the marketplace for ideas."⁶ He continued:

⁵ John Ciardi, *How Does a Poem Mean?* (1959). Ciardi, an American poet, translator, and etymologist, celebrated for his ability to make poetry accessible to adults and children, once quipped: "The Constitution gives every American the inalienable right to make a damn fool of himself."

⁶ Aaron Director, *The Parity of the Economic Market Place*, 7 *J.L. & Econ.* 1, 9 (1964).

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The latter must of necessity rely on exhortation and on the fragile support of self-denying ordinances in constitutions. The former, on the other hand, have grasped the significance of institutional arrangements which foster centers of resistance against the encroaching power of coercive organization.⁷

Coase argued that there was “no fundamental difference between these two markets” and that the same considerations should influence both.⁸ If, said Coase, “the government is as incompetent as is generally assumed in the market for ideas,” we should seek to “decrease government intervention in the market for goods.”⁹ On the other hand, if it is as efficient as it is often implicitly assumed to be in the market for goods, we ought to “increase government regulation in the market for ideas.”¹⁰

Of course, it is not only conservatives and libertarians who have noticed the evident parallelism between the economic marketplace and the marketplace of ideas. Acknowledging that Coase and Director “have confronted New Deal liberals with the free speech tradition in order to remind them of the virtues of laissez faire and to build a case against state intervention in economic matters,” Owen Fiss confesses that his inclination is “just the reverse.”¹¹ Fiss explains:

It occurred to me that if Coase and Director can celebrate the libertarian element in the free speech tradition as a way of arguing against state intervention in the economic sphere, we should be able to start at the other end—to begin with the fact of state intervention in economic matters, and then use that historical experience to understand why the state might have a role to play in furthering free speech values.¹²

The proponents of this view ignore Coase’s challenge to demonstrate the state’s competence first. There was no pure liberal/conservative divide on the issue. Judge Robert Bork, a staunch defender

⁷ *Id.*

⁸ R. H. Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 *Am. Econ. Rev.* 384, 389 (1974).

⁹ *Id.* at 390.

¹⁰ *Id.*

¹¹ Owen Fiss, *Why the State?*, 100 *Harv. L. Rev.* 781, 783 (1987).

¹² *Id.*

of government restraint in the marketplace, has argued that the First Amendment should protect only speech involving the “discovery and spread of political truth,”¹³ and all other forms of speech should be subject to government regulation. More recently, Professor Cass Sunstein has called for a “New Deal for Speech” that would authorize dramatic government regulation of undeserving speech.¹⁴ In the same way that economic regulation enlists government on the side of the poor, the vulnerable, or the numerous, Sunstein would have government take sides in the marketplace of ideas, amplifying powerless voices, squelching the impulses of crass commercialism, and regulating the content of broadcasts.

Sunstein goes beyond the strict parallel between regulation of the market for goods and regulation of the market for ideas. He traces the provenance of his ideas back to *Lochner*.¹⁵ According to Sunstein, “for purposes of speech, contemporary understandings of neutrality and partisanship, or government action and inaction, are identical to those that predate the New Deal.”¹⁶ Thus, the rejection of *Lochner* effectively erased the separation between the public and private spheres. By overruling *Lochner*, the Supreme Court conceded that the Constitution does not require the government to remain neutral toward activities in the private sector or to protect the private status quo.¹⁷ Sunstein’s New Deal for speech would “replace neutrality—which entails the protection of individual privacy and intellectual autonomy—with paternalism—which entails a substantial measure of governmental intrusion into individual thought and action.”¹⁸

Sunstein’s argument is interesting because, in many ways, it is the most candid and most complete. He embraces the true heart of the progressive agenda, finding no principled basis for exempting speech from regulation.

¹³ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 26 (1971).

¹⁴ Cass R. Sunstein, *A New Deal for Speech*, 17 *Hastings Comm. & Ent. L.J.* 137 (1994).

¹⁵ *Lochner v. New York*, 198 U.S. 45 (1905); Cass R. Sunstein, *Lochner’s Legacy*, 87 *Colum. L. Rev.* 873 (1987).

¹⁶ Sunstein, *supra* note 14, at 138–139.

¹⁷ *Id.* at 140.

¹⁸ Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 *U. Pa. L. Rev.* 193, 261 (1996).

Those who now challenge America's historically robust hands-off approach to speech get high marks for consistency. They acknowledge the powerful parallelism between the economic market and the market for ideas. Generally, they simply choose the interventionist state across the board, favoring a more limited notion of protected speech. The ranks of those who think the government should regulate what people see, hear, and say is growing, encompassing a broad spectrum of political views—from conservatives who would treat pornography like smoke pollution to critical feminists, such as Catherine McKinnon, who would have the government pursue us even into our dreams (to ferret out erotic fantasies). The new censors would scrub the minds of citizens of all antisocial thoughts—sexism, racism, homophobia, and pornography. The old censors would treat pornography as a nuisance that degrades the quality of life—a nuisance from which the majority may rationally decide to protect society. The difference between the new and the old censors is that the new would impose an elite vision, the tyranny of the minority, whereas the old would enshrine the tyranny of the majority.

II. Current Challenges

The various challenges to the First Amendment have been nothing if not heterodox. For convenience and brevity, I divide the various arguments into three categories: the new censors, the new neutrals, and the new moralists. None of these categories is impermeable and thus considerable cross-pollination occurs.

A. The New Censors

Not surprisingly, the new censors are the most adept practitioners of postmodern cant—"doublethink" and "newspeak." Echoing Orwell: Freedom is slavery and slavery is freedom, and so on. This school of thought can be summarized very succinctly: There is no such thing as free speech—freedom of expression becomes just another "political device to promote particular agendas."¹⁹ Thus, "free speech" is just "the label" we "want [our] favorites to wear."²⁰ To put it another way: "[S]peech and conduct are continuous; ideas construct reality and reflect it back. Therefore, both are equally

¹⁹ David E. Bernstein, *You Can't Say That!* 21 (2003).

²⁰ *Id.* (quoting Stanley Fish, *There's No Such Thing as Free Speech* 102 (1994) (internal quotation marks omitted)).

regulable if regulation serves desirable ends.”²¹ Speech that makes our society more sexist, more racist, or more violent may not merely cause harm; it *is* harm. Such a view justifies eliminating the speech and reeducating or transforming the speaker. After all, “[i]f you want to change reality, you have to change the speech that constructs it.”²²

B. The New Neutrals

In contrast, the new neutrals don’t seem so radical. Indeed, they purport to accept one of the principal tenets of traditional First Amendment doctrine—neutrality. Under traditional doctrine, except in limited circumstances, government may not suppress or regulate speech merely because its content is objectionable. Permissible government regulation does not take sides and any collateral restriction of speech must be neutral.

But often, when contested questions are involved, neutrality is in the eye of the beholder. As Professor Laurence Tribe notes, sometimes “one man’s discrimination is another’s expression of a moral view.”²³ Thus, the application of anti-discrimination laws to a private association such as the Boy Scouts²⁴ may not be a neutral instance of error-correction, but instead “a direct clash of competing images of ‘the good life.’”²⁵

Is government really being neutral in the clash of ideas when it denies subsidies or benefits on the basis of pejorative labels? Or requires religious organizations to adopt practices fundamentally at odds with their core beliefs?²⁶ Or even when it seeks to exponentially increase a criminal sentence because of perceived “hatred” toward

²¹ Kathleen M. Sullivan, *Free Speech Wars*, 48 *SMU L. Rev.* 203, 210 (1994).

²² *Id.*

²³ Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 *Pepp. L. Rev.* 641, 651 (2001).

²⁴ See, e.g., *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003); *Evans v. City of Berkeley*, 129 P.3d 394 (Cal. 2006).

²⁵ Tribe, *supra* note 23, at 651.

²⁶ See, e.g., *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004) (upholding a California law requiring Catholic Charities to provide its employees prescription coverage for contraceptives); *John Garvey, State Putting Church Out of Adoption Business*, *Boston Globe*, Mar. 14, 2006, at A15.

some protected group?²⁷ If the power to tax is the power to destroy, in the modern state the power to officially label may be equally pernicious.²⁸

C. The New Moralists

Finally, we come to the new moralists. In this camp, I include the civic republicans, the advocates of campaign finance regulations (including those who would regulate speech in the name of fairer and more enlightening public debate), and those who clamor for government subsidies of underfinanced views or compelled speech by broadcasters. A chorus of voices calling for a return to the Fairness Doctrine is growing,²⁹ and regulation of campaign speech continues to proliferate despite the Supreme Court's fiery declamation in *Buckley v. Valeo* that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."³⁰

The argument for economic equality transforms easily into an argument for political equality. If government has an obligation to burden the property of the rich in order to help the poor, why is it not equally obliged to dampen the political influence money can buy? Thus, speech—even (or should I say, *especially*) political speech—must be treated the same way property is treated: "as something that is really owned by government, and which citizens are only permitted to use or engage in when they meet conditions established by government to promote fairness and justice."³¹

²⁷ See, e.g., Posting of Eugene Volokh to The Volokh Conspiracy, The Shmulevich Case—Facts and New York Law, As I Can Best Figure Them Out, <http://volokh.com/posts/1185829677.shtml> (July 30, 2007, 5:07 p.m.) (relating the story of a man charged with hate crimes under New York law for placing two stolen Korans in a toilet).

²⁸ See Tribe, *supra* note 23, at 653.

²⁹ See, e.g., Center For American Progress & Free Press, The Structural Imbalance of Political Talk Radio, <http://www.americanprogress.org/issues/2007/06/talk-radio.html> (June 21, 2007); Posting of Tom Regan to NPR News Blog, http://www.npr.org/blogs/news/2007/06/some_conservatives_fear_return.html (June 22, 2007, 2:02 p.m.).

³⁰ 424 U.S. 1, 48–49 (1976).

³¹ Thomas G. West, The Liberal Assault on Freedom of Speech, The Claremont Institute, http://www.claremont.org/publications/pubid.323/pub_detail.asp (Feb. 4, 2004).

In summary, how zealous the public or the courts will be about defending First Amendment protections seems to depend on the way the challenge is marketed. Direct restrictions, such as campus speech codes or statutes explicitly limiting a particular kind of speech, are likely to be rejected. However, ostensibly neutral and generally applicable restrictions on speech or associational rights easily trump the First Amendment.

III. Half a Loaf?

Of course, as always, there are those who posit a third way. Not all progressives are eager to dismantle the First Amendment; some see no contradiction between a libertarian First Amendment and an economically interventionist state. Economic regulation, they say, is qualitatively different. The government's interference with contract and property rights should be deemed constitutionally inoffensive on pragmatic and pluralist grounds. The key is not paternalism; it is the democratic imperative. As Steven Gey explains, after *Lochner*, "the political majority" was free to do whatever it deemed necessary "to further its own self-interest through government action."³² Gey clings to a critical distinction between the government asserting "the ability to discern the 'true' wishes of workers who have not yet realized their self-interest" and the government acting on "behalf of workers who exercise their political clout in the pursuit of very specific goals."³³ This distinction fails to explain why the majority should be able to overrule constitutional protections in the economic realm but not in the realm of ideas.

As Professor Dellinger noted in his Simon Lecture, "[e]conomic rights, property rights, and personal rights have been joined, appropriately, since the time of the founding."³⁴ Scholars as disparate as Stephen Macedo and Bernard Siegan have argued that economic rights are as clearly entitled to constitutional protection as political rights. "The modern Court's double standard, which neglects economic liberties and protects other 'personal' liberties, like privacy, is

³² Gey, *supra* note 18, at 263 n.212.

³³ *Id.*

³⁴ Dellinger, *supra* note 2, at 19.

incoherent and untenable.”³⁵ Occasionally, even the Supreme Court itself acknowledges the muddle, admitting “the right to enjoy property without unlawful deprivation” is as much a personal right as any other.³⁶

The withdrawal of constitutional protection from economic activity happened because it was necessary to implement the social democratic ideal of the New Deal. This meant the spontaneous order created by the exercise of property rights should be subject to “perpetual revision” and control through central government.³⁷ And although the architects of the new consensus could self-consciously carve out a private sphere ostensibly protected by the First Amendment, nothing in the new vision compelled allegiance to the idea of a permanent separation between the public and private spheres. The collective governance rationale had cachet only so long as it seemed to serve the purposes of the architects.

Alexis de Tocqueville recognized this reality when he spoke out against the revolutionary fervor of 1848—the first broadly socialist revolution in Europe—warning that socialism challenged civilization’s very foundation and “was nothing less than a new ‘road to servitude’ because it makes the state ‘the sole owner of property,’ unleashes man’s crudest material passions, and shows ‘a deep distrust of liberty, of human reason, a profound scorn for the individual in his own right.’”³⁸ He saw democracy as the source of individuality and freedom. He said: “Democracy attaches all possible value to each man; socialism makes each man a mere agent, a mere number. Democracy and socialism have nothing in common but one word: equality. But notice the difference: while democracy seeks equality in liberty, socialism seeks equality in restraint and servitude.”³⁹

³⁵ Scott Gerber, *To Secure These Rights* 191 (1995) (quoting Stephen Macedo, *The New Right v. The Constitution* 47 (2d ed. 1987)); see also Bernard H. Siegan, *Economic Liberties and the Constitution* (1980).

³⁶ *Lynch v. Household Fin. Corp.*, 45 U.S. 538, 552 (1972).

³⁷ John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49, 51 (1996).

³⁸ Daniel J. Mahoney, *A Noble and Generous Soul*, *Claremont Rev. of Books* (Summer 2007) (available at http://www.claremont.org/publications/crb/id.1398/article_detail.asp) (quoting, as translated, Alexis de Tocqueville, *Discours Prononcé à l’Assemblée Constituante le 12 September 1848 Sur la Question du Droit au Travail*, in *Etudes Economiques Politiques et Littéraires* (1866)).

³⁹ Friedrich A. Hayek, *The Road to Serfdom* 29 (1994 ed.) (quoting, as translated, Tocqueville, *supra* note 38).

Tocqueville was not quite prescient. He did not perceive how the collectivist impulse might deform democracy. One hundred years later, Friedrich Hayek laments the inevitable consequence of unlimited democracy: "So long as it is legitimate for government to use force to effect a redistribution of material benefits . . . there can be no curb on the rapacious instincts of all groups." He goes on to say: "Once politics becomes a tug of war for shares in the income pie, decent government is impossible."⁴⁰

Do the same insights apply to the intellectual marketplace? I think they might. We can now broadly identify three different philosophical camps: those who see free speech as an instrument (a means) to a collective good, one that can be jettisoned whenever they perceive circumstances have changed; those who see free speech as instrumental, but argue that it has enduring but limited utility; and those who argue that expressive man and economic man are indivisible and that strong protection of speech, property, and other rights is the end for which government exists. The folks in the middle think we can have it both ways. They insist that the regulation of products and the regulation of speech "pose quite different problems for democratic self-governance."⁴¹ But the difference is more illusory than real. While it is accurate to say that speech regulations are intended to permanently alter "the thought patterns of citizens living under the control of the government,"⁴² it is equally true that economic regulations of the welfare state are intended to permanently transform citizens from being the government's master to subsisting as its ward.

So the more familiar argument made for intellectual freedom applies with equal potency to economic freedom. The attempted distinction cannot be sustained because there is no single road to serfdom. Like the path to hell, the way is broad and paved with good intentions. You can begin by undermining property, or objective moral value, or the family, or by attempting to control ideas directly.

⁴⁰ Friedrich A. Hayek, *Law, Legislation and Liberty*, Vol. III, at 150 (U. of Chi. Press 1979).

⁴¹ Gey, *supra* note 18, at 267.

⁴² *Id.* at 269.

To be sure, the economic revolution is easier to justify on democratic principles. After all, the great leveling impulse is widespread. Being free requires human beings to live in a fierce and irresolvable tension—to accept imperfection and to risk failure. In contrast, slavery in the welfare state—the permissive cornucopia of modern tyranny—exudes the seductive thrall of a crack pipe. Comforting, mind-numbing, solidly addictive—it whispers constantly that you deserve more and you need not tally the cost, for the accounting will be someone else’s problem. It is freedom that is the hard sell. It has a short shelf life. Only entitlements last forever.

IV. The Soul of the Old and the Future Regime

A constitutional republic cannot be sustained without the commitment of virtuous citizens. The founding generation made this point repeatedly. Despite great theological diversity, the Founders unanimously “endorsed ancient ideas concerning the central roles of morality, virtue, the family, and property,” and took an “intrinsically religious approach to government.”⁴³

George Washington, in his farewell address, identified “religion and morality” as “indispensable supports” of “political prosperity.”⁴⁴ John Adams, the nation’s second president, put it just as bluntly: “Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”⁴⁵

The mistake for the would-be regulators on both the right and the left is the misplaced confidence that the state itself should be the source of virtue. No branch of government is competent to coerce virtue—whether virtue is defined as a redistributive notion of compassion; a substantive political dialogue that leads to public consensus; or a society free of bias, bigotry, and prejudice. The inculcation of virtue is beyond the sustained ability of the state. “[V]irtue cannot be enforced or brought about by political means.”⁴⁶ Virtue, like faith, must be a free choice or it is not virtue. As John Locke writes in *A Letter Concerning Toleration*: “[S]uch is the nature

⁴³ Sidney E. Mead, *The Nation with the Soul of a Church* 45 (1975).

⁴⁴ Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 *Harv. L. Rev.* 1409, 1441 (1990).

⁴⁵ Edward J. Eberle, *Religion in the Classroom in Germany and the United States*, 81 *Tul. L. Rev.* 67, 89 n.145 (2006).

⁴⁶ Frank S. Meyer, *Leviathan*, in *In Defense of Freedom* 127 (1996).

of the understanding that it cannot be compelled to the belief of anything by outward force."⁴⁷

The shifting consensus on the value of the First Amendment brings us face to face with our real difficulty. It is the reason the arguments offered for diminishing the protections of the First Amendment seem like *déjà vu* all over again. Tocqueville, as usual, seems to have a unique insight. His 1848 speech may be the first time socialism is explicitly linked to a "distrust of reason, a profound scorn for the individual in his own right."⁴⁸ The link is not immediately obvious. Superficially, at least, socialism seems the implementation of pure reason—perhaps the most prominent example of what Harvey Mansfield calls "rational control."⁴⁹ But it is precisely this notion of rational control that Hayek rejects as a dangerous illusion, the belief that we can deliberately create the future of mankind. He recognizes the demand for just distribution, whether of wealth, ideas, or information, as "strictly an atavism, based on primordial emotions."⁵⁰ Ironically, it is the progressive movement that harkens back to the days of lethal superstition, the evil eye and the bloody sacrifice, to the old gods of envy, jealousy, and guilt.⁵¹ Neither innovation nor virtue can thrive in such an environment.

V. Conclusion

The politics of envy have no principled stopping point. The demand for redistribution of material goods is the place such discussions begin, but the demand must inevitably expand to encompass intellectual and physical inequalities as well. There can never be a society in which there is nothing left to envy. Even when we have the same clothes and cars and faces, there will still be envy for "those

⁴⁷ John Locke, *A Letter Concerning Toleration* 7 (William Pope trans. 1689) (available at <http://www.constitution.org/jl/tolerati.htm>) (last visited July 14, 2008).

⁴⁸ As quoted in Mahoney, *supra* note 38.

⁴⁹ Harvey C. Mansfield, *Rational Control: Or, Life Without Virtue*, 25 *The New Criterion* 39 (Sept. 2006). According to Mansfield, this is the big idea of modernity, an idea that requires us to subject our entire lives, "holding nothing back—which means holding nothing sacred as exempt—to an examination by reason as to whether we can live more effectively."

⁵⁰ Hayek, *supra* note 40, at 165.

⁵¹ Helmut Schoeck, *Envy: A Theory of Social Behavior* 328–329, 361, 363–364 (Liberty Fund 1987) (1966).

imagined, innermost feelings.”⁵² There may be no way out of the dilemma in liberal democracies. The great leveling impulse turns out not to represent progress at all. Instead it signals a return to one of the most primitive aspects of the human psyche.⁵³ In sum, state enforcement of public virtue threatens to undo individual liberty.⁵⁴

If we are not vigilant, if we do not think—as Abraham Lincoln warned us in another time of great peril—as we have never thought before, we might find ourselves in the real world of Harrison Bergeron, in the year 2081, when everybody is “finally equal” because all advantages of energy, imagination, effort, or genetics have been erased by the intervention of a ruthlessly efficient Handicapper General.⁵⁵

The same impulse that felled the Takings Clause of the Fifth Amendment now seems poised to undermine freedom in the intellectual marketplace. The First Amendment’s fall from favor is just another manifestation of the collectivist impulse that has already undermined much of our constitutional order as originally conceived. And it may accurately predict the future of any other constitutional imperative that stands in the way of what is variously called progressivism, radical egalitarianism, the general will, elite opinion, or (my personal favorite) the tyranny of the anointed. “The partisans of equal subordination to the claims of politics have always been driven to crush what stood in their way: religion, talent, property, science and most of all, liberty.”⁵⁶

I am not without sympathy for the concerns expressed by those who see high risk in a robust First Amendment. As does all of existence, freedom has its risks. “Unless men are free to be vicious” as well as vulgar, “they cannot be virtuous.”⁵⁷ As Hayek reminds us, “freedom can be preserved only if it is treated as a supreme principle which must not be sacrificed” because when “the choice

⁵² *Id.* at 15.

⁵³ *Id.* at 363–364.

⁵⁴ Frank S. Meyer, *Western Civilization: The Problem of Political Freedom*, in *In Defense of Freedom* 220–222 (1996).

⁵⁵ Kurt Vonnegut, *Harrison Bergeron* (1950), reprinted in *Welcome to the Monkey House* 7 (Dial Press 1998).

⁵⁶ Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 *U. Chi. L. Rev.* 225, 230 (1992).

⁵⁷ Frank S. Meyer, *The Locus of Virtue*, in *In Defense of Freedom* 148 (1996).

between freedom and coercion is treated as a matter of expediency," freedom loses.⁵⁸

The American ideal of freedom faces challenges, externally and internally. Democracy is a fragile form of government; liberal democracy is more delicate still. We have a constitution. It may not be possible to retrieve what has been lost, but I haven't given up on that yet. What is at stake now is clear. And we do know how our Constitution means. It was intended as a blueprint for liberty. We are now on the cusp of another constitutional moment. We have a chance to think anew, again. Perhaps this time we will "fail better."

⁵⁸ Friedrich A. Hayek, *Law, Legislation and Liberty*, Vol. I, at 57 (U. of Chi. Press 1983).