

## 4 The Case for Free Expression

Over the course of the nineteenth century, the Russian czars enacted a series of harshly anti-Semitic laws, policies, and practices. Between 1908 and 1913, five young Jewish people—Jacob Abrams, Mollie Steimer, Hyman Lachowsky, Samuel Lipman, and Jacob Schwartz—fled Russia for New York's East Harlem neighborhood. They sought a new life in America, as so many others did, believing in the promise of political and religious freedom.

From their new home in New York, Abrams and his colleagues took up the causes of socialism and anarchism. Abrams and friends vocally supported the rise of the Bolsheviks and the effort to bring down the czar's government in Russia. After the Bolsheviks succeeded in overthrowing the czar and coming to power, they entered into a peace treaty with the Germans in 1917. The next summer, the United States sent troops to the Russian borders, near Vladivostok and Murmansk. The purported reason for these military maneuvers was to maintain an Eastern front against the Germans, the United States' adversaries in the First World War.

To Abrams and his colleagues, however, these maneuvers by the United States had nothing to do with Germany and

everything to do with opposing the Russian Revolution, to which they had by this time become devoted. Abrams and his friends printed up two leaflets, one in English and another in Yiddish. Both leaflets called for a general strike by the workers of the United States. The leaflet in English signed off with the words: "Awake! Awake, you Workers of the World! REVOLUTIONISTS." The leaflet in Yiddish focused on Russian emigrants, urging them to "spit in the face of the false, hypocritic [*sic*] propaganda" of the Americans.<sup>1</sup>

Military police arrested Abrams and his colleagues for their allegedly treasonous activities in producing and disseminating the two leaflets. At the end of their first trial, Judge Henry DeLamar Clayton found them guilty of conspiring to violate the Sedition Act of 1918 and sentenced them to three to twenty years in prison.

The case came before the U.S. Supreme Court on appeal. Abrams and his fellow defendants raised a First Amendment defense, claiming that they had been denied their right to free expression. In 1919, a majority of the Supreme Court justices denied their claims. The justices in the majority referred to recently discussed, similar cases, where the justices had found no recognizable free speech protection.

Two Supreme Court justices disagreed with the majority in the *Abrams* case. Justice Oliver Wendell Holmes Jr. wrote a dissenting opinion with which Justice Louis Brandeis concurred. The Holmes dissent in *Abrams* immediately provoked strong opinions, both for and against. It continues to be one of the most famous opinions written by a U.S. Supreme Court justice. The power of this dissent is all the more striking for the fact that it was written for the losing side in this particular debate.

In his dissent, Holmes wrote that he supported the right of Abrams and his colleagues to publish the leaflets and that the state should not have the power to stop them from doing so. The entirety of Holmes's dissent is worth reading, but at its core, he wrote: "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."<sup>2</sup>

Holmes referred to this idea as the "theory of our Constitution." According to him, "It is an experiment, as all life is an experiment. ... While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."<sup>3</sup> Holmes set a very high bar—"imminent threat"—for the instances in which speech might be justifiably curtailed. He also linked this strong level of protection of speech, even loathsome speech, with the very theory of the American system of government.

As famous as it is today, Holmes's dissent in *Abrams* came as a surprise to his contemporaries who followed these matters closely. Holmes had agreed with the majority in a series of previous cases in which the Court decided that the government had a greater power to suppress speech in wartime than during times of peace. But by the time the *Abrams* case came around, he had reached a different view—or perhaps saw the facts in *Abrams* differently than the facts in the previous cases.<sup>4</sup>

Holmes's views were brilliantly expressed and immediately praised as historic and likely to be enduring. But they

were not original. His metaphor of “free trade in ideas” —later repeated as the “marketplace-of-ideas” doctrine—appeared in John Milton’s *Areopagitica* in 1644: “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?”<sup>5</sup>

The case for free expression can be made in many ways. Some reasons for free expression are more compelling than others. In the American context, the argument in favor of free expression often runs along the lines of Holmes’s dissent in *Abrams* and Milton’s *Areopagitica* hundreds of years before. This line of reasoning has come to be known in shorthand as the “marketplace-of-ideas” rationale for free expression. A free and open encounter in the public marketplace, the argument goes, is the only way for the best ideas to emerge. This approach to the free expression of ideas ensures that the people making choices—whether voters choosing among possible representatives or representatives choosing among possible laws or policies—have in front of them the full range of potential options.

The general argument that free expression leads to the truth is good up to a point—in a theoretical sense, it is a powerful line of reasoning. When a listener can compare ideas side by side, both made persuasively, then she or he is more likely to be able to come to a sound conclusion than if only one view were developed and shared. In 1860, Frederick Douglass, the leading nineteenth-century abolitionist, made an argument along these lines: “To suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker.”<sup>6</sup> As Douglass pointed out, both the speaker and the listener matter and

each might benefit from the expression of free speech in the search for the truth. When permitted to try out expressing various ideas, the speaker, too, is more likely to arrive at a truthful statement over time.

The difficulty with the marketplace-of-ideas metaphor—or, more broadly, the “truth-seeking model” of free expression—is that it is essentially laissez-faire in its operation. In practice, even in a stable democracy, some speakers and some hearers have more power than others. Myriad forms of inequality can come into play: unequal voice, unequal access to education, and unequal ability to participate in this marketplace of ideas (when, for example, focusing on more basic human needs such as obtaining food and shelter takes priority).

The theory is not altogether wrong. It is still favored by some theorists. For instance, libertarians who favor the laissez-faire model of economics might also favor the marketplace-of-ideas metaphor when it comes to speech. The theory is, however, constrained by reality, as its critics rightly point out. The Holmesian line of reasoning remains important, but it is no longer the only or the dominant rationale for free expression.

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In a free country, tongues likewise should be free.

—Desiderius Erasmus, *Education of a Christian Prince*, 1516<sup>7</sup>

Before considering some of the other arguments in favor of free expression, let's step back in time. Long before Abrams and his fellow anarchists tested the strength of the First Amendment during the First World War, the right to free expression had been giving rise to controversy. The right to free expression extends back hundreds of years, well before the founding of the United States. The Magna Carta includes hints of modern-day rights

of free expression in the thirteenth century. The English Bill of Rights in the late seventeenth century referenced speech rights, as did the Declaration of the Rights of Man during the French Revolution at the end of the eighteenth century. The source of the right to free expression lay in the “natural rights,” enjoyed at least by fully enfranchised men. To most people thinking and writing about it at the time, that meant that the right to free expression came from God. In the United States, the right to free expression is enshrined in the First Amendment to the Constitution. The First Amendment, enacted in 1791, is part of the Bill of Rights. The right to free expression is one of five related rights enshrined in the First Amendment. The amendment reads, in its entirety: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”<sup>8</sup> If you read it again with care, you will notice that the First Amendment establishes that *Congress* shall not make a law that abridges the “freedom of speech.” This statement appears to be simple, but it is not. It turns out to be very complicated.

One way this right to freedom of speech is complicated is the set of actors to which it is applied. If one were to read the First Amendment as plain English, the answer is straightforward: the rule applies exclusively to the Congress, the legislative arm of the U.S. federal government. Over time, through interpretation by the courts, this restriction has come to be applied to any “state actor.” The list of state actors today means most, if not all, state and municipal government agencies. Some of the most challenging cases have involved instances in which the restriction on abridging speech can cover those private entities that

are not the state but act like the state—for instance, the owners of a company town in 1940s Alabama and owners of a shopping mall in California in 1980.<sup>9</sup>

What is also left unsaid by the First Amendment is to whom it does *not* apply. Except under rare circumstances, private actors are not bound by the amendment. When a schoolchild shouts on the playground, “Hey, it’s a free country—haven’t you ever heard of free speech?,” the implication is that no one can tell another person what to say or not to say. That schoolchild, alas, is mistaken. The First Amendment is totally silent on that issue. It does not apply to that schoolchild, or to his or her friend who is causing trouble. The First Amendment is often assumed to do something that it does not: to grant an affirmative right to free expression to all people. Instead, it operates as a restraint on the state, stopping those in authority from making laws that abridge the right to free expression. For the purposes of this book, this is a distinction that makes a great difference: by and large, private institutions are not bound by the First Amendment, whereas public institutions generally are.

Even this explanation of the law of free speech, however, goes too far. In the words of legal and literary scholar Stanley Fish, “There’s no such thing as free speech, and it’s a good thing, too.”<sup>10</sup> Even the First Amendment to the U.S. Constitution, broad and powerful compared to most other constitutional speech protections around the world, has important limits as to the types of speech that are in fact protected.

The state constrains free expression from time to time through law and policy in ways that are consonant with the modern-day understanding of the First Amendment. We call these constraints “time, place and manner” restrictions. There are some times when one cannot say something; there are some places

where one cannot say something; and there are some manners in which one cannot say something. The Espionage Act offers a wide-ranging example. It is a crime in the United States to reveal certain things about the military and intelligence operations of the government. First enacted by the Congress in 1917, the Espionage Act has been updated many times and its reach has been debated vigorously. Along with the Sedition Act, under which Abrams and his colleagues were prosecuted, the Espionage Act establishes a substantial carve-out to the First Amendment. Under this reasoning, Edward Snowden, the contractor to the National Security Agency who leaked files about government surveillance, did not enjoy full First Amendment protections according to the U.S. government.

There are other exceptions, perhaps more familiar to the casual observer. Most people are aware that it is unlawful to shout “fire” in a crowded theater; to create a “clear and present danger” by inciting another to do violence; to libel someone; and to publish certain obscene materials. These specific exclusions under U.S. law prove that Fish is right: there is “no such thing” as truly “free” speech, even in the country with some of the world’s strongest protections for expression.

To make matters even more complex, we have come to see speech as falling into a hierarchy. Certain speech is given less strong constitutional protection than other forms of expression. For instance, commercial advertising is deemed less worthy of strong constitutional expression than, say, expression of an individual’s political views. For this reason, Congress can more easily—and is more likely to—regulate the sending of unsolicited commercial emails (“spam”) than it can restrict what a citizen might say on a public street corner about a forthcoming election.



The ambit of the First Amendment is instructive on many levels, but the core point is that its reach is limited in certain ways and in certain instances. While there is a very strong presumption in favor of free expression in the United States—stronger than in most if not all other large countries in the world—it is not an absolute, unfettered right. There are good reasons why expression should be broadly protected, and there are occasionally good reasons why it should be limited. The difficulty, of course, is in figuring out where the lines should be drawn—and when and how to do so—such that individuals and the community at large can derive the maximum benefit with the lowest costs. It is no mean feat.

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The marketplace-of-ideas argument for free expression is one plausible line of reasoning to resolve this difficulty, but it is not the most compelling argument.

A second argument in support of freedom of expression rests on the autonomy of the individual in the context of a democracy. In a free and open society, the right to free expression enables a human being to flourish, in part by enabling the exploration of one's identity and one's views.<sup>11</sup> This theory has merit particularly against the backdrop of a society in which free expression is denied to some or all members of the community. If a person does not have the opportunity to express himself or herself, it is implausible that they would experience autonomy in their life. The ability to express one's views is essential to a person's development, particularly at a young age—for schoolchildren and university students, say, during adolescence—but truly at any age.

This same line of reasoning might apply to a community just as it does to individuals. Consider a small town where much of

the decision making that matters most in a person's life is made at the local level, not at the state or federal level. In the U.S. system of governance, many decisions are assigned to the local level—for instance, the system of taxation that funds the local public school system. The right to free expression is as important to a community developing its autonomy as it is for an individual. For a community to be able to form a collective notion of how to organize itself, all individuals need their right to express a broad range of ideas. The autonomy of the community depends on the autonomy of the individuals that comprise it.

The autonomy rationale is useful up to a point but it, too, comes up against its limits relatively quickly. A primary difficulty with this theory that autonomy is needed for a person to thrive is the notion that one person's flourishing (or a community's flourishing) could lead directly to another person's (or community's) harm. For a white supremacist to have the ability to burn a cross in the yard of a person of color, the state must allow a harm to occur. The "speech act" of burning the cross—surely a form of "expression," albeit an abhorrent one—causes harm to the people of color at whom it is directed. The white supremacist may feel as though he or she is flourishing as a result of this expression, but the target of his or her hatred is unlikely to experience that act as anything other than menacing and spiteful. For every community, there are topics that are taboo or harder to confront than other topics. And in every community, there are individuals who find it appealing to test limits, to press on these tender spots, even at the expense of others.

The conversation around free expression is most fraught, most interesting, and most important at these junctures—situations where the interests of one person infringe on the interests of another. Hate speech, to which I devote a later chapter, is the

most obvious and frequent place where this tension arises. Communities must develop specific norms and processes to govern these instances. In some cases, the hateful speech is allowed to continue in the name of autonomy or is hiding behind other justifications of free expression. In communities such as schools and universities, speech codes arise to limit hateful speech or bring about sanctions against those who violate these norms. There will always be those who will use the right to free expression to test taboos and limits for their own purposes—even when this testing is especially harmful to particular subgroups in the community. These tensions make evident the limitations of the autonomy theory of free expression.

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A third theory, one that gives the greatest power to the free speech argument, is the tolerance theory advanced by legal scholar Lee Bollinger.<sup>12</sup> In his book *The Tolerant Society: Freedom of Speech and Extremist Speech in America*, Bollinger asserts that the most effective way to develop a society tolerant of those from diverse backgrounds is to support a strong form of free expression. Tolerance even for most hate speech serves the long-term purposes of a society, according to Bollinger's theory.

The tolerance theory of free expression allows for empathy toward those with less power and fewer opportunities in a society in multiple respects. To tolerate the speech of a recent Jewish immigrant from Russia with unpopular views—in the case of Abrams in 1919, views that made the case for anarchism and socialism—would be a powerful thing for a society to accomplish. Even though the immediate result of the Abrams case was that the defendants went to prison, the long-term effect of their speech acts has been one that favors tolerance. There is little chance that any of the five would be convicted today, at least for

their speech acts. That may partly be because today's politicians are more accustomed to public criticism than were the leaders at the time of the First World War. The explanation for this change may also lie in the power of the ideas advanced by dissent and a growing belief in the value of pluralism and diversity in any democratic society.

The tolerance theory also provides a lens through which to view the long (and continuing) march for civil and political rights in the United States. The notion of equality and a strong form of free expression developed at key intersections in the country's history. Those who argued in favor of equality and inclusion of all people also, along the way, made the strongest case for the right to free expression.

Once the newly formed United States ratified the Constitution (in votes from 1787 to 1790) and the Bill of Rights (in 1791), the right to free expression existed on paper. The words in the First Amendment that describe that right have never changed. Their meaning in practice, though, has evolved substantially in the centuries since then. Those who have fought for the equality of all women and men in the United States have been among the most powerful activists in favor of the right to free expression.

In the first half of the nineteenth century, slavery persisted in the South and several of the Western states of the United States. The movement for abolition, led by a combination of African-American and white men and women, focused primarily on ending slavery. The abolitionists disagreed as to the precise means of ending slavery—there were at least four major strands of abolitionism by 1850—but they frequently agreed that they needed a right to free expression to achieve their aim.

Frederick Douglass's oration, "A Plea for Free Speech in Boston," is among the most enduring proclamations of the

importance of free speech of antebellum United States. Douglass and other abolitionists feared the effect of censorship on the ability of those who opposed slavery to make their case to the public. In Douglass's words:

The world moves slowly, and Boston is much like the world. We thought the principle of free speech was an accomplished fact. Here, if nowhere else, we thought the right of the people to assemble and to express their opinion was secure. Dr. Channing had defended the right, Mr. Garrison had practically asserted the right, and Theodore Parker had maintained it with steadiness and fidelity to the last. But here we are to-day contending for what we thought we gained years ago. The mortifying and disgraceful fact stares us in the face, that though Faneuil Hall and Bunker Hill Monument stand, freedom of speech is struck down. No lengthy detail of facts is needed. They are already notorious; far more so than will be wished ten years hence.<sup>13</sup>

In his "Plea," Douglass presaged later debates about the importance of free expression by ensuring a right not only to speak but also to hear opinions that might be outside the mainstream discourse.

The abolitionists also helped to build the linkage between and among the various rights clustered in the First Amendment. The right to free expression arose alongside the other essential rights embedded in the First Amendment: the right to freedom of religion, the right to freedom of the press, the right to peaceable assembly, and the right to petition the government for a redress of grievances. William Lloyd Garrison, one of the leading abolitionists mentioned by Douglass, wrote to a correspondent: "Be assured, I clearly see the manly assertion of the right of free thought, free inquiry, and free speech, as against religious intolerance, theological dogmatism, ecclesiastical authority, Papal and Protestant infallibility."<sup>14</sup> For the abolitionists, support for a strong form of the First Amendment protections meant support

for the movement to end slavery. The ideas, words, and actions of the abolitionists point toward the essential connections between free expression and related rights.

The women of nineteenth-century America did not have rights equal to those of men. Among other things, women did not have the right to vote. Those arguing for equal rights for women, led by activists such as Lucretia Mott and the Grimké sisters, met frequently with those who favored the abolition of slavery. They shared ideas and strategies. One strand of thinking that linked the women's rights movement to the abolitionist movement was the importance of free speech. Without a right to free expression, the reasoning went, it would be difficult to make the case for change effectively. While there are exceptions to this pattern, as often happens in history, the primary spokespeople arguing for free expression did so in service of promoting systemic change. Those who sought to stifle the rights of free expression did so in the service of maintaining the status quo—the hegemony of men and of the property-owning whites of the Southern United States.

The case for free expression was important to those fighting for civil rights in the twentieth century, just as it was in the nineteenth century. At the University of California at Berkeley in 1964, campaigns for racial and gender equality gave rise to a renewed movement for free expression. In the words of professor and activist Bettina Aptheker:

On October 1, 1964, hundreds of us surrounded a police car on the Berkeley campus of the University of California and refused to allow the police to arrest Jack Weinberg, a graduate student in mathematics who was "manning" a table for the Congress of Racial Equality on the campus's central Sproul Hall Plaza. We held the car for 32 hours with Jack inside and 950 police massed just outside the campus's main entrance

waiting for orders to commence an assault to break us up. Shortly before 7 PM on Friday, October 3, student negotiators led by Mario Savio, who was to become the primary spokesperson for the Movement, had reached an intermediary agreement with the University President. The Free Speech Movement was born.<sup>15</sup>

Roughly a century after the formal end to slavery in the United States, activists for equality found themselves again arguing in favor of a strong form of freedom of expression to be able to make their case effectively. The point of reviewing these examples of progressive reformers as some of the most prominent free speech advocates throughout U.S. history is to highlight the extent to which the right to free expression supports the growth of a stronger and more inclusive society.

Tolerance theory links a commitment to free expression with a commitment to equality. As Frederick Douglass taught us, the key is to focus on the effect of the expression on both the speaker and the listener, and by doing so to strive to become a more tolerant society. The purpose of the right of free expression is thus aligned with the purposes of a more equitable and inclusive society, even as these goals often appear to be at odds with one another.

Today, in the twenty-first century, the use of new media—especially networked digital communications—is putting the idea of freedom of expression to a new test. As Holmes argued in his dissent in the *Abrams* case, the theory of our Constitution is an “experiment.” Through our use of new technologies, we are hurtling into yet another experimental age, one in which the speed, persistence, and scale of our communications are potentially less constrained by states, and likely more by corporations, than in the past.

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When the Internet first hit the mainstream, some argued that it should be a more “free” space than other spaces in the interest of the public good and greater equality. The former Grateful Dead lyricist John Perry Barlow gave voice to this argument in a manifesto titled “A Declaration of Independence of Cyberspace,” written at Davos, Switzerland, in February 1996. Barlow wrote:

Cyberspace consists of transactions, relationships, and thought itself, arrayed like a standing wave in the web of our communications. Ours is a world that is both everywhere and nowhere, but it is not where bodies live. We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth. We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity.<sup>16</sup>

Barlow’s Declaration of Independence of Cyberspace became the rallying call for a movement known as “cyberlibertarianism.” The great hope of the cyberlibertarians centered on the possibilities of a more equitable, less constrained sphere of life that could be built exclusively online. This movement held out hope for new forms of governance that would operate beyond the reach of governments. The only law that was needed, in Barlow’s words, was the “golden rule”: that community members would do unto others as they would have done unto themselves.

Barlow also correctly predicted that a combination of actors would embrace this libertarian vision of how to govern this emerging “space” in the absence of a conventional sovereign. As excited as he was about the possibilities of this new environment, he feared corporate and state actors working together to constrain speech for private gain: “Your increasingly obsolete information industries would perpetuate themselves by proposing laws, in America and elsewhere, that claim to own speech



itself throughout the world. These laws would declare ideas to be another industrial product, no more noble than pig iron."<sup>17</sup> In Barlow's vision, the online environment would favor free expression over the use of ideas and expression for corporate gain.

Barlow and the cyberlibertarians have not succeeded in realizing their vision. The digital space is governed more or less the same way as other human interactions have been governed in the predigital, analog world. Nonetheless, the words of Barlow's Declaration continue to have rhetorical appeal in making the case for free expression in a fast-changing media environment. And there is no question that the Internet and social media matter when it comes to free expression (and diversity for that matter) in the twenty-first century.

Barlow was prescient in calling attention to the transformative change in the way we think about free expression, given how we communicate using digital devices. At a fundamental level, more people have access to information and knowledge than ever before in human history. Today, billions of people (though not all people) have the ability to publish their ideas freely online, such that anyone on the open Internet can view or hear their speech. Before the Internet, one needed money and power to be able to communicate widely and freely—by owning, for instance, a television network or a publishing company. Though no one is guaranteed an audience, the possibility of reaching large numbers of people is now unprecedented.

The effects of these changes on individuals and communities are only becoming clear with time and they are decidedly mixed. Many people, especially those living under authoritarian regimes, have gained the increased autonomy offered by greater access to information and more opportunities to express themselves freely. Those same people use digital, networked

technologies at their peril because oppressive rulers use the same technologies to track their online activities and to jail them for expressing their views publicly.

The use of digital communication also leads to more persistent forms of speech. Much more of our digital communication is recorded for posterity and available for later review than is true of offline speech, which is more ephemeral. When posted on social media, our speech is also networked and can potentially be read, heard, or viewed instantly by any one of the billions of people online.

This reach and persistence has many consequences for speech. For one thing, it means that the potential harms of certain kinds of speech can be greater. If speech that might have been hurtful were never recorded, it would never be encountered by a listener to whom it could have been harmful. Today, that same speech, when recorded and shared broadly, can reach many people who could find it harmful.

Consider the leaflets that Abrams and his colleagues produced during the First World War. In early-twentieth-century New York, those leaflets were likely to reach a limited number of readers in physical proximity to Abrams and his fellow anarchists. A leaflet could of course be reproduced on a printing press or be put on a boat or train and be more widely distributed. But these modes of dissemination were slow and costly, especially when compared to current modes of communication.

What would the activists of the digital era do in Abrams's position? They would perhaps start a hashtag campaign. The supporters of Bernie Sanders's insurgent campaign against Hillary Clinton used many such hashtags—for example, “#Slogans4Hillary,” which quickly became the most trending hashtag on Twitter, only hours after activists thrust it into usage.<sup>18</sup> Those

who opposed Hillary Clinton's candidacy from the right also used hashtags for negative purposes: #WordsThatDontDescribe-Hillary, for instance.<sup>19</sup> They might have written a blog post, updated a status on Facebook, posted a photo on Instagram, or started a story on Snapchat. Ditto for the activists behind #BlackLivesMatter and #SayHerName. Any of these acts would have cost them no more than whatever they paid for access to the Internet (or be potentially free at, say, a public library). And the reach of their digital activism could have extended to literally billions of people connected to the Internet. This argument about the reach, low cost, and replicability of digital communications has yet to alter materially the way free expression is protected in the United States.

This digital environment frequently lends itself to incivility in interpersonal discourse. People are often less civil to one another when the conversation is mediated digitally than in face-to-face encounters, a phenomenon known as the *disinhibition effect*. Most people who have spent time using new media know how easy it is to forget oneself and hit "send" too quickly on an abrasive email, an obnoxious (even if funny at the time) Tweet, or a witty response on Facebook (that someone might take the "wrong way" without the context of a face-to-face interaction). On social media, for instance, young people will often say something quickly and more harshly than they might in the classroom. They cannot see, or even envision, all the recipients of their speech. They act out of emotion, as they might in the privacy of their own home, even though their speech might reverberate around the world—and persist for the rest of their life in digital form online.<sup>20</sup>

Digital-era activism also differs in the way individuals tend to act when engaged in discourse. For example, the disinhibition

effect comes into play in political dialogue. The 2016 presidential election was marked by especially ugly rhetoric online, stoked in particular by Donald Trump and his supporters on Twitter. Democrats were not immune to hurtful online commentary in response, as the characterization of Republican supporters as “deplorables” reverberated through social media. No one had reason to feel especially good about the quality of the online rhetoric in the 2016 election cycle.

In the era of digital media, the effects of speech—hateful speech as well as socially constructive speech—are greater than ever before. The rationale for an empathetic, tolerant society is no less pressing today than before the advent of the Internet and social media. While Barlow’s proposal for an extreme form of free expression online has not come to pass, his call to action has underscored the potential for new media to build on the positive effects of free expression for individuals and communities.

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One does not have to agree with all the arguments for free expression to take the need to protect it seriously. For those who favor a libertarian line of reasoning (whether cyber- or otherwise), the concept of the marketplace of ideas might resonate. For those concerned about redressing the effects of unequal power in society, the need to allow for dissent against the powerful might hold greater force. The right to free expression has enduring importance either way. In an era in which the use of new media is changing the environment for politics and human discourse, it is increasingly important that we clarify our thinking on the degree of free expression we wish to support in our society.

At no time in U.S. history has the right to free expression been unfettered. This right is regularly weighed against other important principles, such as individual safety, national security, and

equality. The claims of those who believe diversity initiatives are more important than free expression ought to be considered in light of the many competing claims for when and how the absolute right to free expression is curtailed. The right to free expression deserves support by those who seek progressive ends as well as those with a conservative agenda: it underpins our ability to function as a democratic society, regardless of who has the upper hand at any given moment. The interests of diversity and free expression point in the same direction, toward a more tolerant and democratic society in which we support the flourishing of our citizens, a genuine search for the truth, and the conditions for sound civic decision making—with careful limitations against the most dangerous speech at the margins.

