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To cite this article: Richard R. John (2019) Freedom of expression in the digital age: a historian's perspective, Church, Communication and Culture, 4:1, 25-38, DOI: [10.1080/23753234.2019.1565918](https://doi.org/10.1080/23753234.2019.1565918)

To link to this article: <https://doi.org/10.1080/23753234.2019.1565918>



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Published online: 11 Mar 2019.



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Freedom of expression in the digital age: a historian's perspective

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ABSTRACT

This essay surveys the history of freedom of expression from classical antiquity to the present. It contends that a principled defense of free expression dates to the seventeenth century, when it was championed by the political theorist John Locke. Free expression for Locke was closely linked with religious toleration, a relationship that has led in our own day to a principled defense of pluralism as a civic ideal. For the past several hundred years, the domain within which free expression has flourished has been subject not only to spatial boundaries and temporal limits, but also to political regulation and social control. The essay concludes by underscoring the challenge to traditional conceptions of free expression that are posed today by social media platforms.

ARTICLE HISTORY

Received 30 June 2018

Revised 5 October 2018

Accepted 18 December 2018

KEYWORDS

Freedom of expression; censorship; social media; John Locke; Alexis de Tocqueville; John Stuart Mill; Oliver Wendell Holmes

Introduction

Freedom of expression is justly hailed as a sacred right and a bulwark of liberty. Enshrined in 1791 in the First Amendment of the United States Constitution, defended in 1859 by the British philosopher John Stuart Mill in *On Liberty*, and reaffirmed in the 1948 Universal Declaration of Human Rights, this cherished ideal has long been a source of inspiration for religious liberals and proponents of democratic self-rule.¹

Freedom of expression is sometimes assumed to be coeval with the rise of Christianity. This contention has a certain plausibility. Certain Christians *have* been among its most fervent defenders. Yet it would be a major oversimplification to assert that present-day free expression norms date back two millennia. In fact, the history of free expression is a good deal less linear, and more complex.

In the United States, the recent rise of social media is prompting a reconsideration of the familiar assumption that free expression is or ought to be more-or-less identical with the elimination of restraints on the circulation of information.² In this

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reconsideration, two aspects of the history of free expression are particularly salient. The first is the close relationship between free expression and religious toleration, a relationship that dates back to the seventeenth century, and that has led in our own day to the principled defense of pluralism as a civic ideal. The second is the realization that, for the past several hundred years, the domain within which free expression has flourished has been subject not only to spatial boundaries and temporal limits, but also to political regulation and social control. These constraints, which were at once technical and institutional, facilitated the monitoring of speakers and writers in ways that were long taken-for-granted, but which have become increasingly problematic today.

Historians see the past through the lens of the present and free expression is no exception. The distinctive, and in certain ways unprecedented technical, political, and cultural affordances of social media – including, in particular, the rise since the early 2000s of Facebook and Google – raise basic questions not only about the possibilities of free expression, but also about its perils. No longer can historians tell the story of its history in the same, basically triumphalist, way that we have since the Enlightenment.

Before free expression

The principled defense of free expression is distinctively modern. Writing in the fourth century BCE, the Greek philosopher Plato found so offensive the values inculcated by the epic poetry that shaped the moral imagination of his fellow Athenians, and especially of its youth, that, in his *Republic*, he recommended the outright banning of Homer's *Iliad* and *Odyssey* – two of the most celebrated of the literary monuments of his or any age. Early Christian theologians systematically and unapologetically destroyed the writings of their opponents – including many who regarded themselves as Christian; Byzantine iconoclasts destroyed thousands of religious symbols that they deemed impious; and the Renaissance political theorist Machiavelli took it for granted that, in a well-ordered republic, censorship was among the most useful tools of statecraft. In early modern Europe, religious dissenters of all kinds – Jewish, Muslim, Protestant, and Catholic – regularly courted imprisonment, torture, and death. Even Thomas Hobbes – the seventeenth-century English philosopher who is often hailed as one of the founders of the liberal tradition – supported the censorship of religious beliefs as a necessary precondition for the perpetuation of a well-ordered society.

When, how and why did this change? Part of the answer lies in the religious and political turmoil unleashed by the Reformation. Following the division of the Catholic Church in the sixteenth century into rival pro-Catholic and anti-Catholic confessions, and the subsequent splintering of the anti-Catholic Protestants into a multitude of rival and often hostile sects, political leaders in the Holy Roman Empire, the Low Countries, England, Scotland, the Swiss cantons, and a few other places, including, for much of the seventeenth century, France, devised institutional expedients to accommodate some, though rarely all, of the continent's religious minorities.

Religious toleration from Henry IV of France to John Locke

Among the accommodationists was Henry IV of France. Determined to unify a realm wracked by religious strife, the French monarch in 1598 bestowed a limited form of religious toleration his country's Protestants, a privilege that in 1685 Louis XIV would rescind. Theoretical justification for the accommodationist position would be forthcoming in 1685 from the English philosopher John Locke. In his celebrated *Letter Concerning Toleration*, Locke defended the rights to free expression of England's Protestants should England's current monarch, the Catholic James II, emulate France's Louis XIV and reintroduce to England the persecution of non-Catholics, a group that included Locke himself.³

Locke's defense of religious toleration was not unconditional. Among the groups he excluded were atheists and Catholics. These exceptions might seem to clash with Locke's commitment to free expression. In fact, they highlighted its distinctive character. Neither of these groups, in Locke's view, could be trusted to obey the laws of the realm. And for this reason, neither should be permitted to participate in public life. Religious toleration presumed fealty to a spatially bounded collectivity, a commitment that atheists could not be trusted to make, since their oaths could not be trusted, and remained anathema to Catholics, who remained loyal to a religious organization that for Locke was tantamount to a foreign power.⁴

Goaded by the Protestant revolt, the Catholic Church embarked on its own Reformation, inventing, in the process, the communications strategy that the church labeled, and has been known forever after, as propaganda. Instead of stamping out dissent – the church adopted the alternative, and ultimately, more effective, strategy of flooding Europe with a torrent of sounds, images, and sensory experiences that art historians have labeled the Baroque.

The Catholic response to the Protestant revolt sparked a century of savage violence in Europe. One of the darkest chapters in this collective tragedy took place in Paris on 24 August 1572, when a Catholic-led mob cold-bloodedly murdered thousands of French Protestants in a horrific act of carnage that has come to be known as the St. Bartholomew's Day Massacre. Thankfully, the memory of this era's Catholic-Protestant warfare has been largely forgotten, a testament not only to the rising spirit of ecumenism, but also to the temporal limits of early modern social media – the pre-digital guarantor, as it were, of the right to forget.

Religious diversity and free expression

The contingent nature of free expression was taken-for-granted not only in early modern Europe, but also in the pre-Internet era United States. The pivotal role of religious dissent in the history of free expression in the United States has long been well known to historians, and has recently been retold with imagination and insight by journalist Steven Waldman.⁵

No single individual played a more pivotal role in establishing the distinctive U. S. tradition of free expression than James Madison, a lawmaker from Virginia who hailed from a region that had recently experienced what Waldman aptly describes as 'a brutal wave of religious persecution against Baptists.'⁶

Madison's personal familiarity with the persecution of religious dissenters reinforced his conviction that free expression could promote political stability. In the years between 1760 and 1778 alone, Virginia lawmakers jailed no fewer than forty-five Baptist preachers for preaching the gospel, fourteen of whom hailed from the county in which Madison lived.⁷ Madison set forth his ideas about the relationship of religious dissent and political stability in the two most famous of the essays that he wrote to make the case for the ratification of the U. S. Constitution in the state of New York. These essays, *Federalist* 10 and *Federalist* 51, remain to this day the single most influential exposition of American political theory to have been written by an American. The co-existence of a multiplicity of religious sects, Madison posited in *Federalist* 10 – a phenomena that created the social reality that we would call pluralism – diminished the likelihood that a single faction could gain control of the government and tyrannize the few in the name of the many.⁸ In *Federalist* 51, Madison made the affinity between civil rights and pluralism explicit. In a 'free government,' he wrote, 'the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.'⁹

Locke feared that certain groups – namely, Catholics and atheists – might threaten political stability. Madison, in contrast, regarded the multiplicity of religious sects as a bulwark of the republic.

Free expression in the United States has from the beginning been constrained not only by law, but also by convention. This circumstance is often underplayed by American historians who naively equate public opinion with the editorial positions of journalists. To cite but one example, the newspapers that pro-war patriot printers issued during the American War of Independence excluded loyalist voices – while the newspapers that *anti-war* loyalists printed included little that would offend the Crown. The pro-war press, in short, helped to create what one recent historian has aptly termed a 'common cause' by conjuring into existence an 'imagined community' that united friends and excluded enemies – with the enemies often including not only the British, but also their supposed fellow travelers – namely Native Americans, slaves, and even free blacks.¹⁰

The First Amendment and the Post Office Act of 1792

The preconditions for free expression in the United States would change significantly following the adoption of the federal Constitution in 1788. The catalyst was the establishment of a new information infrastructure, or what we today would call a media platform. The best-known feature of this new media platform today was the First Amendment, with its celebrated proscription on the enactment by the central government of legislation abridging free speech or a free press. The First Amendment is justifiably praised as a cornerstone of the Bill of Rights – the first ten amendments to the Federal Constitution, all of which went into effect in 1791.

For this reason, it is worth underscoring that the precise character of this guarantee would not be seriously debated by the nation's highest court until the First World War.¹¹

Even more important than the First Amendment in shaping the post-1788 informational environment in the United States was the Post Office Act of 1792. This law lacked a ringing preamble, and in part for this reason is relatively little known. This is unfortunate, since – in an age in which the mail was the primary medium for the long-distance circulation of information on commerce and public affairs – this law would exert a far-reaching influence on American public life.

The Post Office Act of 1792 had three main provisions. First, it admitted every newspaper and magazine into the mail at an extremely low rate, a massive subsidy for the press. Second, it prohibited the surveillance by the government of personal correspondence, popularizing the-then novel idea that certain kinds of communications should as a matter of right remain private. Third, it established an institutional mechanism that facilitated the rapid expansion of the postal network from the seaboard to the hinterland.¹² By the time the French aristocrat Alexis de Tocqueville visited the United States in 1831, the United States boasted a postal network far denser and more spatially extensive than existed in any other country in the world, including England or France. The informational environment that Tocqueville observed when he toured the United States, and that would so alarm John Stuart Mill, could not have existed in the absence of the informational environment created by the Post Office Act of 1792.

The post-1792 informational environment in the United States fostered free expression by making it possible to circulate periodicals throughout the country at an exceedingly low cost. In an average year in the early republic, newspapers typically made up as much as 95 percent of the weight of the mail while generating no more than 15 percent of the revenue.¹³

Though newspapers contained local advertisements, the vast majority of news stories focused on national politics. Only after 1840 would local news emerge as a distinctive journalistic genre.¹⁴ In the parlance of today's Internet gurus, this made news reports about national politics 'cheap speech.' Like the seventeenth-century Catholic Church, the central government had undertaken as a matter of policy to flood the population with information that promoted a specific point of view.

Tocqueville declared in his *Democracy* that no legislation existed limiting freedom of the press in the United States.¹⁵ On this point the French aristocrat was mistaken. In fact, the First Amendment free press guarantee applied only to the central government. 'Congress shall make no law ...' declared its opening clause, a declaration that deliberately excluded the states.

This distinction is important. In the United States during the nineteenth century, the states retained a great deal of authority over their internal affairs. Many restricted the press in various ways, a fact that would become obvious in the 1830s when a tiny group of New York City-based religious radicals known as abolitionists tried to circulate antislavery tracts through the mail. The post office from which the abolitionists sent their tracts was located in the state of New York, a jurisdiction in which no law blocked the circulation of information on the slavery

question. Yet the post offices to which the tracts were destined included many in the slaveholding states, in which the circulation of abolition literature was a criminal offense. For this reason, many, if not most, of the abolitionists' tracts failed to reach their intended destination, having been confiscated upon their arrival in the slaveholding states by state and local government officials. In effect, abolitionists had tried – and failed – to use the technical affordances of the post office to breach what one might call, by analogy to today's censorship regime in China, the 'great proslavery firewall.'¹⁶

Spatial boundaries mattered. The central government chose to reinforce state laws banning the circulation of certain classes of information rather than to permit this information to circulate unimpeded. Here was one instance in which the nineteenth-century U. S. central government enforced a communications policy that in certain ways anticipated the twenty-first century digital media policy of the Chinese government, a policy that historian Timothy Garton Ash has aptly termed 'universal unilateralism.'¹⁷ In this instance, as in others, contemporaries assumed that content creators were responsible for the messages they sent, and that the territory in which their messages circulated was spatially bounded.

The threat of majoritarian tyranny

Threats to free expression in the nineteenth century United States did not originate only from the government. In *Democracy in America*, for example, Tocqueville famously coined the phrase 'tyranny of the majority' to describe the pernicious influence of public opinion on free expression. One example of this kind of oppression was the violence meted out to journalists who publicized unpopular ideas. Interestingly, the murder by a mob of an antiwar journalist during the War of 1812 was one of the relatively few specific examples of the deleterious consequences of the tyranny of the majority that Tocqueville cited in his *Democracy*.¹⁸

This new kind of tyranny originated not in a legal proscription, but, rather, in public opinion. Unable to justify an unpopular position – why should I regard my opinion as superior to that of anyone else? – Americans hived off into 'filter bubbles' that insulated them from alternative points of view. Even after the Civil War, the inhabitants of the former slaveholding states lived for many decades in one such filter bubble. Media coverage of atrocities against African-Americans only rarely reached a nationwide audience and when they did they were swiftly forgotten. Much the same was true of African-American advances in education, commerce, and the professions. Spatial boundaries and temporal limits constrained public discourse, just as Madison had assumed. One need not celebrate these constraints, of course. Yet it would be highly misleading to deny that they existed. Not until *New York Times v. Sullivan*, a landmark Supreme Court case decided in 1964, would the courts exempt journalists from state-level libel laws. In so doing, it created a loophole that minimized the risk of a financially crippling libel lawsuit, a risk that had for many years discouraged publishers from enlisting journalists to report candidly on the African-American civil rights struggle in the South.

John Stuart Mill, public opinion, and individuality

John Stuart Mill read Tocqueville's *Democracy* closely, and in *On Liberty* (1859), characterized the emerging democratic society that Tocqueville dissected as a threat not only to free expression but also to liberty. Tocqueville lamented *individualism* – a neologism Tocqueville did much to popularize – and so did Mill. Yet like Tocqueville, Mill venerated *individuality*, which Mill associated with eccentricity and even genius, and which he believed could be honed through the unceasing, vigorous, and open-ended exploration of one's most cherished beliefs. The goal of such an exploration was the fullest possible development of the individual.

Free expression for Mill could help individuals refine their ideas, yet it was no panacea. There was simply no guarantee that, even in the long term, progressive ideas would triumph over reactionary institutions – which, for Mill, included the Catholic Church. For this reason, it would be a mistake to recruit Mill as a proponent for what today free expression absolutists call the marketplace of ideas. The 'dictum that truth always triumphs over persecution,' Mill noted, was one of those 'pleasant falsehoods' that had been so often repeated that it became a commonplace, even though it was demonstrably false. 'It is,' Mill elaborated, a 'piece of idle sentimentality that truth, merely as truth, has any inherent power denied to error, of prevailing against the dungeon and the stake. Men are not more zealous for truth than they often are for error, and a sufficient application of legal or even of social penalties will generally succeed in stopping the propagation of either.'¹⁹

Mill's hostility to the supposed benefits of the marketplace of ideas is of a piece with oft-expressed hatred for custom, convention, and tradition. Mill despised public opinion, deplored much of what passed in his day for public discussion, and found little to applaud in journalism or public education. Each worked to hasten the 'general similarity of mankind' and weaken the 'social support for nonconformity' and, indeed, for any 'substantive power' that might challenge the 'ascendency of numbers' by 'taking under its protection opinions and tendencies' that might be 'at variance with those of the public.'²⁰ The 'only unfailing and permanent source of improvement' Mill elaborated, was liberty, a 'progressive principle' diametrically opposed to the 'sway of Custom' – a reactionary impulse that had reduced many countries, including China, to a stationary state that had been crippled for centuries by an educational and political system that discouraged independent thinking.²¹

Europe had been saved from such a baleful fate not by any single individual, group, nation, or religious confession, but, instead, by its 'remarkable diversity of character and culture,' or, in a word, by its plurality: 'Europe is, in my judgment, wholly indebted to this plurality of paths for its progressive and many-sided development.'²² Yet should public opinion prevail, progress would cease: 'If resistance waits till life is reduced nearly to one uniform type, all deviations from that type will come to be considered impious, immoral, even monstrous and contrary to nature. Mankind speedily become unable to conceive diversity, when they have been for some time unaccustomed to see it.'²³

Mill's assessment would be selectively appropriated in the post-First World War United States by a group of talented jurists that included Oliver Wendell Holmes and Louis Brandeis.²⁴ These jurists shared Mill's misgivings about the epistemic value of

the marketplace of ideas, a phrase that would not become widely used in the United States until after the Second World War and that would not become ubiquitous until it would come to be appropriated by the digital media techno-utopians of our own age.²⁵ Holmes and Brandeis admired Mill's critique of lazy thinking, which had been spurred, in part, by their revulsion at the propaganda campaigns the Great Powers (including the United States) had launched during the First World War, a revulsion that informed the civil libertarian defense of free expression that emerged at almost precisely the same time, and that would remain an influential strain of first amendment jurisprudence in the United States ever since.²⁶

The civil libertarian defense of free expression rests on a somewhat different foundation from the utilitarian rationale for free expression that Mill defended in *On Liberty*. For American civil libertarians, free expression is a *negative* norm that can check state-sponsored tyranny. Free expression for Mill, in contrast, as it would be for the authors of the Universal Declaration of Human Rights of 1948, is a *positive* norm that can hasten the emergence of the good society.²⁷

Broadcast regulation in Europe and the United States

The different logics that informed European and American free expression norms played out in the regulation of radio, the first electrically mediated broadcast medium. The U. S. system of radio broadcasting that emerged in the 1920s was the outcome of a three-way contest between government administrators, reformers, and corporate managers. Government administrators and reformers assumed that the new medium should be operated as a public service. Corporate managers, in contrast, rejected the public service model in favor of private enterprise. Only competition, in their view, could prevent the medium from falling prey to a monopoly.²⁸ As a result, U. S. broadcasting from the outset was commercially based and advertising funded. The radio broadcasting system in Britain, in contrast, was designed to forestall the kind of competitive chaos that had occurred in the United States. Under the leadership of the high-minded John Reith, the British Broadcasting Corporation would be operated as the public service both at home and abroad. Similar outcomes prevailed in France, Germany, and much of the rest of Europe.²⁹

Just as broadcast regulatory frameworks differ in Europe and the United States, so too do privacy laws. The recently enacted European Union (EU) General Data Protection Regulation (GDPR) is a case in point. It is too early to tell how the GDPR will work in practice. In theory, GDPR should establish new spatial boundaries and temporal limits for free expression by restricting the ability of non-EU organizations to flood EU digital platforms, while expanding the EU citizens' 'right to forget' by enabling them to delete personal data.

It would be a mistake to assume that U. S. media corporations are unregulated. For much of the twentieth century, Hollywood filmmakers have no choice but to pay careful heed to the content guidelines established by the Motion Picture Production Code, a semi-official voluntary standard-setting organization with close ties to Jewish, Protestant, and Catholic religious organizations. Had the Production Code not existed, the individual states might well have stepped into the void.³⁰

The broadcasting counterpart to the Motion Picture Production Code is the Federal Communications Commission (FCC). The FCC has long used its authority over the renewal of broadcast licenses to shape program content. This is particularly true in the case of religious broadcasting, a realm in which for many decades the FCC has been active – consistently favoring ecumenical broadcasting over its evangelical cousins.³¹

U. S. filmmakers and radio and television broadcasters have long found it prudent to monitor the content of their broadcasts. While this might sound unduly intrusive, in fact, it coincided with – and may even have helped to inspire, the ‘Golden Age’ of Hollywood.

The media platform providers Facebook and Google have less to worry about. In part, this is because they enjoy immunity from state-level defamation claims under section 230 of the Communications Decency Act of 1996.³² Just as *New York Times v. Sullivan* empowered big city newspapers, so section 230 would hasten the rise of the digital media platform providers.

Free expression on campus

What about free expression in U. S. college classrooms? In certain respects, this is an old-fashioned issue. Classrooms, lecture halls, and public plazas are all spatially bounded localities that one can point to on a map. Temporal limits are also important: Administrators have an obvious incentive to downplay incidents that invariably cast them in a negative light. Students graduate, and, with their departure, memories fade.

Today’s critics of free expression often lean toward the left. In the 1950s, in contrast, left-leaning speakers often found themselves the objects of attack by anti-communist zealots, while administrators at public universities were so committed to fostering political neutrality that, in 1952, the University of California they actually forced the Democratic presidential nominee Adlai Stephenson off campus to give a speech.³³

Are university administrators the culprits? University mandated ‘hate speech’ bans have led to the disinviting of some controversial speakers, while the mandating of classroom ‘safe spaces’ and the issuance of ‘trigger warnings’ for potentially sensitive material *has* altered the instructional dynamics. To help push back against these restrictions, Harvard professor Cornel West and Princeton professor Robert George have prepared a public statement that commits the signatories to ‘Trust Seeking, Democracy, and Freedom of Thought and Expression.’³⁴

Others point the finger at students. It is sometimes contended, for example, that young people today lack their parents’ commitment to free expression at college because their primary experience of free expression has been on-line, a realm in which positive instances of public debate are depressingly rare.

Whoever might be at fault, the question remains: Just how widespread is today’s campus-based assault on free expression? Instances in which controversial speakers have been disinvited as a result of campus protest, while by no means unknown, remain unusual. This is true even though private colleges and universities have no

legal obligation to open their facilities to anyone. The faculty of Columbia University, where I teach, recently passed a resolution in defense of freedom of expression, a tribute to the continuing commitment of one influential U. S. institution of higher learning to a principle that, if your only source of news was the popular press, you might assume had ceased to exist.³⁵

The challenge of digital media

Historians often contend that there is nothing new under the sun. There is much to be said for this claim: contests over free expression go back over three-hundred years. Even so, the rise of Facebook, Google, and other media platform providers has transformed the free-expression rules-of-the-game. Free expression norms have historically presumed that the network providers are legally responsible for their content and that their audience is spatially bounded and temporally limited. Neither of these conditions can be taken for granted on the web. Protected from prosecution by section 230 of the 1996 U. S. Communications Decency Act, Facebook and Google lack a compelling rationale to monitor their content.

If free expression is to remain a sacred right and a bulwark of liberty, it would seem self-evident that norms should be devised to reinstate the spatial boundaries and temporal limits that the current regulatory regime has emboldened social platform providers to overstep. Free expression in the past – for Locke, for Madison, for Mill, and even for John Reith – presupposed the existence of content creators that were spatially bounded, temporally limited, and accountable to the public. Content and not connectivity was king. ‘What is essential,’ as the British-born American legal scholar Alexander Meikeljohn put in 1948, ‘is not that everyone shall speak, but that everything worth saying shall be said.’³⁶ This is no longer true today.

It is one thing to encourage a multiplicity of viewpoints, a laudable pluralist impulse that would have earned the approval of James Madison and John Stuart Mill. Yet it is quite another thing to condone the existence of multibillion-dollar digital media platform providers such as Facebook and Google that are legally absolved from any liability for the information that they circulate, deny that they are in fact media outlets by claiming merely to be neutral, algorithm-driven platforms, and have arrogated to themselves the authority to alter at will the media streams of millions of people.³⁷ A further challenge to cherished assumptions about free expression is posed by the weaponization by business corporations of the free press clause to expand their rights, a legal strategy that has been dubbed ‘First Amendment Lochnerism’ – a reference to the early twentieth-century business campaign to mobilize the courts to block labor legislation.³⁸

Conclusion

Freedom of expression has a history. It is neither coeval with Christianity, as Catholic apologists sometimes assume, nor inherently valuable, as commentators in the United States often contend. On the contrary, it emerged in its modern form only in the seventeenth century as a byproduct of generations of horrific warfare between

Catholics and Protestants. For John Locke, freedom of expression took the form of an appeal for religious toleration; in the Enlightenment, this appeal would become transmogrified into a principled defense of pluralism as a civic ideal.

Innovations in the means of communications have often been disruptive. Yet the challenge posed by digital media is unusually stark. A new age calls for a new vision. The value of free expression is enhanced, and not diminished, if it is localized in time and space. Liberty is the ally, and not the antagonist, of political regulation and social control. What the sacred cause of liberty demands is not more free expression, but better free expression, and in the pursuit of this elusive yet essential goal, there is much to be done.

Notes

1. For valuable suggestions and advice, I am grateful to David Noell, David Pozen, Father Jordi Pujol, Michael Schudson, Michael Stamm, Jeremy K. Kessler, and Emilie Xie.
2. See, for example, Wu (2017). Wu's assessment of first amendment jurisprudence built on his recent book-length survey of twentieth-century media regulation, in which he proposed that the most important limited resource in mass communications was no longer the scarcity of *broadcast* outlets, as regulators had long assumed, but, rather, the scarcity of audience *attention*. Wu (2016).
3. Locke (2003), pp. 390–436.
4. Locke (2003), pp. 425–426.
5. Waldman (2008).
6. Waldman (2008), p. v.
7. Waldman (2008), p. 101.
8. 'A religious sect may degenerate into a political faction in a part of the Confederacy,' Madison observed, 'but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source.' James Madison, 'Number Ten' [1787], in Madison, *The Federalist Papers*, ed. Roy P. Fairfield, 2nd ed. (Baltimore: Johns Hopkins University Press, 1981), p. 23.
9. Madison, 'Number Fifty-One' [1788], in Madison, *Federalist Papers*, ed. Fairfield, p. 162.
10. Parkinson (2016).
11. Starr (2008), pp. 81, 274–286.
12. John (1995), chapter 2.
13. John (1995), p. 38.
14. The relatively recent inclusion in U. S. newspapers of local news, as compared to national and international news, is worth emphasizing, since media scholars have long repeated uncritically the erroneous contention of the sociologist Robert E. Park that the earliest newspapers were little more than codified gossip. Russo (1980).
15. 'Among the twelve million people living in the territory of the United States, not *one single person* has yet dared to suggest any restrictions on press freedom.' Tocqueville (2003), pp. 211–212.
16. John (1995), chapter 7.
17. Ash (2016), chapter 9.
18. Isaac Kramnick, 'Introduction,' to Tocqueville, *Democracy*, p. xxviii. Mob violence against journalists was endemic in the early republic. On this topic, see Nerone (1994), chapters 3–4.
19. Mill (2015), pp. 29–30.
20. Mill (2015), p. 72.
21. Mill (2015), p. 69.
22. Mill (2015), p. 71.

23. See Note 20 above.
24. Bollinger (1986), chapter 1.
25. ‘The term [the ‘free marketplace of ideas’] does not emerge from Holmes, nor so far as I can discover, any leading theorist of free expression before 1950 such as Louis Brandeis, Zechariah Chaffee, Leonard Hand, or Alexander Meiklejohn.’ Peters (2004), p. 72. For a perceptive comparison of Mill and Holmes that contrasts Mill’s disdain for majoritarianism with Holmes’s exuberant faith in popular democracy—a faith that would sanction restrictions on free expression that Mill would reject—see Blasi (2011). For an unusually perceptive analysis of Holmes’s deployment of market metaphors in some of his most celebrated first amendment opinions, see Blasi (2004). On the distinction between the epistemic (or ‘marketplace-of ideas’) and political (or ‘democracy-enhancing’) rationale for the protection of free expression, see Kessler (2014): 1117, fn 164.
26. Freeberg (2008).
27. The fundamentally negative character of first amendment jurisprudence is a commonplace of legal scholarship. Frederick Schauer put it this way: ‘Freedom of speech... while in theory definable both positively and negatively, has in reality developed more negatively—understood to be at its core about protecting against danger rather than about making conditions better.’ Schauer (2004): 1191.
28. This claim has been informed by an unpublished manuscript by David Goodman in the author’s possession on the history of early radio regulation in the United States.
29. Stamm (2015).
30. Starr (2008), chapter 9.
31. Hangen (2006).
32. Sylvain (2018); Pozen (2018).
33. Schudson (1998), p. 267.
34. George and Cornel (2017)
35. ‘University Senate Passes Revolution on Freedom of Expression,’ (2018); Sachs (2018). For a survey of the relevant issues, see Whittington (2018); Pujol (2016); and Zuckert (2018).
36. Meiklejohn (1948), p. 25. Among the legal scholars who have followed Meiklejohn in emphasizing the value of free expression as a first amendment ideal are Cass R. Sunstein and Owen M. Fiss. Sunstein (1993); Fiss (1998). For a recent summary of the value-versus-access debate, see Mansfield (2018). Mansfield chastises American commentators for neglecting the value of free expression by obsessing over its extent.
37. For an introduction to the large and growing U. S.-based indictment of Facebook and Google, see Vaidhyanathan (2018); McNamee (2018); Foer (2017); Taplin (2016); Taylor (2014).
38. Kessler (2016).

Disclosure statement

No potential conflict of interest was reported by the author.

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