A Freedom Both Personal and Political

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The plurality of the human condition and the capacity of each individual to create a distinctive life for himself lie at the core of John Stuart Mill's worldview. Mill wrote *On Liberty* to foster our individuality, even to the point of eccentricity, and to attack the forces that drive us to conformity. "That so few now dare to be eccentric," Mill warned, "marks the chief danger of the time" (p. 131).

Mill sought such diversity not for its own sake but rather to fulfill a larger vision of human development. He defended individuality, and even eccentricity, on the theory that they reflect the fullest development of our personalities. Such development, he argued, would promote both the happiness of each individual and the well-being of society. As Mill saw it, "In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others" (pp. 127–28).

With these purposes in mind, Mill formulated his principle of individual liberty. In modern times this principle has come to be known as the harm principle, but it still better might be called the harm-to-others principle.[1] It provides that interferences with an individual's liberty can be justified only to prevent him from harming others, never merely for his own good.

Implicit in the harm-to-others principle is the view that all social coercion must be justified, and that such interference can be justified only if it prevents an individual from harming others. In effect, it gives each individual the freedom to decide what is best for himself. Mill assumed that this freedom would lead to the fullest development of each individual and thus enable "human beings [to] become a noble and beautiful object of contemplation" (p. 127).

The harm-to-others principle is the overarching theme of *On Liberty* and arguably its most distinctive contribution. Mill's essay, however, is also a stirring affirmation of the importance of freedom of speech and thus often is read, especially in legal circles, as the theoretical foundation for the protection of free speech — the focus of my concern.

Although modern lawyers tend to separate Mill's discussion of free speech from his more general defense of individual liberty, we must first determine whether Mill actually embraced two distinct principles, as I argue he did, or whether the free speech principle is simply a special application of the harm-to-others principle. As a special application, speech could be protected on the theory, sometimes invoked, that it causes no harm to others. Conceiving freedom of speech more broadly, indeed as an independent principle, would allow for the protection of speech even if it causes harm to others.

In the first chapter of *On Liberty,* Mill introduced the harm-to-others principle. Rather than further develop that principle in the second chapter, though, he launched into a defense of free speech — not with the rather limp argument that it causes no harm to others, but because it is a necessary means for testing one's belief. Only through free and open discussion can we learn whether our views are true or false. No one is infallible, and if even after free and open discussion an individual adheres to the same beliefs, that individual will do so with a new appreciation and even firmer conviction in their truth.

In the third chapter of *On Liberty,* Mill resumed the discussion of the harm-to-others principle and invoked the distinction between speech and action to define the jurisdiction of that principle. The harm-to-others principle applies only to action, he argued, not to speech. Men should be free to form their opinions and to express them "without reserve" (p. 121). A different question arises, according to Mill, when people act upon those opinions. In the domain of action, the harm-to-others principle operates and secures a freedom more limited than the one afforded to speech.

Speech for Mill was not a solipsistic activity. Speech occurs in the presence of others, and Mill argued for a freedom to receive opinions as well as to express them. The freedom he insisted upon was, in a phrase he used repeatedly, a "freedom of discussion." In emphasizing the social dimensions of speech, Mill necessarily acknowledged that speech may contribute to a sequence of events that harms others. Still, he insisted upon a measure of freedom for the expression of opinion that transcends the freedom for action provided by the harm-to-others principle. As Mill put it, "No one pretends that actions should be as free as opinions" (p. 121).

At the beginning of Chapter III, Mill acknowledged that speech might be "a positive instigation" to some action that harms others. In a passage that has become a standard part of the lawyer's repertory, Mill wrote, "An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press,

but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard" (p. 121).

The purpose of this passage is to establish society's authority to restrain those who incite an excited mob. Because of this focus, Mill did not pause to explain why those who express the same view as the instigator of the mob, but who do so through the press, should be let alone. Is it because they cause no harm to others, or is it because they enjoy a freedom to express that opinion — "corn-dealers are starvers of the poor," "private property is robbery" — in spite of the harm to others? Only if we ignore the importance of culture — or, more pointedly, the cumulative effects of public discourse on action, some of which may transgress the law — might we say that systematic attacks in the press upon private property or the propertied classes will not weaken the attachment or respect afforded to private property and thus not affect or harm others. There is no reason to believe Mill was of that view.

It is thus fair to say that in affirming the right of the press to carry or even advance attacks on private property, Mill was either prepared to protect speech even when it affects or harms others or, alternatively, that he would require very special kinds of harms in order to justify the restraint on speech. Not only must the action that inflicts the harm be unlawful, but the relation between that action and the speech must be direct and immediate, and the harm inflicted must be nearly calamitous, as when the excited mob storms the house of the corn-dealer. Under either alternative, Mill may be read as treating free speech as an independent principle that imposes limits on society's authority to interfere with our liberty, limits greater than those imposed by the general harm-to-others principle.[2]

Although Mill did not fully identify freedom of speech as a principle independent of harm-to-others, in another context altogether — the market for goods and services — he explicitly acknowledged that harm to others is not always a sufficient basis for restraints on liberty. In the fifth and last chapter of *On Liberty,* "Applications," Mill acknowledged that in ordinary competitive activities, the person who wins out "reaps benefit from the loss of others" and that "trade is a social act" (pp. 156–57). Under the harm-to-others principle, therefore, restraints on trade would seem justified. But he denied or avoided that conclusion, and thereby gave life to what he referred to as "the so-called doctrine of Free Trade." He argued that restraints on trade are "wrong solely because they do not really produce the results which it is desired to produce by them" (p. 157).

In one respect, Mill justifies free trade somewhat differently than he does free speech. Whereas the reasoning underlying his defense of free

speech — the fullest development of each individual — is primarily moral or humanistic, his defense of free trade appears largely pragmatic: restraints on trade are likely to be counterproductive. Notwithstanding this difference, however, the free trade principle operates in much the same fashion as the one guaranteeing free speech. Both invalidate restraints that otherwise might be justified under the harm-to-others principle.

Over the course of the twentieth century, free speech has become the property of lawyers more than of philosophers. The contours of this freedom have been crafted largely by courts, most notably the Supreme Court of the United States. Starting in the New Deal era, the Supreme Court became increasingly generous in protecting freedom of speech, and did so even as it sustained the government's regulatory authority in the face of generalized claims of individual liberty of the type that might be thought to be protected by Mill's harm-to-others principle. In legal terms, free speech triumphed as substantive due process collapsed. Freedom of speech was protected even though the Supreme Court acknowledged that, absent a free speech issue, there was sufficient basis for public authorities to regulate.

Substantive due process received its most dramatic and forceful statement in the late nineteenth and early twentieth centuries, when the Due Process Clause of the Fourteenth Amendment ("nor shall any state deprive any person of life, liberty, or property, without due process of law") was used to strike down legislation on the ground that it interfered with individual liberty. Sometimes, Mill's harm-to-others principle was invoked in support of this attack on legislation.[3] The most venerable due process ruling of this period was the Supreme Court's 1905 decision in *Lochner v. New York,* setting aside a New York law that established a sixty-hour ceiling on the work week in bakeries.[4] The Court reasoned that the statute was an unconstitutional infringement on individual liberty, specifically the freedom of employees and employers to enter into contracts determining work conditions.

During the New Deal, as the Court began to give real life to freedom of speech, it also repudiated *Lochner* and its progeny on the ground that legislation like the New York bakers rule furthered the general welfare.[5] Freedom of speech gained as substantive due process began to lose. This shift first became visible in the 1931 decision of *Near v. Minnesota,* in which the Supreme Court invoked principles of free speech to set aside a broad injunction that arguably served public purposes and thus could be understood as preventing harm to others.[6]

The injunction in question was aimed at a local newspaper (the *Saturday Press*) that had published a series of articles about crime in Minneapolis.

The series claimed that a Jewish gangster was in control of gambling and bootlegging in the city and accused law enforcement officers, particularly the chief of police, with dereliction of duty and maintaining a cozy relation with the gangster. Acting under a Minnesota statute that allowed abatement or suppression of "a malicious, scandalous and defamatory" newspaper, the state court issued an order against further publication of the *Saturday Press* or any other malicious, scandalous, and defamatory newspaper. The Supreme Court did not dispute the defamatory character of the articles that triggered the injunctive proceeding. The Court did not deny the harm that the articles may have caused public officials, but it invalidated the Minnesota statute and the order to which it gave rise on the ground that it was an unacceptable prior restraint on publication. "This," Chief Justice Hughes said of the mode of state regulation, "is of the essence of censorship."[7]

In the period since *Near v. Minnesota,* during which the juridical tradition of protecting speech has grown in scope and depth, Mill's passionate defense of free speech in *On Liberty* has often been invoked in support of the Court's stance. From one perspective, such references seem entirely appropriate because they are premised on the view that Mill advanced two distinct principles — freedom of speech and harm-to-others — and further that he allowed a greater freedom to speech than to action. The juridical distinction between substantive due process and freedom of speech may be said to have made explicit what was only implicit in Mill.

On the other hand, using Mill in this way to support the growing tradition of protecting free speech in the courts is misleading because it obscures the primarily personal, as opposed to political, character of the freedom that Mill sought. Although Mill's free speech and harm-to-others are distinct principles, in the sense that the former may prohibit social restraints that the latter tolerates, invoking one without regard to the other obscures the theoretical ground that they both share: a desire to promote the fullest development of each individual.

As I have said, personal development lies at the heart of *On Liberty.* Mill hoped for social progress but saw it as a natural, almost inevitable, consequence of the full development of the talent and personality of every individual. He defended both the harm-to-others principle and freedom of speech on this ground. Mill valued freedom of speech because it created the necessary environment in which conventional views about how to live one's life may be openly criticized and evaluated. Free discussion does not ensure that the individual knows what course to follow in charting his life, let alone that he will choose it. But without listening to diverse opinions and testing one's inclination through open discussion, the individual has little

hope of ever gaining such understanding. Freedom of speech fosters individuality through the process of self-examination.

In the American constitutional domain, by contrast, freedom of speech is not like Mill's a philosophic principle but rather a rule of law articulated in the process of creating a structure of government. It thus has a more political than personal character. Although the United States Constitution makes some assumptions about human nature and may ultimately seek to ensure the fullest development of citizens and of society in general, its immediate purpose was more limited. The framers did not seek to create the conditions needed for the individual to flourish, nor did they ever declare such a right; rather, they sought to bring into being a government and endow it with democratic legitimacy. The framing of the Constitution was essentially an eighteenth-century enterprise of state building, and the First Amendment emerged as part of this specific enterprise. It seeks not to foster the kind of individuality Mill sought but rather to ensure the proper functioning of the system of governance that the Constitution establishes.

Whereas for Mill freedom of speech was essential for the full development of the individual personality, from the perspective of the Constitution freedom of speech is valued for the contribution it makes to the working of the democratic system. Freedom of speech fosters democracy through the process of public deliberation. Free and open debate may, as Mill argued, help individuals determine how they should live their lives, but from the viewpoint of the First Amendment that benefit is incidental to the pursuit of the more political end: providing citizens with the information and knowledge that they need in order to exercise their democratic prerogative effectively and wisely.[8] Free speech is needed to enable citizens to decide which of their beliefs are false and which are true — or, put differently, who is the best candidate or which policy is the soundest for the polity to pursue.

The censorship that Mill feared was primarily social. He raised his voice against the informal sanctions that an individual who spoke his mind might experience. The deliberate snub was of more concern than a prison sentence. Of course, Mill condemned state suppression, but he saw this threat to freedom as secondary. The state was nothing more than the agent of society and, in his world, less a threat to personal freedom than society itself. The tools at the state's disposal may well be harsher and more brutal than those available to social acquaintances or than the instruments of popular opinion, such as the newspapers, schools, and churches. But from freedom's perspective, social sanctions could restrain liberty as much as those imposed by law. Indeed, there was reason to be especially fearful of social sanctions, for they were likely to be more pervasive than those exercised by the state. Mill presented *On Liberty* as a protest against "the despotism of custom" (p. 134).

Mill discussed the idea of the social sanction largely in the context of the harm-to-others principle rather than the free speech principle. He was worried about the forces that compel people to live conventional lives. This feature of his discussion is not at all surprising — that people should be free to do whatever they wish provided that it does not harm others is, after all, the principal subject of *On Liberty*. Yet it does not distort Mill's purposes to extend the concept of social censorship to the domain of speech as well. A social sanction can be as much a restraint on the liberty to speak as it is on the freedom to act.

Mill was careful to distinguish the social sanction from the legitimate reactions on the part of others to what one does or professes. He was not calling for suppression of judgment — far from it. "We have a right," Mill insisted, "to act upon our unfavourable opinion of any one, not to the oppression of his individuality, but in the exercise of ours" (p. 141). We have a right to shun anyone of whom we have an unfavorable opinion, and even to caution others against that individual. He was for judgment, though against sanction. Mill acknowledged the hurtful consequence of judgment on the nonconforming individual, but used the idea of intentionality (with all its weaknesses) to mark the boundary between judgment and sanction or between legitimate and illegitimate response. He wrote, "In these various modes a person may suffer very severe penalties at the hands of others, for faults which directly concern only himself; but he suffers these penalties only in so far as they are the natural, and, as it were, the spontaneous consequences of the faults themselves, not because they are purposely inflicted on him for the sake of punishment" (p. 141).

In identifying social as opposed to formal legal sanctions as his principal concern, Mill's views may well reflect the historical milieu in which he found himself — the polite society of the mid-Victorian generation. His views also may have been influenced by his own particular life circumstances — specifically, his relationship with Harriet Taylor, a relationship, described more fully in David Bromwich's essay in this volume, that defied all conventions.[9] The two first met in 1830, when Harriet Taylor, wife of John Taylor, felt restless in her marriage and sought Mill's companionship. Over the next twenty years, Mill and Mrs. Taylor saw each other almost daily and sometimes even traveled together. All of this occurred with the acquiescence of John Taylor, who facilitated the relationship and remained on good terms with Mill, but it scandalized London society, and the two were forced to keep to themselves. Mr. Taylor died in 1849; Mill and Mrs.

Taylor observed the traditional two-year mourning period and married in 1851. Mrs. Taylor died the year before *On Liberty* was published, and with a moving inscription Mill dedicated to her this deeply felt protest against the tyranny of custom.

Aside from such historical contingencies, Mill's emphasis upon social, as opposed to state, censorship may follow from the value he ascribed to freedom in the process of individual self-development. Mill saw freedom of speech as a means of examining the validity of established conventions, and thus he needed to guard against the kind of sanctions that were most likely to be enlisted in the protection of those conventions. A theory of free expression that condemned state censorship while permitting social censorship would do little to provide the individual with the freedom needed to examine prevailing ethical doctrines and religious creeds or, more generally, to determine how best to live his life.

The political conception of free speech has a different orientation. Although it also values free and open debate—what Mill described as "the collision of adverse opinions" (p. 118)—the understanding it seeks to promote is not that of the individual but of the democratic citizen. The issue the citizen confronts is not how to live his life—Mill's concern—but how to make public officials responsive to his desires and needs. Accordingly, the animating concern is that public officials will manipulate or control citizens, and thus compromise the sovereignty of the people, by suppressing criticism of state policies or interfering with the choice of candidates for public office. No wonder, then, that the First Amendment of the United States Constitution is worded as a restraint on a branch of government: "Congress shall make no law abridging the freedom of speech, or of the press."

This line between political and personal freedom is not always drawn with pristine clarity. In fact, it has become blurred as judicial doctrine has expanded its recognition of the possible agents of censorship. In one well-known American case decided in the late 1940s, Justice Hugo Black maintained that the state had a constitutional duty to protect a street-corner speaker from the threat of violence by a heckler.[10] He voiced this view in dissent, but his position later became majority doctrine[11] and served as the foundation for a wide variety of arguments that sought to broaden our understanding of the forces, including some more social in nature, that might threaten free speech.

Black's rule denying the heckler a veto was applied, for example, to prevent shopping center owners from excluding political activists from

their property, and to require broadcasters to air views that otherwise might be slighted.[12] Those who subscribed to this position were able to satisfy the technical legal requirement of "state action"—the fact that the First Amendment consists of a prohibition on a state agency—by treating state inaction as a form of action. The state abridges the freedom of speech, they argued, when it fails to protect a speaker from the heckler, or from the shopping center owner, or from the broadcaster.

As lawyers and courts voiced constitutional concern over the censorial practices of such private actors, one important practical distinction between political and personal freedom began to disappear. The law moved closer to Mill's position that restraints exercised by the state are the qualitative equivalent of those exercised by private agents. Indeed, in his elucidation of the harm-to-others principle, Mill explicitly acknowledged that in exceptional cases, inaction is a form of action (p. 82). Still, an important difference persists between Mill and the direction of constitution law I have described. A recognition that social censorship might be tantamount to state censorship when the state fails to curb private actors who threaten free speech is not the same as condemnation of social censorship outright. The constitutional focus remains on the state. Most forms of social censorship remain beyond the reach of the Constitution and courts.

The distinctive character of political, as opposed to personal, freedom is also reflected in the scope of expressive activities protected. Although the Supreme Court has been generous in its use of the First Amendment to protect speech, it has largely confined that protection to speech essentially public or political in nature, whereas Mill imposed no such limitation on the categories of speech protected by his principle. This difference between the two theories is illustrated by reference to the law of libel and one of the Supreme Court's most emphatic endorsements of the idea of political freedom: *New York Times v. Sullivan.*[13]

The *Sullivan* case arose during the civil rights era of the early 1960s, when a number of Alabama officials had brought a successful libel action in state court against the *New York Times* for carrying an advertisement in support of Martin Luther King, Jr., and his followers. Entitled "Heed Their Rising Voices," the advertisement charged local Alabama officials, in some instances falsely, with harassing civil rights activists. In an opinion rooted in the idea that "debate on public issues should be uninhibited, robust, and wide-open,"[14] the Supreme Court reversed the state court judgment and construed the First Amendment to require that in order to sustain a libel judgment for public officials, the allegedly false statements of fact in the

advertisement had to have been made with "actual malice" —that is, with knowledge that they were false or with reckless disregard for their falsity.[15] A careless error was not enough.

The Justices were fully aware of the larger political significance of the *Sullivan* case and rested their decision on the premise that "the central meaning"[16] of the First Amendment was to prohibit criminal sedition laws that punished criticism of government. Accordingly, the Court has been reluctant to extend the forceful protection of speech manifest in *Sullivan* to matters unrelated to politics. In subsequent cases, for example, the Court ruled that a private party, as opposed to a public official, could recover for libel even if the speaker was merely careless about the falsity of his statement.[17] Actual malice is not required.

A plurality of the Justices also expressly declined to apply the actual malice requirement to allegedly defamatory statements that did not touch on politics but instead involved a false credit report on a business enterprise. Speaking for himself and for Justices Rehnquist and O'Connor, Justice Powell explained that "not all speech is of equal First Amendment importance." He went on to dispense with the actual malice requirement in that case because of "the reduced constitutional value of speech involving no matters of public concern."[18]

Sometimes a whole category of speech—for example, commercial advertising—has been placed beyond constitutional protection because it is not sufficiently related to politics. A commercial advertisement seeks to persuade its audience to buy some good or service, and thus arguably does not raise a matter of concern to the public or organized political community. As a result, the Supreme Court had traditionally placed commercial advertising beyond the protection of the First Amendment.[19]

The Court broke from this tradition in the mid-1970s, but did so in a case that had clear political and public ramifications. The advertising in question concerned the availability of abortions; it therefore implicated a claim of equal rights for women, and the principle affirmed in 1973 that allowed women to control their reproductive destinies. The advertisement appeared in 1971 in a Virginia newspaper. It urged those wanting an abortion to contact the Women's Pavilion in New York "for immediate placement in accredited hospitals and clinics at low cost." The state court held that the advertisement was a commercial one and thus was not protected by the First Amendment. The Supreme Court reversed.[20] The advertisement did more than simply propose a commercial transaction; it reported, for example, that abortions are now legal in New York, which was, in the Court's eyes, factual material of clear public interest. The Court also declared, however,

that speech is not automatically stripped of its First Amendment protection merely because it proposes a commercial transaction or involves sales or solicitations.

Soon thereafter the Court extended its ruling and used the First Amendment to protect pharmacists who advertised the prices of prescription drugs.[21] Still later First Amendment protection was extended to other kinds of advertisements, including those intended to promote electricity sales.[22] By 1996 the doctrine had evolved to the point that the Supreme Court used the First Amendment to invalidate a Rhode Island statute that prohibited off-premise advertisements about the price of alcoholic beverages.[23] Two high-volume discount liquor retailers had brought the constitutional challenge to the law.

In all these case the Justices were sharply divided. Those who disfavored using the free speech guarantee of the First Amendment to protect advertising reminded their colleagues of the essentially political character of the guaranteed freedom. That group remained a minority, but even the prevailing majority scrutinized the regulations in question with considerably less force or enthusiasm than it applied to regulations of more political speech. This difference in the degree of scrutiny itself also reflects the distinction between political and personal conceptions of free speech.

Quite possibly, the majority's willingness to intervene at all may derive less from an appreciation for the value of commercial speech than from a desire to affirm the limits of state authority, or from a skepticism about the public purposes served by the ban on advertising, especially if the state was, as in the case of liquor, unwilling to ban or ration the advertised product or activity. In that respect, the majority may be less concerned with freedom of speech than with the old substantive due process, which, like Mill's harm-to-others principle, limits government interference with individual liberty regardless of whether speech is involved.

In this dispute over the protection afforded by the First Amendment to commercial advertising, Mill lends support to neither group. Because he embraced a personal conception of free speech, the argument of the dissenting bloc about the nonpolitical character of commercial advertising would not register with him at all. But he was also reluctant to defend the protection of commercial advertising under either his free speech or his harm-to-others principle. On this issue, Mill was fairly explicit.

Late in *On Liberty*, Mill considered the case of a person who gives advice, counsels, or instigates another to engage in an act that harms no one other than the person engaging in the action. He acknowledged that these communicative activities are social inasmuch as they may cause someone

to harm himself, and thus are not strictly within the protection of his principle guaranteeing a freedom to each individual to do as he wishes provided it does not harm others. Mill concluded, however, that the reasons underlying that principle require that these actions be protected. Most notably, Mill did not invoke the free speech principle to reach that conclusion. He wrote, "If people must be allowed, in whatever concerns only themselves, to act as seems best to themselves at their own peril, they must equally be free to consult with one another about what is fit to be so done; to exchange opinions, and give and receive suggestions. Whatever it is permitted to do, it must be permitted to advise to do" (p. 160).

Yet Mill entertained the possibility of making an exception to this general rule in cases in which "the instigator derives a personal benefit from his advice" (p. 160) and society justifiably believes that the action might harm the person engaging in it. Mill was clear that the mere risk that liquor may be used intemperately is not a sufficient justification for a law prohibiting its sale, for every article bought or sold may be used in excess. Still, he insisted that we might well acknowledge that "the interest . . . of these dealers in promoting intemperance is a real evil, and justifies the State in imposing restrictions" (p. 162). With considerable disdain for the advertising industry, even as it existed in his time, Mill contemplated a world in which people decide to engage in some self-regarding action "on their own prompting, as free as possible from the arts of persons who stimulate their inclinations for interested purposes of their own" (p. 161).

For these reasons, it seems difficult to read Mill's general defense of individual liberty as yielding a protection of commercial advertising. The same is true for his free speech principle, because it is so personal in nature and linked to the process of self-examination. *On Liberty* lends no support to the prevailing majority on the United States Supreme Court regarding this issue.

On the other hand, Mill's idea of personal freedom might yield support for protecting yet another category of speech — art — that has proved problematic for a constitutional regime devoted primarily to the protection of speech relating to politics. To find support for protecting art in Mill, we would have to imagine a fusion of the political and the personal — or, expressed differently, to appreciate that political freedom may well depend on a healthy measure of personal freedom.

American society has not attempted to restrain artistic production in general, and for the most part has confined itself to regulating the sale or distribution of sexually provocative books, magazines, and films. Such censorship has been defended on the grounds that widespread dissemination of sexually explicit material increases the risk of violence against women and may disrupt the normal developmental pattern of children by exposing them to sexual themes at too early an age. More recently, some have defended the regulation of pornography on the ground that pornography transforms women into sexual objects and thereby contributes to their subordination.

In the 1930s and 1940s, as speech began to win expanded protection in the courts, state censorship of sexually explicit works of art was unrestrained, and even in such cases as *Near v. Minnesota* was assumed to be unquestionably valid. In the second half of the twentieth century, however, beginning most notably in the 1960s, the Supreme Court broke from this tradition and became increasingly hostile to censorship of works deemed to be obscene or pornographic. The Court has not denied the state power to censor sexually explicit literature and art altogether, but in the name of freedom of speech it has established tight bounds on this particular jurisdiction of the censor.

The result has been a body of decisions that seems much admired and secure as part of the constitutional tradition of protecting free speech.[24] It is hard to imagine our law without it. Starting, though, from the premise that the Constitution is devoted to protecting political speech, a question of how to justify these decisions naturally arises. Democracy may require periodic elections, competition among rival candidates, and free and open debate about the merits of each candidate and his performance in office. But does it also require that we be free to read *Lady Chatterley's Lover?*

Mill defended freedom of speech because it enables people to critically evaluate the social conventions that govern their lives. It permits us to question religious dogma and prevailing ethical tenets. Mill saw free speech as part of a process of self-examination and conceived of that process in essentially rationalistic terms. As such, he was less concerned with freedom of speech than with "freedom of discussion," "freedom of opinions," and "freedom of thought." Art that does not express an opinion but rather appeals to the imagination might find it hard to secure a place in such a rationalistic scheme. But once we acknowledge the importance of art in the development of the human personality — that it has a crucial role, for example, in challenging conventions by picturing the lives of others and helping us to experience them — we can understand that art, too, may claim protection under Mill's free speech principle. What would be protected under that principle is not the act of artistic creation — the expression of the artist — but rather the freedom to view and experience art, which, much like free and open debate about religion and ethics, is essential for the critical

evaluation of conventions and thus for the full development of the human personality.

This adjustment to Mill's theory is rather minor and thus we can readily understand why a personal conception of freedom would protect art. To bring art within a free speech principle conceived in political terms, however, we must take yet another step and further acknowledge that healthy functioning of the democratic system depends upon an independent-minded, critical, and imaginative citizenry. In a word, a vibrant democracy requires the kind of individuality Mill sought to protect. Citizens not only need to hear arguments concerning public issues but must be capable of evaluating them. Democracy is a form of self-government and thus requires citizens capable of governing themselves.

In 1948 Alexander Meiklejohn, also a philosopher, published a series of lectures he had given earlier at the University of Chicago. The book was entitled *Free Speech and Its Relation to Self-Government.*[25] In it Meiklejohn set forth a theory of political freedom as bold and demanding as Mill's theory of personal freedom. Over the next several decades, as the Court curtailed the anticommunist crusade spearheaded by Senator Joseph McCarthy, protected civil rights activists, and limited the censorship of art, Meiklejohn's work became increasingly important as a key to understanding constitutional doctrine, including such cases as *New York Times v. Sullivan.*[26]

Meiklejohn saw that freedom of speech serves democracy by maintaining the vitality of public debate, but keenly understood that democracy's well-being also depends on the capacity of citizens to evaluate what they are being told. He grasped the connection between personal and political freedom. Accordingly, although Meiklejohn believed that the function of freedom of speech is to enhance the responsiveness of the political system to the needs and interests of citizens, he defended the Court's effort to curb the censorship of art on the ground that political freedom requires the independence of judgment and thus the freedom that Mill valued. As Meiklejohn put it in 1961, just as the Supreme Court's doctrine on obscenity was taking shape, "I believe, as a teacher, that the people do need novels and dramas and paintings and poems, 'because they will be called upon to vote.' "[27]

Some of those who, much like Meiklejohn, view the First Amendment as a protection of political freedom have rejected this line of reasoning. The most notable example is Robert Bork. In his now-famous 1971 article in the *Indiana Law Journal,* Bork argued that if the First Amendment required the protection of art on the theory that political freedom depends on personal

freedom, it would lead to "an analogical stampede," with virtually no limit to the scope of the First Amendment.[28] Anything needed for creating an alert citizenry would be protected. Accordingly, Bork insisted upon a very tight connection between political content and speech properly protected under the First Amendment: only speech that was explicitly about government, such as criticizing a candidate or favoring one government policy over another, would be protected. Such a principle would, of course, leave most art outside the protection of the First Amendment and thus call into question the entire body of law through which Supreme Court doctrine has placed limits on the state's ability to censor sexually explicit literature and films.

The full implications of Bork's position became clear in 1987, when he was nominated to become a Justice of the Supreme Court. After a prolonged and acrimonious debate, the Senate rejected his nomination.[29] Many factors accounted for this decision, including partisan politics, as well as Bork's views on a number of issues unrelated to his stance on art. (In the same 1971 law review article, for example, Bork denounced the privacy doctrine that later led the Supreme Court to strike down statutes criminalizing abortion. Even before that, he argued against the enactment of the Civil Rights Act of 1964.) But Bork's criticism of the Supreme Court's decisions curbing the censorship of obscenity also played an important role in the opposition to him, and we thus might find in the Senate's rejection of his nomination, as well in the evolution and studied persistence of the judicial doctrine itself, a public recognition of the view that political freedom rests on the kind of personal freedom that lies at the heart of *On Liberty*. This is not to claim a priority of one type of freedom over the other on some metaphysical scale, but only to underscore their interdependence. Had Mill not written his essay under conditions of political freedom that he took for granted, he surely would have acknowledged that the personal freedom so essential to individuality depends upon freedom from state oppression.

An appreciation of the connections between political and personal freedom renders intelligible, indeed secure, an important branch of First Amendment doctrine. It does, however, leave two challenges for the constitutional lawyer. The first consists of the one Bork posed — of stopping the "analogical stampede" that may well follow from using the First Amendment to protect art. In the decades ahead, we need to formulate principles that distinguish art from the many activities, some of a communicative character, that may be essential for personal development but which, as an initial matter, seem to lie outside of the protection of the First Amendment. Work? Education? Dancing?

The second challenge arises from Mill's emphasis on social, as distinct from state, censorship, which, as I have said, derives from his personal conception of freedom. Recognizing the dependence of political freedom on personal freedom may have allowed the Supreme Court to be firm in its protection of art, but we should note that the Court has limited its protection of art to occasions when the threat of censorship comes from the state. For Mill, such protection against "the tyranny of the magistrate" would not have been enough; "there needs [to be] protection also," he said, "against the tyranny of the prevailing opinion and feeling" (p. 76).

Although by many measures the tyranny of custom that Mill feared has certainly diminished since the time that he wrote, the need persists to develop bold and independent citizens, and thus to defend and protect individuality. To meet this need, however, we will have to confront afresh the dilemma posed by the fact that the constitutional guarantee of free speech is a prohibition against censorship by the state. True, the doctrine denying the heckler a veto teaches how that limitation might be finessed as a purely technical matter, insofar as the inaction of the state may be characterized as a form of action. But the issue is more substantive than technical. The First Amendment can be extended in this way only on rare and exceptional occasions, still to be defined, for otherwise we would subvert the structure of the law itself, which derives from the political character of the freedom guaranteed therein.

NOTES

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1. The usage can be traced to Joel Feinberg, *Harm to Others* (New York, 1984).

2. For a recent review of the literature and an analysis coming to a similar conclusion, see Daniel Jacobson, "Mill on Liberty, Speech, and the Free Society," *Philosophy and Public Affairs* 29 (2000): 276–309.

3. For example, see *Mugler v. Kansas,* 123 U.S. 623, 632 (1887) (Statement of Counsel for Plaintiff). Asking the Court to overturn his client's conviction for violating state prohibition laws, counsel argued: "There has never been, and can never be, any question more important or more vital to the existence of civil liberty than that involved in this case. It is the question of the centuries, over and about which men have fought and suffered and

died, until out of the dark and dreary struggle the great truth has been established that 'the only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, mental, or spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.' John Stuart Mill 'On Liberty.' "

4. 198 U.S. 45 (1905).

5. *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937); *NLRB v. Jones and Laughlin Steel Corp.,* 301 U.S. 1 (1937). See generally Owen Fiss, *Troubled Beginnings of the Modern State, 1888–1910* (New York, 1993), pp. 7–8.

6. 283 U.S. 697 (1931).

7. 283 U.S. at 713.

8. See Owen Fiss, "The Idea of Political Freedom," in *Looking Back at Law's Century,* ed. Austin Sarat, Bryant Garth, and Robert A. Kagan (New York, 2002), pp. 35–58.

9. See Phyllis Rose, *Parallel Lives: Five Victorian Marriages* (New York, 1983), pp. 101–40.

10. *Feiner v. New York,* 340 U.S. 315 (1951) (Black, J., dissenting). Also see generally Harry Kalven, Jr., *The Negro and the First Amendment* (Chicago, 1966).

11. See, for example, *Reno v. ACLU,* 521 U.S. 844 (1997).

12. *Amalgamated Food Employers v. Logan Valley Plaza,* 391 U.S. 308 (1968); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969). Also see generally Owen Fiss, "The Censorship of Television," in *Eternally Vigilant: Free Speech in the Modern Era,* ed. Lee C. Bollinger and Geoffrey Stone (Chicago, 2002), pp. 257–83.

13. 376 U.S. 254 (1964).

14. 376 U.S. at 270.

15. Justice Brennan, the author of the Court's opinion, quoted *On Liberty* in a footnote for support. The footnote reads: "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.' " 376 U.S. at 279 n. 19.

16. 376 U.S. at 273.

17. *Gertz v. Robert Welch Inc.,* 418 U.S. 323 (1974).

18. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 758, 761 (1985).

19. *Valentine v. Chrestensen,* 316 U.S. 52 (1942).

20. *Bigelow v. Virginia,* 421 U.S. 809 (1975).

21. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976).

22. *Central Hudson Gas v. Public Service Commission,* 447 U.S. 557 (1980).

23. *44 Liquormart v. Rhode Island,* 517 U.S. 484 (1996).

24. Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America,* ed. Jaime Kalven (New York, 1988), pp. 33–53.

25. Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York, 1948), rpt. as Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Westport, Conn., 1965).

26. See, for example, William J. Brennan, Jr., "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," *Harvard Law Review* 79 (1965): 1–20. As noted earlier, Justice Brennan wrote the majority opinion in *New York Times v. Sullivan.*

27. Alexander Meiklejohn, "The First Amendment Is an Absolute," *Supreme Court Review* (1961): 263 (quoting Harry Kalven, Jr., "Metaphysics of the Law of Obscenity," *1960 Supreme Court Review,* p. 16).

28. Robert H. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (1971): 27.

29. Committee on the Judiciary, Nomination of Robert H. Bork to be an Associate Justice of the U.S. Supreme Court, *S. Executive Rep. No.* 100–7 (1987), *S. Hrg.* 100–1011 (1987).