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Amending the First Amendment

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If I were a minister of the Gospel, I would begin my sermon today with a reference to a sacred text. Well, I am not a minister of the Gospel, but I nonetheless have in front of me a sacred text. It reads, "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." As you know, I am quoting the First Amendment to the American Constitution.

Once, that constitutional provision was the law of the land. For a great many decades, Congress acted as instructed and passed no law whatsoever "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." And for a great many decades the states and localities respected the same principle.

Those days are gone. Now we live in a brave new world in which there is a great deal of legislation in place that has a considerable impact on the free exercise of religion and that abridges freedom of speech, freedom of the press, and the right of the people to petition the government for a redress of grievances.

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The First Amendment has not been amended. It has not been repealed by the American people acting in a solemn fashion via the amending process provided for in the Constitution. But it is nonetheless well on its way to becoming a dead letter—thanks to the ambition of politicians, to the grand projects they pursue, and to a decision of the courts to strike a balance between the rights provided for by the First Amendment and other imperatives thought to be of greater or at least equal importance.

Whether our gradual abandonment of the First Amendment is a good thing, whether the principles articulated within that amendment are good principles, whether they still pertain, is a question worth asking. For it has not always been obvious to human beings that the members of a particular political community should be free to speak their minds, to worship, and to teach religious doctrine as they wish. In fact, if you were to take the time to examine the entire sweep of human history, you would find that men have almost never been left free in these regards. We Americans are—or, at least, we used to be—peculiar.

For the sake of brevity, I leave aside the question of religious freedom and ask more narrowly, "Why did Americans once think that Congress should be prohibited from making any 'law...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'?"

This question is relatively easy to answer. James Madison, who drafted the First Amendment to the Constitution, those in the First Federal Congress who approved it and sent it on to the states for consideration, and those in the state legislatures who ratified the amendment thought freedom of speech, freedom of the press, freedom of assembly, and the freedom to petition the government for a redress of grievances essential to self-government. They did not regard themselves as the rulers of the Americans, but rather as representatives of the people—responsible to the people. It was *through them* that the people governed, and elections were held at frequent intervals to keep the representatives of the people faithful to their charge and to insure that they were forcefully reminded that they were mere intermediaries, not rulers. There was every expectation that these elections would be contested and that the results would frequently turn on questions of principle. This could not happen if there were no press to keep the people informed. It could not happen if the people were not free to argue things out in the public arena, and it could not happen if the people could not operate collectively by assembling in one fashion or another and petitioning for a redress of grievances.

Elsewhere in the eighteenth century, there were those who ruled the people, and they did so on the presumption that they knew the interests of the people

better than the people did themselves. Plato's *Republic* with its guardian class is an extreme and imaginary case, but the human possibility explored and articulated in that work was the common sense of the matter. Had you asked almost any magistrate or any prelate at that time, you would have been told that ordinary folk need guidance. The operative word was *tutelage*. In consequence, nearly everywhere, after the revolution effected by Gutenberg, there was a licensing of the press and there were restraints on religious dissent. Religious establishment and censorship were the norm—and even in Great Britain, where religious dissent was tolerated and licensing fell into abeyance, criticizing the government could give rise to a charge of seditious libel.

There is another way to put this. When the First Amendment states that "Congress shall make no law...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," it presupposes that the people of the United States can be trusted and that the members of Congress cannot. There is reason for this. The latter have an interest that can set them at odds with their constituents. Put simply, those who hold high office do not want to be subject to criticism. They also want to be reelected tolerably often—and they prefer that there be no effective opposition. To grant Congress the right to abridge freedom of speech, freedom of the press, and the collective right to assemble and petition for a redress of grievances is to give the fox free rein within the henhouse. It is to treat our lawmakers as judges in their own cause. It is, our forebears thought, the task of the people to hold their representatives accountable, and this they cannot do if their right to speak to their fellows concerning matters of political concern is *in any way* regulated by those on whose conduct in office they are sitting in judgment.

The freedom of speech that the First Amendment was designed to protect was freedom of political speech. No one in the Founding generation had artistic license in mind. No one supposed that pornography or blasphemy as such could not be banned. The pertinent passages from the First Amendment have to do with reporting the news and with public advocacy.

Times, as I said, have changed. We now have a Federal Election Commission—which tells us what we can do and what we cannot do with our own money when we engage in public advocacy. It puts roadblocks in the way of candidates raising money for their campaigns, and federal prosecutors haul into court and see to the imprisonment of those who make contributions that are not allowed. It does this—in defiance of the plain meaning of the words "Congress shall make no law"—purportedly because contributions exceeding a paltry sum corrupt. But the law's real purpose is to protect incumbents and

prevent the emergence of insurgencies. It is easy for an incumbent to raise small sums from a host of donors. It is next to impossible for an insurgent to do so—unless, of course, the insurgent is a celebrity already in possession of a large following (think Donald Trump!), or a fabulously wealthy man spending his own money (think Mitt Romney!).

There is even talk these days that the Federal Election Commission should regulate the Internet, treating advocacy in a blog post as a financial contribution to a candidate. I am myself a blogger. I have a website, and I write from time to time for a website called *Ricochet*. The price that one pays for having a website is negligible—not even ten dollars a month. This is seen, however, as a threat, for the low price of entry means that the Internet is a medium by which an insurgency can begin. Of course, no one dares to suggest that such a standard be applied to the *New York Times*, the *Washington Post*, or the television networks. The legacy press—owned by the American oligarchy—is sacrosanct. It is the little guy on his Internet soapbox who needs to be reined in, and there are those in Congress today who argue that the press should be licensed—that journalists should be certified, regulated, and required, like bakers, beauticians, and bicycle repairmen, to meet certain standards. Otherwise, we are told, there might be malpractice and "fake news" might be propagated. But we should not kid ourselves. Laws made where no law is supposed to be made are always made in the interest of the few.

This is not the worst of it. For when the courts decided that "Congress shall make no law" really means "Congress shall make no law that we do not approve of," they opened the flood gates—and at the state and local levels a great deal of legislation has been passed regulating what citizens can and cannot do by way of public advocacy, and these laws all make elected officials and their minions the arbiters of what constitutes the speech that can be tolerated. In other words, those on whom we sit in judgment on election day propose to sit in judgment on us and to regulate what we can say and when and where and how we can say it. In many cases, these laws put obstacles in the way of public assembly and cooperative efforts—because collective action is a real threat to the powers that be. In other cases, they ban speech that public officeholders regard as misleading—which is to say that these women and men presume to decide what is true and what is false.

There is more that can be said. Our last president seemed interested in shutting down civil society, and he hailed from a city where they really know how to do it. To this end, his administration considered the means by which the government could use its licensing power to intimidate radio station owners into shutting down conservative talk radio. To the same end, this president sought to

have corporations seeking government contracts list their political donations. Being from Chicago, he understood how a political machine can isolate, intimidate, and crush all sources of opposition. As that machine and similar operations abroad—in Russia, for example, and in Turkey—have demonstrated, it is perfectly possible to have the forms of democracy without the reality.

One of our two political parties is now committed to that same project. When, in *Citizens United v. Federal Election Commission*, the Supreme Court recently ruled in defense of the right of citizens to band together, pool their money, incorporate, and speak up not only on the issues being debated but also concerning the candidates running for office, forty-five senators from that party (and two Independents) presented an amendment to the Constitution aimed at allowing Congress to regulate freedom of speech, the right of assembly, and the right to petition for a redress of grievances (see addendum).[1]

Yes, indeed, forty-seven senators in all…

Section 1 of the proposed amendment says: "Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections."[2]

Section 2 of the proposed amendment says: "Congress and the States shall have power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections."[3]

The point of the amendment, as was acknowledged at the time, was to overturn the Supreme Court decision in *Buckley v. Valeo*, which reasoned as follows: "The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP v. Alabama* stemmed from the Court's recognition that [e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[4] In short, the aim of the proposed amendment is to eliminate the right to assemble peaceably and petition for a redress of grievances. You must keep in mind that the act of assembling and petitioning is virtually guaranteed to influence elections. That is what distinguishes petitioning from begging. The petitioners are issuing—gently, to be sure—a threat.

[1]Citizens United v. Federal Election Commission 558 U.S. 310 (2010).

[2]Calendar No. 471: 113th Congress, 2nd Session, S. J. Resolution 19, July 17, 2014, 3, https://www.congress.gov/113/bills/sjres19/BILLS-113sjres19rs.pdf.

[3]Ibid., 4.

[4]Buckley v. Valeo 424 U.S. 1 (1976).

Moreover, as one commentator noted at the time, "By implication, then, the proposed amendment also overturns the landmark civil rights case *NAACP v. Alabama*, which protected the privacy of the members of associations to allow them to engage in anonymous political speech. Congress—and the states, including Alabama—would now have the power to compel disclosure for any criticism of an elected official, and to outright ban speech by groups."[5]

There is an exception to this rule. Section 3 of the proposed amendment gives—you guessed it—the legacy press an express carve-out: "Nothing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press."[6] The only individuals or groups allowed a megaphone are those who own the newspapers and the radio and television stations.

I am not worried that this means that in the near future Congress will actually send such an amendment to the states. That, I suspect, our senators and congressmen would not dare to do—for they know that we still hold elections and that if such an amendment were to pass there would be a hue and a cry in the localities. My worry is that this is a signal to the courts. The real story of the last century is that—as Woodrow Wilson openly, publicly advocated in *The New Freedom* (1912)—the courts have over and over and over again made it their business to bring constitutional law into accord with current political fashion. "Congress shall make no law…" Surely that cannot mean what it says. *Presto chango!* Today, it doesn't mean what it says—it means what the courts want it to say.

A word should perhaps be added about current political fashion. At least in theory, universities should be the place where anything can be debated, where all claims are up for dispute, where freedom of speech knows no bounds, where evidence is allowed to defeat ideology—and it was once in these United States close to being true. Today, nearly all of our universities, public and private—with the exception of Hillsdale College and a handful of other institutions—take money from the federal government, and the courts have ruled that this legitimates the imposition of almost any condition by the government upon the receipt of that money that Congress or the regulatory agencies care to impose. The U.S. Department of Education-sponsored regulations addressing sexual harassment have been interpreted so broadly

[5]See Phil Kerpen, "Democrats Voted to Repeal First Amendment," American Commitment, n.d., http://www.americancommitment.org/content/democrats-repeal-first-amendment, who cites the proposed amendment in full and comments on it.

[6]S. J. Resolution 19, 4.

as to make actionable in a court of law any conversation concerning women and men thought by a listener to create "a hostile environment." In practice, this rules out the discussion of disputed questions—if anyone takes offense the instructor will land in hot water. And, of course, on many campuses this new set of rules has been extended to race. Can one assign Jane Austen's works? Can one intimate that she has something to teach us? Can one assign Mark Twain's *Huckleberry Finn*? Some of the characters in the novel use language that is offensive. To get along in the academy today, one has to go along—which means that to an ever increasing degree, in the humanities and the social sciences, the questions of deepest interest—those that pertain to how we should live our lives—cannot be touched. For one cannot ask whether one way of life or one code of conduct is superior to another without risking offense. If the university is to be "a safe space," free from "microaggressions," it will not be a sanctuary for free inquiry.

Yale University is a case in point. When, after the hullabaloo over Halloween costumes that took place on that campus in fall 2015, Erika Christakis gave up her job teaching in the field of education, it was because, she later explained, "I lost confidence that I could continue to teach about vulnerable children in an environment where full discussion of certain topics—such as absent fathers—has become almost taboo." In her seven years of teaching on two different campuses, she found that "a growing number of students report avoiding controversial topics—such as the limits of religious tolerance or transgender rights—for fear of uttering 'unacceptable' language or otherwise stepping out of line. As a student observed in the *Yale Daily News*, the concept of campus civility now requires adherence to specific ideology—not only commitment to respectful dialogue."[7]

I mention our universities here because they are where we often see in embryo what will soon appear in the larger world, and what is happening is a shutting down of controversial discourse—insofar as that discourse does not contribute to the project favored by those who want to put an end to academic freedom and freedom of learning. We should not kid ourselves. All of this is a prelude to unleashing a new and unchallengeable orthodoxy. There will be no "safe space" for those who firmly disagree; and, as Erika Christakis and her husband learned to their chagrin, the aggression they encounter will not be "micro" in any way.

[7]See Erika Christakis, "My Halloween Email Led to a Campus Firestorm—and a Troubling Lesson about Self-Censorship," Opinion, *Washington Post*, October 28, 2016, https://www.washingtonpost.com/opinions/my-halloween-email-led-to-a-campus-firestorm–and-a-troubling-lesson-about-self-censorship/2016/10/28/70e55732-9b97-11e6-a0ed-ab0774c1eaa5_story.html?utm_term=.ef004e32c820.

ADDENDUM

Senators Who Voted for S. J. Resolution 19

(https://www.congress.gov/bill/113th-congress/senate-joint-resolution/19/text)
Proposed amendment to the Constitution "aimed at allowing Congress to regulate freedom of speech, the right of assembly, and the right to petition for a redress of grievances," as explained in Dr. Rahe's address:

Tom Udall, New Mexico (Democrat)
Michael Bennet, Colorado (Democrat)
Tom Harkin, Iowa (Democrat)
Chuck Schumer, New York (Democrat)
Jeanne Shaheen, New Hampshire (Democrat)
Sheldon Whitehouse, Rhode Island (Democrat)
Jon Tester, Montana (Democrat)
Barbara Boxer, California (Democrat)
Chris Coons, Delaware (Democrat)
Angus King, Maine (Independent)
Chris Murphy, Connecticut (Democrat)
Ron Wyden, Oregon (Democrat)
Al Franken, Minnesota (Democrat)
Amy Klobuchar, Minnesota (Democrat)
Mark Udall, Colorado (Democrat)
Tim Johnson, South Dakota (Democrat)
Bob Menendez, New Jersey (Democrat)
Jack Reed, Rhode Island (Democrat)
Richard Blumenthal, Connecticut (Democrat)
Martin Heinrich, New Mexico (Democrat)
Jeff Merkley, Oregon (Democrat)
Dianne Feinstein, California (Democrat)
Mark Begich, Alaska (Democrat)
Ben Cardin, Maryland (Democrat)
Kirsten Gillibrand, New York (Democrat)
Kay Hagan, North Carolina (Democrat)
Barbara Mikulski, Maryland (Democrat)
Tammy Baldwin, Wisconsin (Democrat)
Ed Markey, Massachusetts (Democrat)
Elizabeth Warren, Massachusetts (Democrat)
Sherrod Brown, Ohio (Democrat)
John Walsh, Montana (Democrat)

Dick Durbin, Illinois (Democrat)
Harry Reid, Nevada (Democrat)
Mazie Hirono, Hawaii (Democrat)
Tom Carper, Delaware (Democrat)
Patty Murray, Washington (Democrat)
Brian Schatz, Hawaii (Democrat)
Bernie Sanders, Vermont (Independent)
Jay Rockefeller, West Virginia (Democrat)
Debbie Stabenow, Michigan (Democrat)
Cory Booker, New Jersey (Democrat)
Heidi Heitkamp, North Dakota (Democrat)
Joe Manchin, West Virginia (Democrat)
Claire McCaskill, Missouri (Democrat)
Maria Cantwell, Washington (Democrat)
Bill Nelson, Florida (Democrat)