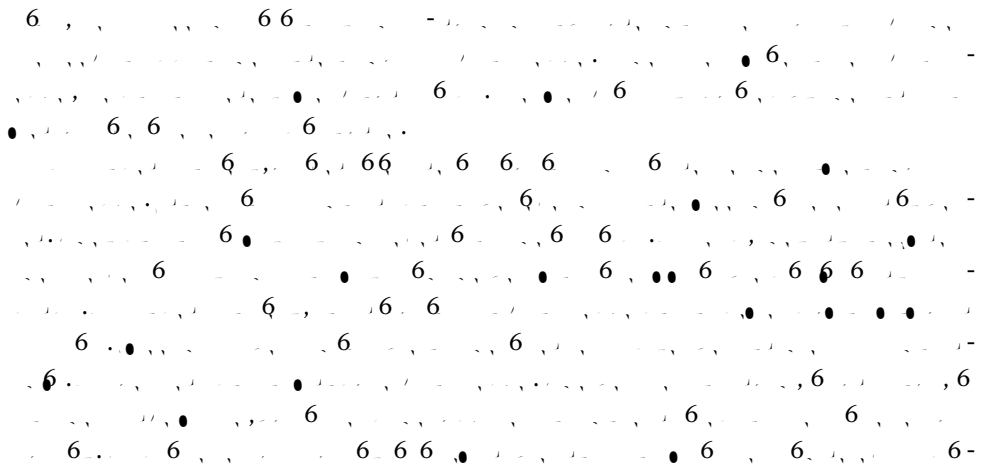


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endnotes

- ¹ If there is so-called cancel culture on the left—for example, see Philip W. Magness, “The Suicide of the American Historical Association,” American Institute for Economic Research, August 20, 2020, <https://www.aier.org/article/the-suicide-of-the-american-historical-association>—there is outright state censorship on the right. See Rashawn Ray and Alexandra Gibbons, “Why Are States Banning Critical Race Theory?” Brookings Institution, November 2021, <https://www.brookings.edu/blog/xgov/2021/07/02/why-are-states-banning-critical-race-theory> and Keith E. Whittington, “Professorial Speech, the First Amendment, and the ‘Anti-

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¹¹Dickens Olewe, “Stella Immanuel—The Doctor Behind Unproven Coronavirus Cure Claim,”

- ²⁴ Michael Warner, *Publics and Counterpublics* (New York: Zone Books, 2002), 11–12. Warner adds that “one of the most striking features of publics, in the modern public sphere, is that they can in some contexts acquire agency. . . . They are said to rise up, to speak, to reject false promises, to demand answers, to change sovereigns, to support troops, to give mandates for change, to be satisfied, to scrutinize public conduct, to take role models, to deride counterfeits.” *Ibid.*, 122–123.
- ²⁵ See Robert Post, “Data Privacy and Dignitary Privacy: *Google Spain*, The Right to be Forgotten, and the Construction of the Public Sphere,” *Duke Law Journal* 67 (2018): 981–1072.
- ²⁶ Carl Schmitt, *Constitutional Theory*, ed. and trans. Jeffrey Seitzer (Durham, N.C.: Duke University Press, 2008), 275. Democracy is “the organized sway of public opinion.” Charles Horton Cooley, *Social Organization: A Study of the Larger Mind* (New York: Charles Scribner’s Sons, 1909), 118. For an account of the emergence of this concept of democracy, see Robert C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (Cambridge, Mass.: Harvard University Press, 2014).
- ²⁷ Michael Schudson, “Why Conversation Is Not the Soul of Democracy,” *Critical Studies*

- ³⁹Our current Supreme Court, with its aggressively libertarian agenda, seems perversely unable to understand this seemingly obvious point. See *National Institute of Family & Life Advocates [“NIFLA”] v. Becerra*, 138 S. Ct. 2361 (2018). See also Robert C. Post, “NIFLA and the Construction of Compelled Speech Doctrine,” *Indiana Law Journal* 97 (2022): 1071. As a federal court recently, candidly, and naively affirmed when analyzing restrictions on the professional speech of physicians: “Simply put, speech is speech, and it must be analyzed as such for the purposes of the First Amendment.” *King v. Governor of the State of New Jersey*, 767 F.3d 216, 229 (3d Cir. 2014).
- ⁴⁰ *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 478 (1997) (David Souter, dissenting).
- ⁴¹ See Post, “NIFLA and the Construction of Compelled Speech Doctrine”; and Amanda Shanor, “The New Lochner,” *Wisconsin Law Review* 2016 (1) (2016): 133–208.
- ⁴² For a discussion, see Robert C. Post, “Theorizing Disagreement: Reconceiving the Relationship between Law and Politics,” *California Law Review* 98 (4) (2010): 1319–1350.
- ⁴³ Chantal Mouffe, *On the Political* (London: Routledge, 2005).
- ⁴⁴ For a perfect example, see Michael Anton, “The Flight 93 Election,” *The Claremont Review of Books*, September 5, 2016 (<https://claremontreviewofbooks.com/digital/the-flight-93-election>). Anton’s essay begins with the sentence: “2016 is the Flight 93 election: charge the cockpit or you die.” The essay embodies Nazi political theorist Carl Schmitt’s notorious concept of politics as an existential battle between friends and enemies. Schmitt’s concept of politics may accurately describe the orientation of the Nazi Party, but it is inconsistent with the practice of politics in any modern, peaceful democracy. See Post, “Theorizing Disagreement.”