## T e U f a e C e e ce. • a M ded F e S e c P c e

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For at least the past half-century, Americans have been committed to a "free speech principle," holding that speech is to be encouraged because it serves to produce knowledge, to enable the development of personal autonomy, and to facilitate the self-governance of the nation. In this essay, I argue that any such abstract free speech principle is fundamentally misguided. The value of speech is instead the value of the social practice within which speech occurs. Speech is to be encouraged when it advances the purpose of the social practice in which it is embedded. For constitutional purposes, the most important social practice established by communication is the public sphere, whose development in the eighteenth century made possible democratic self-governance. The health of a democracy depends upon whether its public sphere can produce a public opinion capable of legitimating the state. This turns on the quality of a nation's politics, not on the quantity of its speech. Americans who conceptualize the current crisis as requiring rededication to the free speech principle thus essentially misdiagnose the nature of our contemporary emergency. We need to repair our politics, not our speech.

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## endnotes

<sup>1</sup> If there is so-called cancel culture on the left–for example, sethilip W. Magness, "The Suicide of the American Historical Association," American Institute for Economic Research, August 20, 2028;ttps://www.aier.org/article/the-suicide-of-the-american -historical-association-there is outright state censorship on the right. Seteashawn Ray and Alexandra Gibbons, "Why Are States Banning Critical Race Theory?" Brookings In stitution, November 2021,https://www.brookings.edu/blog/ xgov/2021/07/02/why -are-states-banning-critical-race-theoryand Keith E. Whittington, "Professorial Speech, the First Amendment, and the 'Anti-

<sup>11</sup>Dickens Olewe, "Stella Immanuel–The Doctor Behind Unproven Coronavirus Cure Claim,"

- <sup>24</sup> 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 satis ed, to scrutinize public conduct, to take role models, to deride counterfeits." Ibid., 122–123.
- <sup>25</sup>SeeRobert 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.
- <sup>26</sup> 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 de mocracy, see Robert C. Post*Citizens Divided: Campaign Finance Reform and the Constitution* (Cambridge, Mass.: Harvard University Press, 2014).

<sup>27</sup>Michael Schudson, "Why Conversation Is Not the Soul of Democracy Critical Studies

- <sup>39</sup>Our current Supreme Court, with its aggressively libertarian agenda, seems perversely unable to understand this seemingly obvious point. Set *ational Institute of Family & Life Advocates ["NIFLA"] v. Becerra*, 138 S. Ct. 2361 (2018). See also Robert C. POBRUA and the Construction of Compelled Speech Doctrine, *Indiana Law Journal* 97 (2022): 1071. As a federal court recently, candidly, and naively af rmed 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 *Sing v. Governor of the State of New Jersey*, 767 F.3d 216, 229 (3d Cir. 2014).
- <sup>40</sup> Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 478 (1997) (David Souter, dissenting).
- <sup>41</sup>See Post, *NIFLA* and the Construction of Compelled Speech Doctrine"; and Amanda Shanor, "The New Lochner," *Wisconsin Law Review* 2016 (1) (2016): 133–208.
- <sup>42</sup> For a discussion, see Robert C. Post, "Theorizing Disagreement: Reconceiving the-Rela tionship between Law and Politics," *California Law Review* 98 (4) (2010): 1319–1350.
- <sup>43</sup>Chantal Mouffe, *On the Political* (London: Routledge, 2005).
- <sup>44</sup> For a perfect example, see Michael Anton, "The Flight 93 Election, *the Claremont Review of Books*, September 5, 2016, https://claremontreviewofbooks.com/digital/the- ight -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."