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The First Amendment and the Dissemination of Socially Worthless Untruths

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STEVEN G. GEY*

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I. INTRODUCTION

The modern world is a relativistic place that is increasingly defined by vociferous debate about nearly every proposition. This contentiousness is not limited to assertions of opinion about religious, moral, or political issues. Even assertions about basic facts are often subjected to the doubting postmodernist gaze. Some on the political left, for example, insist that biological realities such as race and sex are largely socially constructed, while their right-wing alter egos deny with equal fervor the biological and geological realities of evolution and a 4.5 billion-year-old Earth. In a world where presidents can blithely dismiss inconvenient facts as “stupid things,”¹ everything is open to question, even those things that are, as an empirical matter, incontestably and incontrovertibly true.

The interesting thing is that, even in such a world, some facts still receive nearly universal affirmation. To cite an obvious example, even in a world defined by postmodernist disbelief in the very concept of certainty, virtually all of us still agree with this statement: the Holocaust happened. One reason that almost all of us concede the truth of this proposition is that those who conducted the Holocaust were such efficient record keepers. The Nazis documented their war crimes in detail, often in duplicate, and usually in multiple different media. The perpetrators erased all reasonable doubt about the facts

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1. President Ronald Reagan, Hailing Fruits of the Party’s Dream of 1980, Address to the Republican National Convention in New Orleans (Aug. 15, 1988), *in* N.Y. TIMES, Aug. 16, 1988, at A20 (discussing increasing inflation and falling wages, President Reagan stated that “Facts are stupid things- stubborn things, I should say”).

by recording their sins on film, describing them in memoranda, and accounting for them in ledgers.² It is true that a tiny handful of cranks continue to deny that the Holocaust occurred,³ but those who do so are ostracized by virtually all sectors of society; like child molesters, they are routinely derided and reviled, and their assertions are not taken seriously in polite society. These individuals are widely regarded as social mutants, their politics are viewed as existing beyond the fringe of legitimate discourse, and their perspective on reality is considered warped and even deranged.⁴

So why do we let them talk? By allowing Holocaust deniers to talk, we allow them to perpetuate ideas that are generally considered to be socially worthless and dysfunctional nonsense, and we thereby create the risk that they will attract future generations of weak-minded fanatics to their maligned cause. If this type of speech is judged by a clear-minded measure of costs and benefits, the costs of allowing the speech to occur seem to far outweigh the benefits of adding a small quantum of total nonsense to public discourse. For this reason, most nations feel no compunction about silencing Holocaust deniers and will be happy to put them in jail or fire them from public jobs if they insist on expressing themselves publicly. Virtually every Western democracy other than the United States has a statute criminalizing Holocaust denial,⁵ and these statutes have been enforced routinely, even against relatively mainstream publications and authors.⁶

2. The Nazis not only compiled extensive documentation about their general approach to the Holocaust, they also documented the fates of individual victims. The most comprehensive collection of Nazi documents regarding individual victims is an archive of approximately 30 to 50 million documents regarding 17 million victims, located in Bad Arolsen, Germany, and administered by the International Tracing Service of the International Red Cross. Charles Hawley, *Fifty Million Nazi Documents: Germany Agrees to Open Holocaust Archive*, SPIEGEL ONLINE (Apr. 19, 2006), <http://www.spiegel.de/international/0,1518,411983,00.html>. In the United States, a large collection of Nazi photographic and filmed documentation can be found at the United States Holocaust Memorial Museum. For a sample of their collection, see United States Holocaust Memorial Museum, Steven Spielberg Film and Video Archive, <http://www.ushmm.org/research/collections/filmvideo> (last visited Nov. 12, 2008).

3. See, e.g., RICHARD E. HARWOOD, *DID SIX MILLION REALLY DIE?* (1974), <http://www.ihr.org/books/harwood/dsmrd01.html> (denying that the Holocaust occurred).

4. See DEBORAH E. LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* (1993), for a detailed account of recent efforts by Holocaust deniers “to move denial from the lunatic fringe of racial and antisemitic extremism to the realm of academic respectability.” *Id.* at 142. This book was the subject of a famous trial in England, when one of the individuals identified by Lipstadt as a Holocaust denier, David Irving, sued her (unsuccessfully) for libel. For an account of the trial by one of the expert witnesses, see RICHARD J. EVANS, *LYING ABOUT HITLER: HISTORY, HOLOCAUST, AND THE DAVID IRVING TRIAL* (2001), which recounted his investigation of David Irving’s work and the Irving libel trial.

5. For examples, see *infra* notes 8-11.

6. The three most prominent examples of Holocaust deniers prosecuted under these laws are Ernst Zundel, who was arrested in 2005 and sentenced to five years in prison un-

In the United States, in contrast, the nearly absolute protection of political speech under the First Amendment prevents the government from imposing similar punishments on Holocaust deniers. Recognizing the fact that First Amendment doctrine leads to this result is uncontroversial; discerning the reason *why* the First Amendment doctrine leads to this result is much more problematic. The problem is that the usual explanations for why the First Amendment protects the expression of radical ideas do not easily explain why the First Amendment should protect the public assertion of facts that are both socially worthless (or worse—socially harmful) and demonstrably untrue. I will suggest in this Article that the source of this problem is our persistent reliance on an individual-rights conception of the First Amendment. I will also suggest that it is easier to explain the First Amendment's protection of speakers who disseminate socially worthless untruths with an appeal to the structural function of the First Amendment within a broader concept of constitutional democracy. Under this conception, the First Amendment is not, in the end, primarily about protecting the individual's right to speak; rather, the First Amendment is primarily about constraining the collective authority of temporary political majorities to exercise their power by determining for everyone what is true and false, as well as what is right and wrong.

II. HOLOCAUST DENIAL AND THE INDIVIDUAL-RIGHTS CONCEPTION OF THE FIRST AMENDMENT

The legal prohibition of Holocaust denial is an uncontroversial fixture of most Western legal systems. In 2007, the European Union adopted the Directive for Combating Racism and Xenophobia, which requires all member nations to punish acts “condoning, denying or grossly trivializing crimes of genocide.”⁷ Even before this continent-wide mandate, almost every European country had already enacted a criminal statute punishing those who deny the Holocaust, minimize its magnitude, or refuse to recognize its moral significance. These statutes are often linked to prohibitions of breach of the peace, in-

der German Holocaust denial laws, *see* Victor Homola, *Holocaust Denier Gets 5 Years*, N.Y. TIMES, Feb. 16, 2007, at A6; David Irving, whose civil libel trial is discussed in footnote 4 *supra* and who was also sentenced to three years in prison under Austria's criminal Holocaust denial laws, *see Austria Imposes 3-Year Sentence on Notorious Holocaust Denier*, N.Y. TIMES, Feb. 21, 2006, at A11; and Robert Faurisson, who was convicted under the French Holocaust denial laws and fined over 300 thousand francs, *see Faurisson v. France*, ¶ 2.5, U.N. Human Rights Comm., U.N. Doc. CCPR/C/58/D/550/1993 (Dec. 16, 1996).

7. The Directive was adopted on April 19, 2007, to implement Council Joint Action 96/443/JHA, Concerning Action to Combat Racism and Xenophobia, tit. I, § (A)(c), 1996 O.J. (L 185) 5 (EU). A copy of the Directive can be found at <http://www.legislationline.org/legislation.php?tid=218&lid=7975&less=false> (posted Oct. 9, 2007).

citement, or other political crimes,⁸ and in some countries are joined with prohibitions on reviving Nazism⁹ or disseminating Third Reich memorabilia. In several European countries, however, the denial of historical facts alone is sufficient to warrant prison sentences ranging from one year to (in Austria) twenty years.¹⁰ The statutes are often phrased comprehensively; for example, the Austrian statute brings within the scope of its National Socialism Prohibition Law “whoever denies, grossly plays down, approves or tries to excuse the National Socialist genocide or other National Socialist crimes against humanity in a print publication, in broadcast or other media or otherwise in a way that would be publicly accessible to many people.”¹¹

The First Amendment would not permit prosecutions under any of these statutes in the United States, nor would any of the European statutes criminalizing Holocaust denial be compatible with the constitutional protections of free speech in this country. Several different aspects of First Amendment doctrine support this conclusion, including the virtually absolute protection of radical political advocacy and the equally strong prohibition of content and viewpoint regulation by the government.

If the government were attempting to punish statements denying the Holocaust because of their tendency to lead to acts of political violence, for example, the First Amendment would permit prosecution of such statements only if they took the form of specific incitement to violence and only if they led immediately to acts of violence—a situation that will almost never occur.¹² The usual ways of circumventing

8. Einundzwanzigstes Strafrechtsänderungsgesetz [Twenty-First Law Modifying the Criminal Law], June 15, 1985 BGBl. I at 965 (codified at Strafgesetzbuch [StGB] [Penal Code], § 130, ch.3) (F.R.G.).

9. Crimes of Genocide, art. 607, C.P. (Spain), *translated in* Prevent Genocide, <http://www.preventgenocide.org/es/derecho/codigos/espana.htm> (last visited Nov. 12, 2008).

10. Verfassungsgesetz vom 8. Mai 1945 über das Verbot der NSDAP [Verbotsgesetz] [Prohibition of the National Socialist German Worker’s Party (NSDAP)] Staatsgesetzblatt [StGBI] No. 13/1945, as amended by Bundesverfassungsgesetz (BVG) BGBl. III No. 148/1992 (Austria); Law of Mar. 23, 1995, *Moniteur Belge*, Mar. 30, 1995, p. 7996 (Belg.); Law of July 29, 1881, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 30, 1881, p. 4201; Law No. 90-615 of July 13, 1990, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 14, 1990, p. 8333.

11. Verfassungsgesetz vom 8. Mai 1945 über das Verbot der NSDAP [Verbotsgesetz] [Prohibition of the National Socialist German Worker’s Party (NSDAP)] Staatsgesetzblatt [StGBI] No. 13/1945, as amended by Bundesverfassungsgesetz (BVG) BGBl. III No. 148/1992, § 3 h (Austria) (author translation).

12. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (describing the comprehensive First Amendment protection of political advocacy); *Hess v. Indiana*, 414 U.S. 105 (1973) (explaining the requirement that the threat of an immediate harm is required before the government may suppress speech); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (describing the First Amendment rules protecting political speech, which do not permit the government to punish a speaker unless the government can prove that the speaker engaged in incitement, created a clear and present danger, and intended to cause immediate harm as a result of the speech).

the First Amendment's strong protection of unsavory political advocacy—including the characterization of speech as fighting words,¹³ unprotected “true threats,”¹⁴ or intimidation¹⁵—do not fit the usual Holocaust denial scenario, which typically involves books, websites, or pamphlets asserting facts in the abstract, rather than directing the speech at a particular target under circumstances in which that target would fear immediate consequences stemming from the speech.

From the perspective of American law, it is irrelevant that the speech is generally offensive or that the speech maligns an entire racial or religious group. In its First Amendment doctrine, the Court long ago abandoned the proposition that the government could use its legal authority to protect the sensibilities of racial or religious groups from verbal or symbolic attacks that fall short of incitement, fighting words, or true threats.¹⁶ In the modern era, the basic First Amendment rule is that speech is constitutionally protected in the absence of proof that the speech creates a much more individualized and concrete harm than simple offense. Thus, the government would have no success prosecuting statements denying the Holocaust in the absence of proof that the specific statements in question were linked to acts of immediate political violence.

The judicial decisions discussing the rules about viewpoint and content regulation usually arise from contexts relating to the expression of opinions.¹⁷ The Court has not distinguished, however, between the government's ability to regulate expression in order to favor certain opinions and the government's ability to regulate expression to favor certain facts. The only exceptions to this rule appear in specialized areas of First Amendment law, in which speech is protected less rigorously than political speech or other discussions of public issues. For example, government may assign liability to speakers who express false statements of fact that constitute libel¹⁸ and likewise may punish fraudulent speech containing factual misstatements about

13. See *Gooding v. Wilson*, 405 U.S. 518, 523 (1972) (describing the narrow category of fighting words as requiring the instigation of an immediate physical altercation).

14. See *Watts v. United States*, 394 U.S. 705, 708 (1969) (noting that the First Amendment permits the government to ban “true threats”).

15. See *Virginia v. Black*, 538 U.S. 343, 360 (2003) (describing “intimidation” as a subset of the unprotected category of “true threats,” “where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death”).

16. See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (overturning a local ordinance that prohibited the use of hateful symbols in a way that would arouse “anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”).

17. See, e.g., cases cited *supra* note 12.

18. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (permitting civil libel actions on behalf of public officials when speech is uttered with knowledge or reckless disregard of falsehood).

commercial products.¹⁹ There is nothing in First Amendment doctrine to suggest, however, that outside the realm of low-value speech such as libel or commercial speech, the Court would permit the government to sanction the expression of false facts in the context of general discussions about historical topics—even where there is abundant objective evidence that the facts asserted by the speaker are grossly inaccurate.

Although the First Amendment doctrine summarized in the preceding paragraphs is well settled, it is difficult to explain why these doctrinal conclusions are so obvious. The reason for this difficulty is that most of the traditional explanations for First Amendment protections of political speech do not apply easily to expression disseminating obviously false facts. Indeed, it is not difficult to construe many of the traditional explanations for First Amendment protection of speech in ways that would justify government suppression of Holocaust denial or other expression of false facts. This is because most of the traditional justifications for free speech protection under the First Amendment focus on free speech as an individual right—that is, a right that exists in order to protect each individual’s freedom to develop his or her individual persona and translate that persona into political action.

Consider four of the traditional justifications for the protection of free speech: the need to protect the truth-seeking function of the marketplace of ideas; the facilitation of democratic self-actualization; the pragmatic value of providing a social safety valve; and the safeguarding of individual liberty or autonomy.²⁰ None of these justifications seem to offer much reason to protect expression of obviously false facts such as Holocaust denial. In fact, a brief consideration of each of these four traditional justifications will illustrate that permitting the public expression of false facts arguably falls outside the bounds of many of these traditional justifications for protecting the expression of politically unpopular opinions.

A. *The Marketplace of Ideas*

From the perspective of the layperson, the need to protect the pursuit of truth through the marketplace of ideas is perhaps the most familiar justification for free speech. The use of an open marketplace of ideas to discover truth (and indeed the phrase “marketplace of ideas” itself) is a concept commonly associated with Oliver

19. See *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 535 n.12 (1987) (“The government constitutionally may regulate ‘deceptive or misleading’ commercial speech.”).

20. Various versions of these justifications appear throughout the First Amendment literature, and they are famously compiled in Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 878-87 (1963).

Wendell Holmes's famous First Amendment opinions in the early part of the twentieth century.²¹ The usual interpretation of this phrase is attributable to Holmes's benign phrasing of the rationale, which explicitly framed the marketplace of ideas in the context of a particular goal: the pursuit of truth, which Holmes described as "the only ground upon which [the public's] wishes safely can be carried out."²²

Unfortunately, the common interpretation of the "marketplace of ideas" justification gravely misconstrues what Holmes actually meant. Holmes actually had little use for popular conceptions of truth—especially anything approaching an assertion of objective or absolute truth. In his social and political morality, as well as in his spiritual life, Holmes was agnostic, if not outright atheistic. He believed in no universal truths other than a pragmatic recognition of the universal Hobbesian reality that in politics the powerful always triumph over the powerless.²³ To the extent that the concept of truth enters into the political equation at all, it serves largely as a cloak to justify the self-interested actions of those who develop and disseminate particular conceptions of "Truth." Holmes himself described "truth" variously as "the system of my (intellectual) limitations"²⁴ and "the majority vote of that nation that could lick all others."²⁵ In Holmes's conception of the marketplace of ideas, Bolshevism could be "true" to exactly the same degree as liberal capitalism.²⁶

For the reasons that will become evident below, I believe that Holmes basically got it right. Indeed, I believe that Holmes's cynical agnosticism provides a much more stable basis for the strong protection of free speech than the much more optimistic, kindly, and self-congratulatory conceptions of truth-seeking that are common features of both the popular conception of the First Amendment and cornerstone First Amendment opinions such as the Brandeis's concurrence in *Whitney v. California*.²⁷ Nevertheless, it is the more benign concept of truth-seeking through the marketplace of ideas that probably forms the core of the popular conception of free speech. It is probably Holmes's friend Brandeis who provided the public with its

21. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").

22. *Id.*

23. See Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).

24. *Id.* at 40.

25. *Id.*

26. See *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.").

27. See *Whitney v. California*, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring) (describing Brandeis's views on political speech protections under the First Amendment).

cozy notion of truth-seeking in the market when he attributed to the brave Framers of the Constitution the belief “that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”²⁸ Unlike the cynical Holmes, the optimistic Brandeis really seems to have believed that truth existed and could be realized by normal mortals. To Brandeis (and to most Americans who think blithely and superficially about the concept of truth and the intellectual marketplace), truth could be achieved through the “power of reason as applied through public discussion.”²⁹

It is difficult to use this popular conception of seeking truth through the marketplace of ideas to justify protecting the expression of Holocaust denial and other public assertions of false facts. In its benign Brandeisian manifestation, the marketplace justification depends largely on the instrumental value of free speech in producing more just and efficient social and political arrangements. We do not protect the marketplace for its own sake; we protect the marketplace because it leads us to “truth” in the form of more salubrious ways of living.

In many contexts—such as those involving discussions of social morality, political policy, and other normative questions—the instrumentalism of the marketplace of ideas justification will produce strong protections of speech. The marketplace justification vigorously protects free speech in this context because these discussions are highly subjective, the normative basis for the discussions are highly contestable, and each position expressed in the discussion is based on conflicting higher-order judgments about the nature of reality, perception, human nature, and social structure—none of which judgments can be easily reconciled or resolved definitively. The traditional model of free speech protects such discussions precisely because in a diverse society, where people disagree about ultimate goods, these discussions can never really end. Empirical proof is not available to resolve disputes about right and wrong. All that is left is discussion, in which each party’s best hope is to persuade the other. In such an atmosphere, the commonplace conception of the marketplace of ideas at least holds out the promise of some benign synthesis of the competing positions. If we cannot ascertain which normative position is objectively “true,” we can at least discern through discussion which normative positions most closely comport with reality as we understand it.

In contrast to normative disagreements, disputes about facts have completely different characteristics. Disputes about facts do not in-

28. *Id.* at 375.

29. *Id.*

volve interminable discussions about irreconcilable and unprovable normative judgments; rather, disputes about facts can be resolved through the use of ordinary resources available to assess objective reality. We may not be able empirically to resolve questions about the meaning of the universe, but we have multiple tools with which to ascertain whether the earth revolves around the sun. The marketplace of ideas justification for free speech provides a much weaker footing for protecting expression that can be readily disproved than it does for normative advocacy. If the determination of truth is the objective of the entire marketplace mechanism, there is no point in permitting the further dissemination of proven falsehoods. Indeed, disseminating falsehoods directly undermines the purpose of having a marketplace in the first place. The only purpose of the marketplace of ideas is to advance human understanding about the nature of the world and the best way to live within it; it directly contravenes that purpose if the marketplace is used to keep human society mired in socially dysfunctional misunderstandings about the nature of the world and its history.

B. The Facilitation of Democracy

Another common justification for free speech is the need to facilitate democratic self-actualization. In many ways, this is simply the collective version of the marketplace of ideas justification discussed above. In other words, the claim is that political factions comprised of like-minded individuals require the protection of free speech (defined broadly to include the right of free association) in order to develop their arguments, muster support, attract converts, and learn how to use the political sector to take power from their ideological adversaries. Without the protection of free speech, the concerted political action that is necessary to keep democratic political structures fresh will never occur. Although this justification is similar to the popular conception of the marketplace of ideas justification, it differs from the marketplace justification in two ways. First, it is focused less on individuals per se than on individuals as components of a political collective; second, although (like the marketplace of ideas) a democratic self-actualization justification is highly instrumentalist, its goal is not to discern political truth, but rather to allow like-minded individuals to attain political power in ways that do not undermine the operation of the democratic system of government.

The basic idea behind the self-actualization justification is the Panglossian notion that if political factions are allowed to freely disseminate their point of view, the large portion of the population that is not pre-committed to particular ideological positions will be able to objectively choose among various pragmatic solutions to the problems of the day. The model is once again the Brandeisian conception of

people in good faith reasoning together in a nationwide town hall, resolving problems, rather than seeking domination.³⁰ Whether this rosy view accurately describes any democracy, much less the American version, is a question for another day. The relevant point for present purposes is that the democratic self-actualization justification for free speech would not logically encompass the protection of those seeking to disseminate empirically disprovable falsehoods. Those seeking to disseminate disprovable falsehoods can in no way be viewed as acting in good faith with their fellow citizens. Rather, they are seeking power through the duplicitous means of the Big Lie. The optimistic Brandeisian concept of democracy would not countenance this kind of collective duplicity. Under this conception, free speech exists to root out such irrationality: “Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.”³¹

As in the realm of the marketplace of ideas, there is no such thing as a false political value under the democratic self-actualization justification. But there is such a thing as a false fact, and the dissemination of false facts is much more likely to undermine democracy than it is to bolster democracy. Therefore, since the second justification for free speech is specifically oriented toward facilitating the wise and efficient operation of democratic self-governance, the dissemination of false facts such as Holocaust denial would not be protected.

C. *The Safety-Valve Justification for Free Speech*

The safety-valve justification for free speech is distinguished from the first two justifications because it is a purely pragmatic rationale for dealing with radical political dissent. The notion here is that the First Amendment allows those who disagree strongly with the political status quo to vent their anger and therefore release pressure that could otherwise potentially build into a revolutionary conflagration. In Emerson’s phrasing of this point, “[t]his results in a release of energy, a lessening of frustration, and a channeling of resistance into courses consistent with law and order. It operates, in short, as a catharsis throughout the body politic.”³²

Unlike the first two justifications for free speech, the safety-valve justification makes no pretense of advancing truth or facilitating democratic self-governance;³³ the safety-valve justification is about

30. See *supra* notes 27-29 and accompanying text.

31. *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

32. Emerson, *supra* note 20, at 885.

33. In this respect, Emerson’s rendition of the safety-valve justification is somewhat sloppy, since many of the arguments he uses in favor of allowing dissidents to express their frustration are actually arguments in favor of democratic self-actualization or marketplace

nothing more than containing the frustration of those who will never be victorious in a majoritarian political system. The usual criticism of the safety-valve justification highlights the theory's mundane underpinnings. The usual argument against the safety-valve justification is that legislatures, rather than courts, should be authorized to render what are essentially pragmatic judgments about whether to create efficient mechanisms permitting dissidents to vent their social frustrations. According to this argument, legislators have access to more information about the causes, nature, and depth of the dissidence, and the legislature is the branch of government usually responsible for making judgments about the social control of potentially dangerous or disruptive behavior.

Whatever the merits of the safety-valve justification might be, that justification would not logically encompass the protection of those disseminating falsehoods such as Holocaust denial. The kinds of frustrations addressed by the safety-valve justification usually take the form of opinions and beliefs, not assertions of fact. If, for example, a neo-Nazi group is allowed to express publicly its desire to exterminate the Jews, the safety-valve function of free speech has been served. Little additional pressure will build up if the same group is prohibited from also arguing that the original Nazis did not have their own extermination program. Even if the courts are authorized to base constitutional protections of speech on judicial judgments about the need for ideological safety valves, all of the functions needed to provide a proper safety valve could be served without protecting the dissemination of false facts.

D. The Protection of Individual Liberty and Autonomy

The final traditional justification for the protection of free speech is the protection of individual liberty and autonomy. To many minds, this may be the most important traditional justification.³⁴ Indeed, in his famous compilation of arguments for free speech, Thomas Emerson lists this justification first.³⁵ The basis of this justification is simple and elegant, and once again Emerson's rendition of the autonomy rationale is classic:

The right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual. It derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being. Man is distinguished from other ani-

truth-seeking. *See id.* at 884-86 (arguing that permitting free speech safety valves will prevent the political status quo from ossifying, contribute new ideas, and bring to light grievances that society should address).

34. *See, e.g.*, discussion of C. Edwin Baker's work *infra* note 37.

35. *See* Emerson, *supra* note 20, at 879 (listing "Individual Self-Fulfillment" first).

mals principally by the qualities of his mind. He has powers to reason and to feel in ways that are unique in degree if not in kind. He has the capacity to think in abstract terms, to use language, to communicate his thoughts and emotions, to build a culture. He has powers of imagination, insight and feeling. It is through development of these powers that man finds his meaning and his place in the world.³⁶

Under this conception, the protection of free speech is absolutely necessary because the suppression of free speech “is an affront to the dignity of man, a negation of man’s essential nature.”³⁷

There are two major conceptual problems with the individual autonomy justification for free speech. The first problem is that the autonomy theorists have no good response to Robert Bork’s observation that humans pursue their autonomy in a range of different ways other than expression.³⁸ Singling out expressive modes of autonomy as somehow more important than other forms of human activity therefore seems like nothing more than ipse dixit asserted by those who personally favor speech over other, noncommunicative forms of autonomous behavior.

The second major problem for the autonomy justification of free speech is that it cannot explain why society should protect one individual’s autonomy if that autonomy will be used in a way that undermines the autonomy of many other individuals who populate mainstream society. Those who justify free speech by reference to individual autonomy usually describe the use of that protected autonomy in positive ways, as if all individuals will use their autonomy in ways that contribute directly to the growth and strengthening of the collective interests of society as a whole. In fact, we all intuitively understand that this is often not the case. The need to devise legal rationales to protect individual autonomy to pursue idiosyncratic in-

36. *Id.*

37. *Id.* There is abundant literature linking the right of free speech to the individual interest autonomy. C. Edwin Baker has made autonomy a central focus of his scholarship on the First Amendment. For the basic argument that “speech should receive constitutional protection or be accorded fundamental legal status because and to the extent that it is a manifestation of individual autonomy,” see C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 981 (1997). For Baker’s consideration of the limits of autonomy justifications for free speech (specifically, commercial speech), see C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161 (2004). For a detailed investigation into the meaning of autonomy and its consequences for free speech theory, see David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

38. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25 (1971) (“[T]he important point is that these [autonomy] benefits do not distinguish speech from any other human activity. An individual may develop his faculties or derive pleasure from trading on the stock market, following his profession as a river port pilot, working as a barmaid, engaging in sexual activity, playing tennis, rigging prices or in any of thousands of other endeavors.”).

terests is worthy of note precisely because those interests are foreign to members of the social mainstream—which is another way of saying that most people in society find those interests unusual, odd, or even frightening or dangerous. It is not sufficient to argue that society's oddballs have to be protected because the same free speech standard that protects them also protects those who express opinions that fall within the social and political mainstream, as most people who express mainstream opinions will never need protection, and they know it.

It is reasonable for those in the mainstream to respond to such arguments by asserting that they are actually worse off with a system in which free speech standards protect the expression of idiosyncratic individuals, because dissident expression actually harms the society in which those in the mainstream want to live. This has long been the argument in favor of community regulation of sexually explicit speech. Recall the arguments of the notorious Meese Commission Report in favor of regulating pornography:

[W]e certainly reject the view that the only noticeable harm is one that causes physical or financial harm to identifiable individuals. An environment, physical, cultural, moral, or aesthetic, can be harmed, and so can a community, organization, or group be harmed independent of identifiable harms to members of that community.³⁹

If, to borrow Emerson's phrasing, the objective of free speech is to help people develop their powers of "imagination, insight and feeling" in order to find their "meaning and . . . place in the world,"⁴⁰ then the individual-autonomy justification for free speech may actually be counterproductive in the sense that it protects selfish and potentially destructive forms of autonomy that may undermine both the individual and collective search for value. These problems intensify when individual autonomy is used to undermine or inhibit the political action of others. As Cass Sunstein, a prominent critic of the individual-autonomy justification for free speech, once concluded, "the interest in legally protected private autonomy from government is not always connected with the interest in democratic self-governance."⁴¹

It goes without saying that if the individual-autonomy justification for free speech cannot support the protection of the idiosyncratic statements of opinion, then autonomy cannot support the protection of the public dissemination of obviously false facts. First, the dissemination of false facts threatens the collective interest in self-

39. ATTORNEY GEN. COMM'N ON PORNOGRAPHY, U.S. DEP'T OF JUSTICE, FINAL REPORT 303 (1986).

40. Emerson, *supra* note 20, at 879.

41. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 277 (1992).

governance even more than the dissemination of “bad” opinions. Conducting discussions of public policy in a context where false facts are excluded helps the uncommitted citizen to reject “bad” opinions that are unfounded, irrational, or inconsistent with reality. Conducting discussions of public policy in a context where dissemination of false facts is permitted, on the other hand, provides nefarious political actors with the opportunity to convince uncommitted citizens that there is a factual basis for “bad” opinions that the uncommitted citizens would otherwise reject. Second, the logic of individual autonomy suggests that there is less of an autonomy interest in the ability to disseminate false facts than in the ability to hold “bad” opinions. We protect autonomy in order to protect the ability of individuals to draw their own conclusions from the world around them. But it makes little sense to protect the autonomy of individuals to misconstrue the world around them; this would be akin to protecting the political autonomy of children or the mentally unfit. It is difficult to articulate a legitimate government interest in urging people to be Democrats rather than Republicans; it is not so difficult to articulate a legitimate governmental interest in convincing people that the President does not travel to the White House on a magic carpet.

E. The Flaws in the Individual-Rights Conception of the First Amendment

As the quotation from Cass Sunstein above indicates, there is tension between some of the traditional justifications for free speech—in particular, justifications that assert the need to protect free speech in order to advance the individual’s interest in joining with like-minded fellow citizens in political action, versus the justifications for free speech that rely on the need to protect individual autonomy disconnected from any collective political endeavor. Moreover, there are additional internal inconsistencies within each of the traditional free speech justifications. The interest in democratic self-governance is internally inconsistent, for example, to the extent that it does not distinguish between the individual citizen’s personal interest in political participation and the interest of all political actors in making their political participation effective through efficient governance (defined as the ability to construe collective desires and advance those desires as effectively as possible). These two interests—the individual interested in participating in politics versus the collective interest in effectively governing—may sometimes coincide, but only when the individual’s interest in political participation coincides with the interests of the dominant faction in society. When the individual citizen’s political objectives deviate substantially from those of the political mainstream, that citizen will see little value in helping those in the political mainstream realize their political goals. Like-

wise, those in the political mainstream will see little to be gained in facilitating the political self-actualization of their weaker ideological adversaries.

Resolving the seeming conflict between the free speech interests of political insiders and political outsiders is not possible within the context of individual-rights rationales for free speech. To resolve the dilemma, one has to move beyond the individual-rights paradigm. The individual-rights paradigm needs to be augmented because two factors render the individual-rights concept of free speech inadequate as an explanation for strong First Amendment protection of idiosyncratic, antisocial, or radical expression, much less for dissemination of obviously false facts.

First, the very fact that the individual-rights concept emphasizes the individual interest in free speech renders all four traditional justifications for free speech vulnerable to the utilitarian response that the accumulated preferences of the many should trump the minority interests of the few. The usual method of responding to this criticism emphasizes the broader, long-term social goods that come from free speech. The problem with this response—which is highlighted by instances of idiosyncratic speech such as Holocaust denial—is that there are many examples of individual free speech that cannot be explained in a consequentialist manner as producing concrete long-term benefits for society as a whole. It is difficult to see what good will ever come from the dissemination of demonstrably false facts; indeed, it is plausible to argue that the benefits from the dissemination of such facts will never outweigh the negative social consequences inherent in the possibility that some individuals will actually come to believe (and base their political opinions on) facts that are demonstrably untrue. Even if one accepts that all individuals have the right to adopt any moral or political point of view toward society, it is difficult to devise any rationale for legally protecting an individual's right to construct a moral or political framework out of sheer falsehoods. In any battle between the antisocial individual whose opinions are derived from lies and the authority of society to formulate collective rules to advance the community's long-term interests, the individual is almost certainly going to lose.

The second flaw in the individual-rights justification for free speech also derives from the structure of these arguments. In discussions of each of the four traditional individual-rights justifications for free speech, emphasis is placed on the positive social goods that will come from protecting individual expression. With regard to the truth-seeking justification, the social good is nothing less than the identification of truth itself. With regard to the democratic self-actualization justification, the social good is a more efficacious protection of the democratic polity's ability to put its ideas into action. With regard to

the safety-valve justification, the social good is the release of potentially revolutionary political pressure and the preservation of social peace. With regard to the individual-autonomy justification, the social good is a more enlightened and psychically fulfilled citizenry.

The problem with these promises of social goods, as noted above, is that our collective intuition tells us that the protection of individual rights may not necessarily deliver on the promises. Protecting the marketplace of ideas sometimes allows politically evil majorities to take control of the government, democratic self-actualization may have the same effect, the safety valve may sometimes lead to the fomenting of social discord rather than the preservation of social peace, and tiresomely voluble individualists exercising their personal autonomy to the hilt may often drown out interesting and worthwhile speech by other, more polite and sensible individuals. If we focus only on the benefits produced by the protection of free speech as an aspect of individual rights, an honest assessment of those benefits will often lead logically to the renunciation of free speech in favor of well-intended and presumptively wise collective control of political discourse.

If the broad protection of free speech makes sense, it therefore must be justified in negative, as well as positive, terms. The individual-rights justifications for free speech outlined above must therefore be augmented with a structural-rights theory to limit the ability of political majorities to regulate speech. In other words, the proper argument for free speech is not only that unfettered speech produces more social goods, including enlightened self-governance, but also that governmental suppression of speech produces more social harms of a sort that are inconsistent with democratic self-governance. The next Section provides a brief outline of the structural-rights justification for free speech that responds to the problems inherent in the individual-rights perspective, with a particular emphasis on why free speech properly construed should protect the wide public dissemination of socially worthless untruths such as Holocaust denial.

III. STRUCTURAL RIGHTS, THE FIRST AMENDMENT, AND THE PROTECTION OF SOCIALLY WORTHLESS UNTRUTHS

The key difference between a structural-rights interpretation of the First Amendment and an individual-rights interpretation is that a structural-rights interpretation focuses on the problematic nature of collective power rather than the beneficial character of individual rights. This difference in focus leads to two theoretical distinctions between the structural- and individual-rights perspectives toward free speech.

First, a structural-rights interpretation of the First Amendment is entirely negative; it does not rest on the affirmative claim that free speech will lead to any particular social or political benefits. For this reason, the assertion that restrictions on free speech will produce more social and political benefits or a greater quantum of social welfare than the absence of such restrictions does not undermine the case for structurally limiting the government's power over speech.

Second, rather than relying on the instrumental claims of the individual-rights position, the structural-rights perspective relies on a metaphysical assertion about the nature of truth and the role of collective entities in ascertaining that truth. The structural interpretation assumes, in the properly construed Holmesian tradition, that all assertions of truth are incomplete, inevitably flawed, and probably tendentious. This assumption is derived from the imperfections inherent in all human attempts to perceive reality and give it meaning: the reliance on incomplete information, coupled with the contaminations of self-delusion, self-interest, self-aggrandizement, cultural myopia, incompetence, and/or simple laziness. These faults are magnified when collective entities are involved in the determination of truth. The structural interpretation assumes, also in line with the Holmesian tradition, that collective assertions of truth should be viewed even more skeptically than individual assertions of truth. Collective assertions of truth are, by nature, committee products and therefore tainted with the impurity of a process that generates its conclusions through negotiation, compromise, and deal-making. Collective assertions of truth should therefore be viewed as a metaphysical camel, in the sense of the old vaudeville quip that a camel is a horse designed by committee. Finally, collective assertions of truth are likely to be even more infected by self-interest than individual assertions, because collective assertions are driven in part by the desires of the group to reinforce its unity of purpose, through which it maintains its power and influence.

The structural approach is hardly foreign to the First Amendment text or jurisprudence. In one important respect, the structural approach explains the First Amendment text better than the more common individual-rights perspectives, because it unifies the Establishment Clause and the other clauses that come after it. Indeed, when viewed from the perspective of the structural-rights approach, the Establishment Clause is the model for the entire First Amendment. In the Supreme Court's traditional treatment of its First Amendment religion cases,⁴² the Establishment Clause has been

42. Ever since it entered the Establishment Clause arena in 1947, the Supreme Court has organized its Establishment Clause jurisprudence around the notion that church and state should be entirely separate entities. Thus, as the Court articulated the basic command of the portion of the First Amendment dealing with religion, the government was not

used to impose on the government a rigid agnosticism, under which the government is not allowed to endorse or otherwise support one religion or religion in general and also is not allowed to sanction individuals who deviate from the political majority's religious norms.

The Establishment Clause is not the only reflection of the structural-rights perspective in current First Amendment doctrine. Several aspects of the Court's First Amendment free speech doctrine can also be best explained by reference to a structural-rights interpretation. The most direct reference to the structural view of the First Amendment can be found in Justice Jackson's famous assertion in *West Virginia v. Barnette* that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."⁴³ As in the Court's traditional treatment of the Establishment Clause, the effect of this statement is to impose on the government an ideological agnosticism mandate. The agnosticism mandate in the speech area is weaker than the similar mandate in the religion area in the sense that, with regard to political ideas, the government is allowed to take sides in political debates. But as in the religion area, the government is prohibited by the speech clauses of the First Amendment from using the law to enforce its ideology on those who disagree. In recent years, this aspect of the First Amendment's political agnosticism mandate has been enforced

allowed to "pass laws which aid one religion, aid all religions, or prefer one religion over another . . . [nor] force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion." *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947). Likewise, "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.* at 16. Although the Court often honored its separationist mandate only imperfectly, the mandate had very real effects in limiting the sectarian activities of government and protecting the religious liberty of those outside the religious mainstream.

It is unclear whether the new majority on the Supreme Court is willing to maintain separationist principles as a centerpiece of its Establishment Clause jurisprudence. The Court has already hinted that it will permit widespread government financing of religious activity. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 644-48 (2002) (upholding Cleveland school voucher program, which provided substantial sums to parents of children attending religious schools); *Mitchell v. Helms*, 530 U.S. 793, 801 (2000) (plurality opinion) (permitting public school district to lend educational materials and equipment to private religious schools). Certain members of the new majority would even abandon the concept that the government must be theologically ecumenical, arguing instead that the government may favor monotheistic faiths and that the Establishment Clause permits the government to "disregard . . . polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists." *McCreary County v. ACLU*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).

43. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

through very strong restrictions on government regulation of the content or viewpoint of speech.⁴⁴

The core of the structural-rights justification for free speech is the claim that democratic self-governance is inconsistent with a regime that permits political majorities to suppress free speech. It is important to underscore that this is not a claim about the political outcomes of the democratic political process. From the structural-rights perspective, the particular outcome produced by the political system is entirely irrelevant to the question of whether it is legitimate for the government to suppress free speech. The structural-rights approach takes to heart Holmes's contention that if participants in a proper democratic system decide to adopt the principles of Bolshevism, then from the structural-rights perspective the only meaning of free speech is that they should have their way.⁴⁵ From a structural-rights perspective, collective political control of speech is inconsistent with democratic self-governance not because it will lead to more social evils in the form of bad political results, but rather because free speech regulation undermines the very character of the democratic political system itself.

These assertions relate to democratic theory in very basic ways. The agnosticism mandate imposed on the government by the structural interpretation of the First Amendment is, in many ways, the *sine qua non* of democratic governance itself. Reduced to its essence, democratic governance requires that the political structure reflect certain basic attributes, each of which makes sense only if one assumes that the government will be ideologically agnostic. Three of these basic attributes are worthy of note here. First, a democracy is defined by the concept of popular control of the government. Therefore, a democratic political structure must specifically eschew governmental authority to control or manipulate the ideological predispositions of its population. In a democracy, government cannot be allowed to systematically indoctrinate its citizenry or instill in citizens a particular ideological bias, because to do so would essentially allow the government to undermine popular control by manufacturing its own consent. Second, power within a democracy must be fluid, in the sense that democratic governments must incorporate the assumption that power will shift periodically from one faction to another. Any attempt by government to hobble or eradicate opposing factions un-

44. See *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed. . . . Content-based regulations are presumptively invalid.")

45. See *Gitlow v. New York*, 268 U.S. 652, 673 (Holmes, J., dissenting) ("If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.")

dermines the circulation of elites that is necessary for healthy democratic governance. Finally, a democratic political structure may not ascribe to any principle or policy the status of permanence or inviolability. Democracy itself may be abandoned or overthrown, but while the democratic government continues to describe itself as such, everything is always open to question; nothing is sacrosanct.

If these attributes accurately describe the essence of democracy, then structural limits on the government's ability to control speech are indispensable. If the government were allowed to control speech so that the population could hear only the government's perspective on reality, then the government would be well on its way to constructing a population in its own image. If the government could do this job efficiently, those controlling the government could effectively stay in power indefinitely. Likewise, if the government were allowed to enshrine in law and prohibit the disavowal of a set of ideological principles that favored the current status quo, the dominant political faction could preempt any attacks on the legitimacy of its power. The structural interpretation of the First Amendment prevents the government from doing any of this. This interpretation is predicated on the premise that government has no authority to enforce through legal proscriptions any ideology or use the law to protect any set of favored ideas. The dominant political faction may certainly pursue its own political agenda while in power, but not in a manner that seeks permanently to ostracize its adversaries or distort the political process in a way that perpetuates the dominant faction's control over the government.

It is easy to apply these concepts to government attempts to regulate the expression of opinions. As the modern free speech doctrine regarding content and viewpoint regulation illustrates, except in rare circumstances all such attempts are unconstitutional. Government simply has no business in enforcing its version of metaphysical or ideological truth. The underlying assumption of the structural-rights perspective on the First Amendment is that power is the only relevant phenomenon in the political sphere and that collective assertions of truth via the government are therefore defined by (and likewise corrupted by) power. If democratic theory mandates that power must be both impermanent and fluid, then these attributes must apply as well to governmental determinations of truth.

The question is whether the same constitutional skepticism toward government assertions of metaphysical or ideological truths should also apply to governmental assertions of empirical or historical truths. We return, finally, to the precise question being discussed here: Should the First Amendment protect the dissemination of socially worthless factual untruths? I have argued above that the justifications for protecting free speech that are based on an individual-

rights interpretation of the First Amendment do not logically lead to the protection of expression containing obviously false facts. Each variation on the theme of the individual-rights interpretation depends on an optimistic view of the social benefits arising from speech. The individual right to free speech is not protected for its own sake under these theories, but rather as an efficient mechanism to increase the commonweal. Individual-rights variations that attempt to move beyond the claim that individual rights will lead to greater collective benefits—such as the individual-autonomy rationale—have a difficult time distinguishing themselves from arguments for nonexpressive freedoms and have an even more difficult time justifying the burden that an idiosyncratic individual will impose on the collective interests of society as a whole. Thus, in order to be effective, each of the variations on the individual-rights interpretation must assert that through free expression, individuals will become more enlightened, smarter, more tolerant, and generally better citizens. Expression that impedes social progress does not fit the individual-rights model and is therefore vulnerable to a utilitarian balancing of interests, under which antisocial speech will frequently lose.

Under a structural interpretation of the First Amendment, it is much easier to defend the protection of antisocial speech, because the government is robbed of its usual justifications for suppressing that speech. Antisocial speech cannot be suppressed because it is wrong or untrue, because under the structural model the government has no authority to use its legal authority to identify and enforce any particular version of right and wrong, or truth and untruth. Under the structural interpretation, government is neither an intellectual nor a moral arbiter. The government is simply the vehicle for powerful elements of society to carry out certain pragmatic objectives.

In this light, false statements of fact are indistinguishable from “false” statements of opinion. Just as the government cannot suppress expressions of opinion that are illogical, badly reasoned, intolerant, or counter to the country’s dominant social and political ethos, the government also cannot suppress statements of fact simply because they are demonstrably untrue and may lead astray those who hear the statements and are too lazy or dim-witted to sort out truth from falsehood. Under the structural interpretation, government has no paternalistic role over matters of the intellect, just as it has no paternalistic role over matters of the soul. It is up to individual citizens alone to sort out truth from falsehood. Intellectual paternalism is contrary to the government’s role under the structural interpretation because the structural interpretation builds into the First Amendment a deep skepticism about the good faith of those controlling the government. We instinctively assume that the government does everything for a political reason. If the government punishes the expres-

sion of factual falsehoods—such as Holocaust denial—it does so because the statement of such facts are bound up with political perspectives that the government seeks to undermine. Politicians are not scholars, and politicians' claims of factual veracity should never be taken at face value—even when there is independent evidence that the government is actually correct. This is not to say that the politicians are always wrong; it is to say that determinations of right and wrong should not be in the hands of politicians.

All other things being equal, the world would be a better place if everyone recognized the reality of the Holocaust. But all other things are not equal. The benefits to be achieved from cleansing the world of Holocaust denial would come at great cost. The benefits to be achieved by having the government correct the dissemination of factual falsehoods would be far outweighed by the signaling effect of having the government settle intellectual disputes through legal sanctions. Allowing the government to act in this way would subtly diminish the importance of recognizing the government's natural tendency to twist reality to its own purposes. Allowing the government to encourage truthfulness by punishing falsehood has the potential for lulling the citizenry into taking what the government says at face value. As paradoxical as it may seem, the cause of democracy is much more likely to advance through a healthy dose of cultural relativism and Holmesian skepticism than through the saccharine Brandeisian platitudes about the brave Founders, noble town meetings, and patriotic politicians looking out for our best interests.

IV. CONCLUSION

Viewing the First Amendment through the prism of structural rights resolves many of the uncomfortable questions posed to those who would protect the speech of political radicals, social misfits, and those whom society would rather just shut up and go away. The structural-rights interpretation of the First Amendment resolves these questions because it is no longer necessary to explain what social benefits are obtained by protecting the expressive interests of the purveyors of hatred and lies. From the perspective of the structural-rights interpretation, First Amendment proponents can plausibly explain that the purveyors of nonsense are merely incidental beneficiaries of the ideological agnosticism mandate that has characterized the expansion of First Amendment protections during the twentieth century. Even if those spreading malicious nonsense incidentally benefit from this trend, we can take solace in the knowledge that we did not expand the First Amendment for them; we expanded it for ourselves.