

New Model Federalist No. 1 – On Fundamental Liberties

We propose, in summary: That the rights guaranteed by the First Amendment are the foundation of free government – That speech ought not to be restricted, even if it causes offense – That the press ought to be protected, even when it is flawed – That peaceful protests ought neither to be derided by public officials nor suppressed – That there ought to be no compulsion in matters of faith – That citizens are the final guardians of First Amendment rights

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. —First Amendment to the U.S. Constitution, ratified December 15th, 1791.

To begin this series on the preservation, perpetuation, and expansion of free government in these United States and the world, we must start with free government’s foundation. It consists of several pillars that stand in the way of tyranny, both of one man and of the majority, and that distinguish a republic that is free from one that merely pretends to be free – that is, a classically liberal democracy from the ‘illiberal democracy’ envisioned by the would-be despots of today. These pillars were inscribed, with elegance and clarity, into the First Amendment to the U.S. Constitution. They are: freedom of speech, freedom of religion, freedom of the press, and freedom of peaceable assembly. Yet the First Amendment has lately been neglected in our public debates; it is the provision of the Constitution most threatened by the proponents of ‘illiberal democracy’ on both the right and left, whom the Republican and Democratic parties have been unwilling or unable to disavow. Thus it falls instead to all citizens who care for the future of their Republic to uphold its founding freedoms. We must all of us adopt the spirit of Voltaire, that “I may disagree with what you say, but I will defend to the death your right to say it.”¹

Free government – a mode of political organization, in which individual citizens may live their lives peacefully according to their preferences without government coercion, hold their own distinct opinions on public matters, and, together with their compatriots, choose the laws that govern them – cannot exist without the rights to free speech, free press, free worship, and peaceable assembly.² A government that rules by the unrestrained will of the majority and does not respect those liberties is not free, even if it holds elections, but is only a waypoint on the road to servitude.³ For under such government the minority, be it forty-nine percent or one-hundred-and-fifty-nine million citizens, is ever in danger of losing their inalienable rights to life, liberty, and the pursuit of happiness, because they, at sword-point, are neither permitted to object nor to organize in opposition to such affronts against their freedom. And once that minority loses its inalienable rights, the rights of the majority are soon lost too: because after the old majority has stripped the former minority of political rights, and reduced them to servitude, a new majority

¹ This quote was, in fact, attributed to Voltaire by a biographer; but it captures well that great man’s spirit.

² “The part of the Magistrate is only to take care that the Commonwealth receive no prejudice, and that there be no Injury done to any man, either in Life or Estate.” John Locke, *A Letter Concerning Toleration*.

³ “They have taken up an idea which they seem to think quite new, but which in reality is as old as despotism and about as narrow and selfish. It has been heard and answered a thousand times over. It is the argument of the crowned heads and privileged classes of the world. It is as good against our Republican form of government as it is against the negro. The wonder is that its votaries do not see its consequences. It does away with that noble and just idea of Abraham Lincoln, that our government should be a government of the people, by the people, and for the people, and for all the people.” Frederick Douglass, “Lessons of the Hour” Speech, Jan. 9, 1894.

eventually forms out of those who remain; and that new majority then strips forty-nine percent of the old majority of their rights, and reduces them, too, to servitude. This process continues until no citizen holds power but one – the tyrant – at which point elections are done away with altogether or continued merely as a farce. So then does the Republic perish from the earth.

The corrosion of republics in this way has recurred throughout mankind's history. In the dying days of the Roman Republic, the populists led by Marius violently assailed the elitists, who returned under Sulla to trample the populists; then came Caesar and Pompey, then Antony and Augustus, until Rome was no longer a republic but a violent despotism suffering under the insane caprices of Nero and Caligula. The history of Germany in the 1930s, as it degenerated into the brutality of Nazism, also attests to illiberal democracy's inevitable result. There, those who manipulated the majority came first for Socialists, then for Jews, and then in stages brought repression, war, defeat, and ruin upon every citizen.⁴ In our own age, we witnessed Venezuela's republic crumble. Chávez, elected by the people, broke the barriers that constrained him, and violated the liberty of the minority which voted against him; now his successor watches with impunity as all the people starve. All of those nations were republics when they began their path to ruin; and no republic, if it fails to vigilantly guard its freedoms, is immune from their fate.

Be it known, then, the majority can have no political consciousness other than the words of a demagogue if ideas cannot be freely exchanged; all other rights, and all checks and balances in government, have no use if citizens' grievances cannot openly be aired; there will be grievous loss of life if peaceable assemblies are violently suppressed; there can be no liberty if contrary words are silenced; and no citizen may pursue happiness who is denied the free exercise of his or her faith. Government without these freedoms ceases to be a government of the people, by the people, for the people; it becomes first a government of the majority, by the majority, for the majority; and then it becomes inexorably a government of the tyrant, by the tyrant, for the tyrant. The Second Amendment preserves the sword that may, at last resort, be taken up by a free citizenry to defend itself from tyranny; but the First Amendment preserves the pen that allows the people to recognize tyranny when it appears, and to organize in struggle against it.⁵

We shall now, in the interest of preserving them, examine the present state of each of the First Amendment's freedoms: of speech, the press, peaceable assembly, and religion. Most have not yet been formally encroached upon by government, and those small intrusions that the federal and state governments have made on them have, for the time being, been justly rejected by our courts of law. Yet this happy state of affairs cannot be expected to continue if our public

⁴ "First they came for the Communists/And I did not speak out/Because I was not a Communist/Then they came for the Socialists/And I did not speak out/Because I was not a Socialist/Then they came for the trade unionists/And I did not speak out/Because I was not a trade unionist/Then they came for the Jews/And I did not speak out/Because I was not a Jew/Then they came for me/And there was no one left/To speak out for me." Pastor Martin Niemholler, c.1946

⁵ "The speculative line of demarcation, where obedience ought to end, and [revolutionary] resistance must begin, is faint, obscure, and not easily definable. It is not a single act, or a single event, which determines it. Governments must be abused and deranged indeed, before it can be thought of; and the prospect of the future must be as bad as the experience of the past. When things are in that lamentable condition, the nature of the disease is to indicate the remedy to those whom nature has qualified to administer in extremities this critical, ambiguous, bitter portion to a distempered state. Times and occasions, and provocations, will teach their own lessons. The wise will determine from the gravity of the case; the irritable from sensibility to oppression; the high-minded from disdain and indignation at abusive power in unworthy hands; the brave and bold from the love of honourable danger in a generous cause: but, with or without right, a revolution will be the very last resource of the thinking and the good." Edmund Burke, *Reflections on the Revolution in France*.

attitude becomes corrupted against these freedoms: the laws will eventually be undermined, the courts will grow silent, and tyranny will creep forward.⁶ It is therefore necessary for the citizens of our Republic to examine ourselves at regular intervals, so as to see if this corruption is creeping into our hearts; and if so, to reject it and instead stand firm in our convictions.

The First Amendment guarantees the right to free speech, from which the right to free expression by other means may be derived. It does not, nor does any other article or amendment in the U.S. Constitution, guarantee a right not to be offended. The Declaration of Independence expresses an inalienable right only to pursue happiness; as the author of that venerable document might once have said, we must attain happiness ourselves.⁷ Movements that seek to restrict free speech in order to protect sensitivities are contrary to the principles of free society. This is all the more so when they unfold in the nation's universities. Such places of learning, where the youth of future generations, to whom we will someday entrust our Republic, are forming their life-long convictions, ought to be open to the free exchange of ideas. Moreover, public universities, being as they are provided for by the States, are bound by law to be so.⁸

Freedom of expression extends also to history. Monuments and dedications, which are by their nature public in character, ought to be removed or altered by the majority vote of those who govern them,⁹ not hastily purged at the demand of activists, however impassioned they may be. He who controls the past controls the future;¹⁰ in a free society no individual or group ought to control the future, and so ought none to control the past by such means. If there is no consensus to discard the relics of past sins, build new statues to memorialize the aspirations of the present. Rather than censor the annals of history, write a new chapter through good works today.

We do not, by way of our defense of free speech, endorse hateful speech; such invective is unbecoming of the dignity of our Republic. Yet vile words do no injury to life or property. The notion of hate speech can never be so precisely defined that it will not, at some future time, be interpreted as to include speech that is merely considered offensive by one group or another. Such an ill-defined notion, were it to become a basis of law, would inevitably enable government to restrict any speech that it chooses; and government, by its nature, would then choose to restrict the speech which criticizes it. Thusly does liberty die. It is to the citizens of these United States, then, to rebut with our own dignified and respectful conduct those who spew forth hateful words. It is neither just nor wise to call upon the heavy hand of the state to do so.

Incitements and threats are another matter; both infringe upon the liberty of others.¹¹ No murderer ought to evade justice merely because his own hands did not hold the killing blade, if his words urged the one who held the blade to kill. Incitement to violence is thus rightly unlawful

⁶ "Decline in the moral character of a people is not sudden, but gradual. The downward steps are marked at first by degrees and by increasing momentum from bad to worse." Frederick Douglass, "Lessons of the Hour," Jan. 9, 1894.

⁷ "The Constitution only gives people the right to pursue happiness. You have to catch it yourself." This quote is attributed variously to Benjamin Franklin and Thomas Jefferson; which one, if either, said it, we do not know.

⁸ By the First Amendment itself. The several States may not violate the Constitution of the United States.

⁹ In the case of a monument on public grounds, the elected legislature of that municipality or State; in the case of monuments on private grounds, such as a university, we would recommend a vote of students, faculty, and alumni.

¹⁰ "Who controls the past controls the future. Who controls the present controls the past." George Orwell, *1984*.

¹¹ As in the case of an inciter of a lynch mob, or someone who stands outside a church, exhorting a crowd to ransack everything within. Inciting panic, when doing so could cause physical harm, is also justly illegal; e.g. shouting "fire" in a crowded theater. A rant by someone who calls some group by hateful names but does not threaten anyone, by contrast, is highly distasteful, but not criminal; its perpetrator ought to be shunned, but not prosecuted.

in these United States. Threats, even if they do not result in violence, are instruments of coercion that restrict liberty; they are likewise unlawful, and justly so.

Defamation, known too as slander or libel, can under certain circumstances impose social or monetary costs on people and firms; it is therefore just and proportionate that, in our Republic, those offenses are tried in a civil court, wherein those costs may be restituted to the plaintiff. Yet it is also to our Union's lasting credit that its standards of evidence for such complaints are more stringent than elsewhere in the world: the accused must have deliberately or recklessly spread a falsehood, rather than merely made an error or spoken the truth to one who wished to hide it.¹² In doubt, it is best to err on the side of liberty; exceptions to free speech are thus narrowly limited, and ought to remain so.

Yet there ought also to be a higher moral standard for public officials: that they ought not to disparage the exercise by others of those founding freedoms. For high officials hold the levers of government; their words signal the will of the state, and thereby cause the state's machinery to press upon those who do not possess such might. Thus do we turn to the next three freedoms.

The press, even at its best, will be flawed, and it may well be said that the press today is far from its best; but its freedom must nevertheless be sacrosanct.¹³ Popular disdain for modern news practices does not override the First Amendment, and thus government may not lawfully take it upon itself to reform the failings of journalism. Yet today press freedom is ridiculed from the highest levels of authority. Such assaults are unacceptable in a republic: the use of political pressure on newspapers and other media outlets that criticize the policies or personalities of government is but a prelude to the use of violent force to silence opponents. If the people of these United States stand by and allow the free press to be shackled on account of its fleeting unpopularity, then there shall be no-one to sound the alarm when the freedoms of the people are menaced in turn.¹⁴ Citizens of this country are under no obligation to love the press; we may criticize it when it fails to uphold its standards; but we are nonetheless duty-bound by the principles underpinning our Republic to protect it from government coercion.

The exercise of the right to peaceable assembly, known as peaceful protest, has likewise fallen into contempt. Some officials, at the apex of our government, have in recent years reveled in the violent treatment of peaceable protestors. This, too, is unacceptable in a republic. Certain protests may be petty or foolish; but that they are petty or foolish has no bearing on the right of protestors to assemble. Other protests may call for policies that are harmful to the well-being of the Union, or even repugnant to the fundamental rights expressed in the First Amendment; but that they call for such harmful actions does not abrogate their right to gather together in peace.

There is but one distinction that matters: that protests are peaceable, or else are violent or threaten imminent violence. We hold, therefore, that mobs, which wantonly ruin life or property,

¹² The result of Supreme Court precedent beginning with *New York Times v. Sullivan* in 1964 and *Curtis Publishing Co. v. Butts* in 1967.

¹³ "In the matter of the press there is therefore really no middle between servitude and license. To get the inestimable good that freedom of the press assures one must know how to submit to the inevitable evil it gives rise to." Alexis de Tocqueville, *Democracy in America*, Vol. 1, Part 2, Ch. 3.

¹⁴ "The sovereignty of the people and freedom of the press are therefore two entirely correlative things: censorship and universal suffrage are, on the contrary, two things that contradict each other and cannot be found in the political institutions of the same people for long." Tocqueville, *Democracy in America*, Vol. 1, Part 2, Ch. 3.

are not peaceable protests, but riots; that ‘armed protests,’ if done to intimidate lawful authorities or seize public property, are not peaceable protests, but rebellions; and that the dispersal of either by government forces, through use of proportionate means, is justified by the Constitution, which refers often to the necessity of suppressing insurrection, rebellion, and lawless violence.¹⁵

The First Amendment guarantee of religious freedom contains two parts: it prohibits the establishment of a state religion – “Congress shall make no law respecting an establishment of religion...” – and it gives the citizen freedom to exercise his or her own faith – “...or prohibiting the free exercise thereof.” The distinction between these parts appears clear, but often today they are invoked at cross-purposes; that is, the free exercise of religion is prohibited in the name of preventing religion’s establishment.

The line ought justly to be drawn at the point of compulsion.¹⁶ No citizen should be compelled in any matter of faith, unless that compulsion is to protect the constitutional rights of another citizen.¹⁷ No Catholic organization therefore ought to be compelled to pay for insurance providing contraception, since such compulsion interferes with the free exercise of its faith;¹⁸ but similarly, no insurance provider ought to be compelled by the government, for religious reasons, not to offer to the general public coverage providing contraception, for such compulsion would amount to an establishment of religion. Similarly, the First Amendment prevents religious rules, such as the Islamic sharia, from carrying the force of law. But were Congress to pass a law prohibiting the wear of the Islamic headscarf, such an act would prohibit the free exercise of our Muslim citizens’ faith and thereby also violate the First Amendment. These and similar acts have been discussed or enacted in recent years, and will only continue; when they tend toward compulsion in affairs of faith, we as citizens must steadfastly oppose them.

It is not only the First Amendment that guards the essential rights of citizens in these United States. The Second and Third Amendments shield citizens from martial oppression; the Fourth through the Eighth Amendments ensure that tyrannical rule may not be imposed under the pretense of false justice; and the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments

¹⁵ “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,” *U.S. Constitution* Art. 1, Sec. 8; “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it,” Art. 1, Sec. 9; “...and [the United States] shall protect each of them [every State] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” Art. 4, Sec. 4.

¹⁶ “Because the Care of Souls is not committed to the Civil Magistrate, any more than to other Men. It is not committed unto him, I say, by God; because it appears not that God has ever given any such Authority to one Man over another, as to compel any one to his Religion. Nor can any such Power be vested in the Magistrate by the consent of the People; because no man can so far abandon the care of his own Salvation, as blindly to leave it to the choice of any other, whether Prince or Subject, to prescribe to him what Faith or Worship he shall embrace.” John Locke, *A Letter Concerning Toleration*.

¹⁷ “But indeed if any People congregated upon account of Religion, should be desirous to sacrifice a Calf, I deny that That ought to be prohibited by a Law. Melibaeus, whose Calf it is, may lawfully kill his Calf at home and burn any part of it that he thinks fit. For no Injury is thereby done to any one, no prejudice to another man’s Goods.” John Locke, *A Letter Concerning Toleration*. Human sacrifice, as it does injury to another, is logically prohibited by law.

¹⁸ Insofar as they are compelled to directly provide, pay for, or condone practices contrary to their faith; they may not, however, use the First Amendment to justify a refusal to pay general taxes on the basis that the government uses revenue from those taxes to fund or provide some such service which contradicts that citizen’s faith. In that case the payment is from the citizen to the government; the government then spends that revenue on whatever the will of the majority, as expressed through Congress, lawfully demands. The Congress thus takes on the moral considerations of the spending decision; the citizen is fulfilling only his or her lawful obligation to provide revenue to the government.

make clear beyond any shadow of doubt that citizenship in this Republic, and all the rights attendant upon it, stands independent of any criteria of race or gender. As it is the duty of all citizens to uphold the entire Constitution of the United States, so must they guard vigilantly against infringement of all those parts of it. Yet the First Amendment is undoubtedly the foundation upon which those other freedoms have been upheld or gained; for without its guarantees of expression and assembly, citizens could never mobilize to demand their rights.

In the remaining essays in this series, we shall put forth particular proposals for action relating to the topic at hand. Yet we cannot propose legislation to protect these First Amendment rights, because they are inscribed already in the Supreme Law of the Land. We can only maintain a constant vigilance, and staunchly resist encroachments upon this first of laws and principles, regardless of whether those assaults are against the letter of the law or its spirit, and regardless of whether they are loud and aggressive or silent and furtive. We can demand that our legislators keep the First Amendment's freedoms foremost in their minds as they craft our laws; that our President enforce the laws faithfully and in a way that respects the aforementioned liberties; that the President nominate Justices and other officers of government who shall also uphold those freedoms; and that the Senate approve or reject those officers by weighing firstly whether or not they will guarantee the Constitution's promises of liberty. Lastly, we as citizens can and ought to vigorously defend these First Amendment freedoms in public debate, whether federal, state, or local; in the courts of law when serving as advocates, witnesses, or jurors; and in our interactions with fellow citizens, by whose vote legislators and the President are brought forth and recalled.

—U.S. Citizen