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The Dysfunctional Relationship Between the United States and the First Amendment Through the Eyes of its Favorite Villain: The Joker

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I. Introduction

In this paper I will seek to reconcile the seeming love/hate relationship that the United States has with the First Amendment. This uneasy, if not dysfunctional relationship can be understood in two contexts: 1) resistance to episodes of strong federal government restriction on seditious speech and 2) state and local government attempts to limit private expression in order to prevent offense being given or taken. This paper posits that Americans have misplaced their priorities, refusing to sacrifice some freedoms for the greater defense of their liberties, but quick to silence at the most insignificant sleight of supposedly distasteful expression.

Because this area of study is mired in innumerable cases, statutes and scholarly commentary, I will attempt to provide a more original analysis from the perspective of a popular villain from western film. Using this individual as a foil, my hope is to deconstruct and render plain the often inaccessible dogma of first amendment jurisprudence and commentary and to facilitate a conversation about our nation's psychology and laws in this area.

The first part of this paper will assess the long train of legislative and judicial interpretations, validations and restrictions upon the First Amendment, identifying their causes and their effects, while the latter portion will deal with the accuracy of our villain's perceptions of society when matched with those interpretations. Finally, a brief note on the benefits (or hazards) of such a perspective will be offered.

a. First Amendment "Lite"

The First Amendment to the Federal Constitution states: "*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."*[1] To trudge through the law as it pertains to each element of this amendment would require devotion beyond the patience of even the most disciplined Franciscan Friar. For our purposes, we will remain within the confines of those clauses that prevent "*prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press"*[2]. Limiting the scope of our discussion does not stem from laziness, but rather a curiosity about the American citizenry's bizarre "love/hate" relationship with this clause, as it is unique among any other law that our country was founded upon.

Before a productive discussion of the First Amendment can begin, many of the inaccuracies in historical accountings of the time must be unraveled.

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[1] U.S. Const. amend. I
[2] Id.

Chief amongst those discrepancies is the actual popularity of the Constitution. Of the 1,681 delegates selected to vote on ratification, passage was won only by a margin of 1,071 to 610[3]. It was not, by any means, the solemn manifestation of solidarity that the Declaration of Independence represented[4]. This relative split in delegates should come as no surprise. Indeed, of the two generations that were present as representatives of their state, the elder had fought for decades to preserve what they felt were inherent political and humanitarian rights while the younger had been raised in an environment that persistently questioned the notions of "representation", "government" and "liberty"[5]; small wonder then that these two monoliths of political ideology would clash over the formation of new governance.

Ratification was both a temporally and philosophically grueling process: from Delaware's ratification in 1787 to Rhode Island's final assent in 1790, nearly two-and-a-half years had passed[6]. Many of the champions of the glorious revolution of 1776 had assumed other roles in securing the liberties of their new country and were absent for the debates that subtly or not-so-subtly caused the stress fractures upon which the country would eventually break some 70 years after[7]. John Adams, chief amongst the great paragons of American independence was abroad serving as the country's first Ambassador to the court of King George III in London, while his younger colleague, Thomas

[3] Middlekauff, Robert. *The Glorious Cause: the American Revolution 1763-1789*. Oxford University Press, 2009.
[4] Ferling, John. *Independence: the Struggle to Set America Free.* Bloomsbury Press, 2011.
[5] Middlekauff at 656
[6] Id.
[7] Id.

Jefferson, was serving in similar capacity in France[8]. The great unifying force for the nation, George Washington, was serving as President of the Constitutional Convention and was therefore largely removed from position by which to voice opinion[9].

The Constitution that was eventually accepted was an amalgamation of compromises, desperate bargains and political intrigue, with each delegation seeking the best deal for its State or region[10]. The most notable of these compromises was the creation of a Bill of Rights – an addendum to the Constitution that would codify *in aeternum* the rights that individuals and states would have that the yet-unproven-still-apprehensive Federal Government could not truncate. This bundle of ten amendments was adopted by the House of Representatives in 1789 and came into effect in 1791[11]

It is interesting therefore - in light of this country's recent and not-so-recent history of rolling back free speech rights in "perilous times"[12]- to view First Amendment jurisprudence through the lens of perhaps popular culture's most notorious villain, the Joker. Are our First Amendment values merely a "bad joke, dropped at the first sign of trouble"? Would that necessarily be bad? What if by acknowledging that there are behaviors that our rights were not meant to protect, we succeed in validating their purpose in protecting the ones that they were?

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[8] McCullough, David. *John Adams.* Simon &Schuster, 2002.
[9] Middlekauff at 687
[10] Id.
[11] *Journal of the House of Representatives of the United States, 1789–1793*, August 21, 1789, p. 85
[12] Stone, Geoffrey. *Perilous Times: Free Speech in Wartime.* W.W. Norton & Company, Inc. 2004

b. An Agent of Chaos

In the enormously popular and internationally recognizable film *The Dark Knight*, the character of the Joker serves a unique purpose: to point out the various hypocrisies of our society's morals and laws. The summation of his philosophy, in his own words, is this: "…Their morals, their code: it's a bad joke, dropped at the first sign of trouble. When the chips are down, these 'civilized' people will eat each other."[13] Because the Joker was the antagonist and went about correcting the systemic errors he perceived violently, much of the wisdom in his philosophy was lost or rejected. This should not, however, diminish the merits of his rather profound observation.

Why did I choose the Joker? What we know about him personally is entirely through self-disclosure. At two points in the film he relays to victims traumatic events from his life before becoming the familiar nihilistic anarchist he now portrays. He begins each of these stories with the query, "Wanna know how I got these scars?,"[14] presumably referring to the scars on his face, but one could also infer more personal, invisible scars. The first story he tells involves himself as a young boy witnessing a particularly brutal episode of domestic violence committed against his mother by his father.[15] In that story, his father draws a kitchen knife on him, sticks the blade in his mouth and asks "why so serious?" as he proceeds to mutilate the young boy by carving the signature grin across the child's face. The second tale involves the Joker's wife, whom,

[13] *The Dark Knight* (Warner Bros. 2008)
[14] Id.
[15] Id.

after being attacked by mobsters to whom she was indebted, was irreparably scarred upon her face, hideously deforming her appearance. The Joker, in response, "put a razor in [his] mouth"[16] and intentionally shredded his own mouth to demonstrate that "[he] didn't care about the scars". Consequently, his wife left him: "She can't stand the sight of me! She leaves. Now I see the funny side. Now I'm always smiling!" referring to the distorted scarring on his face that mimics a perpetual smile.

The Joker's existence revolves around the idea that all value systems – ethics, laws, morals – are farcical and temporary; erected *ad hoc* to protect salient interests but dissolved when those interests require sacrifice to maintain. In the film, the Joker seeks to prove this theory by subjecting Gotham City to a series of calamities designed to shatter those so-called moral foundations and demonstrate that when called to task, humans will choose to save themselves rather than to uphold the values they claim to stand for.[17] These "tests" included Joker's threat to blow up a hospital unless the people of the city executed a fellow citizen (who, interestingly, was a lawyer). Further, adopting a perverted adaptation of "game theory", the Joker allows two ferries to shuttle citizens off of the city's island –one with ordinary citizens and one with prisoners, loading each vessel with a quantity of explosives and giving each boat the detonator to the other's explosives[18]. If one vessel decided to blow up the other, the Joker – holding the detonator to both – would let that one

[16] Id.
[17] Id.
[18] Id.

proceed safely. If neither decided to destroy the other, the Joker would destroy them both[19].

The Joker describes himself as "an agent of chaos", and "the thing" about chaos, he says: "It's fair." This identification lends itself to revealing the Joker's true purpose: to "upset the established order" and demonstrate that that society is best, which is governed not at all. Ultimately, I chose to use the Joker because he represents the truth that we – as humans, as Americans, as participants in the marketplace of ideas – do not want to face: that a truly free society demands sacrifice. Sacrifice, he demonstrates, that no one seems willing to make. As we progress through this paper, this idea manifests itself in two distinct ways: 1) the unwillingness of Americans to give up their freedoms temporarily so they may be preserved indefinitely, and 2) the eagerness to support a "free expression of ideas" only insofar as their own feelings are not hurt.

II. Heavy Lifting: History of Legislation and Jurisprudence

a. Alien and Sedition Acts of 1798

Any analysis of First Amendment history invariably begins with some lament regarding the sinister and oh-so-inglorious "Alien and Sedition Acts". I assert rather fervently that this outrage is misplaced, misguided, and the result of lazy history. Rather than some arbitrary dictum of a tyrant president, the Alien and Sedition Acts were created to keep closed the very recent wounds of

[19] Id.

revolution in the States.[20] Indeed, a series of diplomatic catastrophes between the fledgling American republic and the nation of France being in the throes of revolution had led both countries to the brink of war[21]. At that time, the government of the United States was divided between the Federalists (whose political philosophy cannot be – and often is – distilled to simply "belief in a strong central government") and the Democratic-Republicans, or simply "Republicans" (whose political philosophy equally escapes pithy definition).

The Republicans at this time were led by Thomas Jefferson and entirely supported the French Revolution – oftentimes comparing quite closely the American Revolution in both the underlying rationale and the inevitable effect[22]. The Federalists, led by Alexander Hamilton, had a strong distrust of France and preferred dealing more closely with Britain whom they felt were more akin in philosophy and culture and therefore more stable an ally than the conflagrated and disorganized French leadership[23]. This breach boded ill for the Federalists as popular opinion became increasingly pro-French – and therefore pro-Republican – throughout President Adams' administration[24]. The result was a wave of French sympathy incited by French émigrés who played on American sentiments for France that stemmed from French support during the American Revolution[25]. In opposition, many pro-British, Federalist

[20] Grant, James. *John Adams: Party of One.* Ferrar, Straus & Giroux, 2003. p. 405-8
[21] Id.
[22] Ellis, Joseph, J. *American Sphinx, The Character of Thomas Jefferson.* Alfred A. Knopf, Inc. 1998. p. 127-8
[23] McCullough at 445-447
[24] Id.
[25] Id.

Americans were demanding war with France to redress the numerous grievances that nation had inflicted upon the American states.

This onslaught of French expatriates and French sympathy clashing with contrary Federalist and equally potent anti-French views threatened to tear apart the fragile government that had been so assiduously created only ten years earlier[26]. Domestically, there were threats of secession, military posturing and partisan vitriol; abroad, French agents were demanding bribes to be treated with, American merchant ships were being seized by French privateers and the looming specter of standing armies in the States was ever-present[27].

In an attempt to prevent a war with France that could not be won – or won at impermissible cost – President Adams agreed to sign a package of legislation into law that included the Alien and Sedition Acts[28]. These acts prohibited the *defamation* of the President and his administration. I repeat – *defamation.* Not the disagreement with, not the challenging of, but the publishing of "false, scandalous, and malicious writing" against the government and its officials[29]. This was the first major restraint on the First Amendment since its adoption seven years prior. While this act was rarely enforced, several notable convictions did occur. Among these was the trial and conviction of James Callender[30]. Callender was the publisher of numerous anti-Federalist

[26] Id
[27] Id.
[28] Id.
[29] The Alien Act, July 6, 1798; Fifth Congress; Enrolled Acts and Resolutions; General Records of the United States Government; Record Group 11; National Archives.
[30] Stone at 61-63.

periodicals and a known mudslinger[31]. Indeed, as was after seen, Callender had been accepting payments from Thomas Jefferson to publicly defame the character of John Adams. Further, upon his release, Callender extorted then-President Jefferson for a political appointment[32]. Upon refusal, Callender loosed his venom upon his former benefactor and began an equally insidious campaign of slander and calumny[33]. Was this sort of thoughtless, reckless and unnecessarily harmful journalism what was meant to be protected? Was Callender merely exercising a right to publicly disagree with the government?

History would say otherwise. After the passage of the acts, many French expatriates left the States, unrestrained secessionist invective calmed and the sins of France were exposed. Just a short time after President Adams was ousted, the French expressed a desire to avoid war and establish peaceful relations with the United States. The Alien and Sedition Acts were allowed to expire, but not before the new Republican administration directed its wrath at its former Federalist creators. This duplicity cast the die for centuries of paradox to follow; that "liberty", while essential, must, at times, be subordinated temporarily to be preserved indefinitely.

b. Sedition Act of 1918

Following the United States' entry into the First World War in 1918, the Congress passed into law an amendment to the Espionage Act of 1917 which forbade interference with the government's war effort, raising and recruiting

[31] Ellis at 303-305
[32] Id.
[33] Id.

armies and fundraising for the military[34]. This amendment became known as the Sedition Act of 1918; it proscribed "disloyal, profane, scurrilous, or abusive language" about the United States government, its flag, or its armed forces or that caused others to view the American government or its institutions with contempt[35].

These were uncertain times for the United States. With the European War drawn to a stalemate, American aid was sorely needed despite its previous commitment to remain neutral in European affairs[36]. Despite having decided to enter the war to preserve the "ideals of freedom and democracy[37]", President Wilson supported legislation that was – in seeming – wholly undemocratic in the Sedition Act. However, far from being opposed publicly or even by the press, the Sedition Act of 1918 was embraced by news media, who seemed to encourage the speedy passing of the law[38]. Indeed, even the court embraced the necessity – or at least the rationale behind – the Sedition Act. In *Schenk v. United States*, Justice Holmes established the now well-known "clear present danger" test; a contextually based test that asks if the offending speech "are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[39] Justice Holmes

[34] Espionage Act of 1917**,** Act of October 6, 1917, ch. 106, §10(i), 40 Stat. 422, *codified at* 18 U.S.C. §§ 793-98
[35] Id.
[36] Woodrow Wilson, *Message to Congress,* 63rd Cong., 2d Sess., Senate Doc. No. 566 (Washington, 1914), pp. 3-4.
[37] Woodrow Wilson, *War Messages*, 65th Cong., 1st Sess. Senate Doc. No. 5, Serial No. 7264, Washington, D.C., 1917; pp. 3-8, *passim.*
[38] Mock, James R., *Censorship 1917* (1941)
[39] United States v. Schenck, 249 U.S. 47 (1919)

also went so far as to indicate that speech tolerable in peacetime may not be during war.[40]

Furthermore, the Supreme Court case *Abrams v. United* States dealt with a challenge to this law. Defendants in that case were convicted under the Act for distributing leaflets criticizing the United States' war effort and its involvement in Russia. Additionally, the leaflets called for the interference with weapons production that would be shipped to the Soviet Union[41]. The Court's opinion upheld the law. Writing for a 7-2 majority, Justice Clark wrote:

> This is not an attempt to bring about a change of administration by candid discussion, for no matter what may have incited the outbreak on the part of the defendant anarchists, the manifest purpose of such a publication was to create an attempt to defeat the war plans of the government of the United States, by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war[42].

Indeed, Justice Clark felt that the leaflets exceeded the protections to bring about public discussion peacefully but suborned a violent resistance to the American war effort. Because the law was passed so late into the war, prosecutions were few[43]. Of those that were prosecuted, their sentences were commuted later on and in many instances by President Wilson himself[44]. The Sedition Act of 1918 was repealed in 1920[45]. The Constitution itself defines its own purpose to both "provide for the common defense" and to "ensure the

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[40] Id.
[41] United States v. Abrams, 250 U.S. 616 (1919)
[42] Id.
[43] Stone at 230
[44] Id. at 231-32
[45] Id. at 4

blessings of liberty to ourselves and our posterity"[46]. Indeed, we once again see that when the government acts in its limited role to protect its citizens and to safeguard liberty, it can responsibly restrict some freedoms to preserve them going forward.

c. Smith Act

World War II came with its own manifestation of a "Sedition Act". The Smith Act, passed in 1940, criminalized advocating the overthrow of the United States government[47]. The relevant clause prohibits behavior:

> ...with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or...organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof.

This time around, the statute was targeted primarily at Nazi-sympathizers, anti-Semites and communists[48]. Furthermore, President Roosevelt sought a revival of the Sedition Act of 1918 but was spurned[49]. Indeed, President Roosevelt's own views on civil liberties were a reflection of many Americans: half-hearted support that continued only until they got in his way[50]. However,

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[46] U.S. Const. Pmbl.
[47] Smith Act, 76th United States Congress, 3d session, ch. 439, 54 Stat. 670, 18 U.S.C. § 2385, enacted June 29, 1940
[48] Richard W. Steele, *Free Speech in the Good War* (NY: St. Martin's Press, 1999), 150-51
[49] Id. at 152-53
[50] Stone at 252

due to the opposition of three consecutive Attorneys General, only two prosecutions were brought under the Smith Act during the entirety of World War II[51]. Future-Justice-then-Attorney General Robert Jackson went so far as to request special scrutiny by his United States Attorneys in dealing with what he termed "so-called" subversive activities, fearing a lack of definitive standards for what constituted "subversive" presented an all too vague specter that would haunt American civil liberties[52].

It is this sort of disagreement that differentiates the Smith Act with its World War I counterpart. Support for the bill was less enthusiastic. The press this time around was not on board; the New York Times, acting as though media was spellbound during the last war, applauded the Justice Departments cautionary manner in prosecuting under the Act: "[I]t is reassuring…that there is an absence of hysteria in regards to this war that contrasts sharply with the feeling in the last war. To say this is not to discredit our predecessors, but to thank them for having taught us. We have reason to hope that this sort of thing is over…we may be expected to have a deeper toleration for the 'thought that we hate'[53]. Francis Biddle, Justice Jackson's successor as attorney general, was a member of the American Civil Liberties Union and cautioned against falling prey to the "hysteria" of allegedly "subversive" activity[54].

[51] Ibid.
[52] Ibid.
[53] Id. at 256
[54] Id. at 255

This hesitation on Biddle's part led President Roosevelt to question Biddle's resolve and his fortitude to tackle subversive sects of the American population[55]. Biddle's – as well as other less fervent stewards of the bill's - concerns stemmed from a fear of repeating what they felt were the zealous encroachments on civil liberties perpetrated during the First World War under the 1918 Sedition Act[56].

Following World War II however, the Smith Act was applied in fuller force. By 1956, 131 indictments had been brought under the Smith Act, leading to 98 convictions[57]. The whole of these prosecutions being brought in response to fears of communist infiltration into American society[58]. Beginning in 1957 however, the Court began taking a more sympathetic view towards the First Amendment. *Yates v. United States* restored *Schenk-era* conditions and held unconstitutional laws prohibiting anti-government or subversive speech unless that speech presented a "clear and present danger"[59]. With respect to the Smith Act, the Court required that one must encourage others to act upon seditious behavior, not simply hold or assert those beliefs[60].

The death knell for anti-sedition acts and their relatives was sounded following the decision in *Brandenburg v. Ohio. Brandenburg* decided once and for all that:

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[55] Ibid.
[56] Ibid.
[57] Claudius O. Johnson, "The Status of Freedom of Expression under the Smith Act," *Western Political Quarterly*, vol. 11, no. 3 (September 1958), 469-70
[58] Ibid.
[59] United States v. Yates, 354 U.S. 298 (1957)
[60] Id.

> …the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[61]

Conveniently (or inconveniently) *Brandenburg* ended the era of legislation restricting speech targeting government institutions while simultaneously begetting the modern age of "hate speech" restrictions. *Brandenburg* dealt with a local Ku Klux Klan leader who advocated retaliating against African-Americans, Jews and their "supporters" and encouraged a march on Washington, D.C. The Court narrowed the government's ability to restrict speech unless that speech constitutes an incitement to "imminent lawless action"[62]; a standard we will soon see attacked by "feel-good", "feelings-based" speech legislation and preserved by the courts that seem determined to temper public histrionics.

d. Advent of "Hate Speech"

The age of government taking offense to the insults of its citizens ended with *Brandenburg.* In its place however, came a new generation of individual-based restrictions (legally or socially) on speech that offended private citizens. This "hate speech", as it has been coined, is as loosely defined as it is defensible. For the fairest discussion of "hate speech", we will accept a definition propagated by one of the area's harshest critics – Jeremy Waldron[63].

[61] Brandenburg v. Ohio, 395 U.S. 444 (1969)
[62] Id.
[63] Jeremy Waldron is a well-known author, Professor of Law, and proponent of hate speech restrictions. His most notable piece is "The Harm In Hate Speech", President and Fellows of Harvard College, 2012.

Waldron defines "hate speech" as: "publications which express profound disrespect, hatred, and vilification for the members of minority groups.[64]"

An analysis of hate speech spans a spectrum of vitriol among which anyone could find offensive content. It is this area especially that exemplifies the theory of this essay: that we support the inalienable rights of self-expression until we get *our* feelings hurt and then that freedom-be-damned. This section will attempt to lay out the relevant law through cases and legislation and provide a framework by which to criticize or applaud the actions of the government in attempting to cure a systemic and recurring issue or simply interfering with its citizens' rights to express themselves.

Three notable cases are worth examining for the purposes of this section: *Texas v. Johnson, R.A.V v. City of St. Paul*, and *Snyder v. Phelps*. Each of these cases requires the court to defend distasteful manifestations of expression and each of these cases stands for the proposition that society will abandon its principals when faced with discomfort in defending them. The consistency of these results invites the question: What is the point of the First Amendment, if the people it was created to protect refuse its protections? The answer, as we will see, is that reactions to the above cases indicate this country's willingness to protect *only* the speech that they favor and for however long they favor it.

One might argue that the First Amendment is only as strong as its softest skinned citizen and that we should dilute our own expressions to

[64] Waldron at 27

accommodate others. However, this is not so. The Bill of Rights was carefully and contemplatively created after years of thoughtful debate and even more years of oppressive government. What resulted was the sublime product of intellectual elegance and pragmatic strength that cannot – and must not – be undone by a select few who cannot stomach a cross word thrown their way from time to time.

i. Texas v. Johnson

In 1984, in front of the Dallas City Hall, Gregory Lee Johnson burned an American flag as a means of protest against Reagan administration policies. Johnson was tried and convicted under a Texas law outlawing flag desecration. He was sentenced to one year in jail and assessed a $2,000 fine. After the Texas Court of Criminal Appeals reversed the conviction, the case went to the Supreme Court[65].

The Supreme Court first had to decide a question concretely that would alter the terrain of First Amendment jurisprudence forever: whether non-"speech" acts could be covered by the protections of the First Amendment. The Court recognized its long standing commitment to the idea that behaviors can be protected but had rejected the idea that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.[66]" The Court reiterated two questions that in the aggregate help answer whether a particular conduct is protected: 1)

[65] Texas v. Johnson, 109 S.Ct. 2533 (1989)
[66] Johnson, *quoting* United States v. O'Brien, 391 U.S. 367 (1968)

whether the sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments[67] and 2) whether an intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it[68].

In determining these questions, the Court relied on the context of the action. Due to the temporal and physical proximity to the 1984 Republican National Convention, the Court held that Johnson's conduct was overwhelmingly political in nature and was therefore entitled to protection[69]. The Court was quick to add the caveat that not all instances of flag burning would be protected and that the Court would look to the circumstances under which the flag was burned[70]. In addition, the Court acknowledged that the government would have greater latitude in regulating conduct versus speech or written word, but should be wary not to seek restrictions on conduct *because* they were expressive[71].

The result of this case therefore invalidated dozens of laws that outlawed flag burning across the country[72]. In turn, it opened the door to other expressive acts that would now be considered "protected" by the Constitution; acts which, despite the public's every attempt to dilute in salvation of their

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[67] Johnson *quoting* Spence v. Washington, 418 U.S. 405 (1974)
[68] Johnson at 410-11
[69] Id.
[70] Id.
[71] Id.
[72] Id.

"feelings" would be upheld by the courts despite the shrill cry of public denunciation.

ii. R.A.V. v. St. Paul

Several teenagers allegedly burned a crudely fashioned cross on a black family's lawn. The police charged one of the teens under a local bias- motivated criminal ordinance which prohibits the display of a symbol which "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." The trial court dismissed this charge. The state Supreme Court reversed. R.A.V. appealed to the U.S. Supreme Court[73].

The Court held that government cannot prohibit speech simply because they disapprove of the ideas being expressed.[74] "Content based" restrictions, as they are referenced, are presumptively invalid under the First Amendment.[75] In doing so, the Court once again restrained a State government from proscribing speech because it did not approve of the message being sent. The Court seems to attempt to create a standard of fairness in the accessibility and capability for a certain idea to be expressed; the Court says in part: "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.[76]" This touches on

[73] R.A.V. v. St. Paul, 505 U.S. 377 (1992) *passim.*
[74] Id.
[75] Id.
[76] Id.

the philosophy of Jonathan Rauch, American author and stalwart advocate of an unsullied "marketplace of ideas"[77].

In his essay "Kindly Inquisitors", Rauch perceptibly dissects the philosophical bents of numerous hate speech restrictions, their supporters and the dangers that they pose. In discussing the most effective manner of discerning "right" and "truth", Rauch establishes a principle that operates with wholesale disclosure as its fundamental principle[78]. Rather than seeking to be "compassionate", Rauch asserts that the only mechanism capable of distilling truth from fallacy is that of public criticism[79]. Two "rules" underlie this philosophy: 1) The Skeptical Rule, which posits that a statement of fact is only knowledge if it can be debunked – in principle – and to the extent it has indeed withstood attempts to debunk it; and 2) The Empirical Rule, which impugns the notion of "personal authority"; that a method to "debunk" is only legitimate if it is a method which anyone can use – *who* you are is meaningless, *what* you do is what matters[80]. In effect, Rauch treats the "marketplace of ideas" like a game; he sets the rules that all participants must adhere, and prevents the outcome from being pre-determined[81].

It would seem therefore, that Rauch's theory is in harmony with the *R.A.V.* court's holding: that government cannot play favorites and must follow "the rules" like anyone else. If an individual or group's behavior is offensive, the

[77] Rauch, Jonathan. *Kindly Inquisitors: The New Attacks On Free Thought.* University of Chicago Press (1995)
[78] Rauch at 6
[79] Id.
[80] Id. at 49
[81] Id. at 50

merits of that offense will be vetted by an informed society and all parties who follow the vetting rules will deliver a result. The final case discussed – and perhaps the most offensive – tests the credibility of this theory thoroughly: the exhibition of society at its worst and therefore the perfect opportunity to test this society's willingness to defend its lowest, meanest, most despicable members.

iii. Snyder v. Phelps

Undoubtedly the most controversial First Amendment decision in the past decade, *Snyder v. Phelps* involved the sluicing of fresh wounds by an unfeeling, abominable organization whose conduct was found to be protected by the First Amendment. In *Phelps*, plaintiff Snyder sued the Westboro Baptist Church for defamation, invasion of privacy, and intentional affliction of emotional distress. The family of fallen marine Corporal Matthew Snyder filed suit after the church picketed his funeral, displaying signs that said, "Thank God for dead soldiers" and "Fag troops"[82]. The District Court Judge found in favor of Snyder and awarded the family $5 million only to be reversed on appeal by the Fourth Circuit Court of Appeals. Petition to the United States Supreme Court followed thereafter[83].

In an 8-1 decision, the Court – with a noticeably bad taste in its mouth – affirmed the Fourth Circuit's reversal, saying in part:

[82] Snyder v Phelps, 131 S.Ct. 1207 (2011) *passim.*
[83] Id.

> The following signs displayed by the Defendants, which are similar in both their message and syntax, can readily be assessed together: "America is Doomed," "God Hates the USA/Thank God for 9/11," "Pope in Hell," "Fag Troops," "Semper Fi Fags," "Thank God for Dead Soldiers," "Don't Pray for the USA," "Thank God for IEDs," "Priests Rape Boys," and "God Hates Fags." As a threshold matter, as utterly distasteful as these signs are, they involve matters of public concern, including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens. Such issues are not subjects of "purely private concern."…
>
> Additionally, no reasonable reader could interpret any of these signs as asserting actual and objectively verifiable facts about Snyder or his son. The signs reading "God Hates the USA/Thank God for 9/11" and "Don't Pray for the USA," for example, are not concerned with any individual, but rather with the nation as a whole. Other signs (those referring to "fags," "troops," and "dead soldiers") use the plural form, which would lead a reasonable reader to conclude that the speaker is referring to a group rather than an individual[84].

Effectively, the Court ruled that, despite the patently offensive material displayed on the picket signs, one could not reasonably believe that the signs were directed at the deceased or his father – that the offense was intended for the entire nation and therefore could not be defamatory.

Justice Alito, the lone dissenter, made a remarkably poignant – and often overlooked – assertion: "Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case."[85] Finding no redeeming value to the speech nor purpose in the market place of ideas, Justice Alito braved the desolation of dissent to draw a line in the sand that prior courts were unwilling to draw. His dissent propels us into

[84] Id. at 1212
[85] Id. at 1222

the final section of this paper, where many of the following questions will be discussed: Have we forsaken the First Amendment? Should we? Should nine aloof Justices play gatekeeper for the content to which society is exposed?

III. Forsaking First Amendment Values When the Going Gets Tough

One of the prevailing themes in *The Dark Knight* ("TDK") is a measurement of how far society, the police, and the protagonist will go to preserve the values they claim to cherish. The citizens of Gotham must choose whether to out the vigilante that has protected them when the price for his protection becomes too steep, law enforcement must choose whether to break their oaths when their own families become threatened, and Batman must choose whether to betray his moral principles when they become the most difficult to defend.

The Joker expresses his lack of faith in humanity in unmistakable terms: "…their morals, their code: it's a bad joke, dropped at the first sign of trouble. When the chips are down, these 'civilized' people will eat each other."[86] Indeed, the District Attorney, Harvey Dent, expresses similar reservations about society's commitment to justice; when the Joker demanded the identity of Batman be exposed lest more citizens be executed, Dent attempts to reel in public outrage: "The Batman is an outlaw. But that's not why we demand he turn himself in, we're doing it because we're scared. We've been happy to let

[86] *The Dark Knight*

the Batman clean up our streets until now. The Batman will answer for the laws he's broken, but to us, not this madman.[87]"

The Joker's and Dent's views are in harmony; both agree that society will look the other way until it requires sacrifice. After which, they expect rules to be enforced that they were previously content to ignore. This section will analyze the actions of the Federal government and the people (as expressed through public opinion and State government decisions)to determine the extent to which the First Amendment has been forsaken out of fear, ignorance or discomfort. The latter part of this section will examine when, if ever, that may be appropriate.

a. The Schemers: the "Government" and Their Plans

When face-to-face, Joker attempts to explain to Dent his philosophy and the motivation behind his seemingly senseless behavior:

> Do I really look like a guy with a plan? You know what I am? I'm a dog chasing cars. I wouldn't know what to do with one if I caught it. You know, I just...do things. The mob has plans, the cops have plans. You know, they're schemers. Schemers trying to control their little worlds. I'm not a schemer. I try to show the schemers how pathetic their attempts to control things really are... It's the schemers that put you where you are. You were a schemer, you had plans, and look where that got you.[88]

The Joker seems to label any individual or institution of authority – legitimate or illegitimate – as a "schemer". The cops, the mob, the Police Commissioner and the District Attorney all represent "schemers" attempting to control "their

[87] Id.
[88] Id.

little worlds" – presumably their spheres of influence. In the instant context, we can apply the Joker's views to the Federal Government action mentioned *supra.* Are the Federal government's attempts to control speech futile? If they are successful, do its actions necessarily discard the First Amendment and its principles? The Joker seems to label any individual or institution of authority – legitimate or illegitimate – as a "schemer". The cops, the mob, the Police Commissioner and the District Attorney all represent "schemers"

As mentioned earlier, the First Amendment was passed during the most tumultuous time in American history. Having slipped free the bonds of monarchial tyranny with the blood of their countrymen, the colonial – now state – representatives to the Constitutional Convention were concerned with establishing a republican form of government unlike that of Great Britain[89]. However, there were other equally important concerns: creating a federal government strong enough to maintain the unity of the republic, but not so strong as to suppress the rights those individual states still retained. Having subsisted thirteen years under the Articles of Confederation, one obstacle to sustainable government became painfully clear: federation must supplant confederation. Under the Articles of Confederation, the states were loosely bound to one another and refereed by a largely impotent central government[90]. This government could not impose taxes to compel action by any individual

[89] Middlekauff at 688

[90] Papers of the Continental Congress, 1774-1789; Records of the Continental and Confederation Congresses and the Constitutional Convention, 1774-1789, Record Group 360; National Archives.

state and any financial contribution to the central government was voluntary only[91].

In Federalist 10, James Madison addressed the threat "factions" posed[92].Factions, according to Madison, were groups of citizens with specialized interests contrary or askew to that of the whole community[93] (think political party). Madison believed that a stronger federal government could keep the factions in check – an ability the former Confederated States lacked. Under the Articles of Confederation, the larger states could easily coerce, manipulate or potentially invade the smaller states. A federation, Madison asserted, could protect the rights of the less powerful by compelling subordination of provincial interests to that of the whole nation.

This established the federal government as a parent figure; one that ensures that all members of the family play by the same rules and that no one member has an advantage over any other, but largely lets the kids play without supervision. This explains the creation of a bicameral legislature, the more powerful of which is equally represented by each state. It also supports the notion that the federal government's duty is to the weakest, most marginalized members of society to ensure that they are given equal voice – no matter how offensive that voice may be. Furthermore, the federal government – evidenced by the context of its creation – was meant to protect its citizens from radical

[91] Id.
[92] Madison, James. Federalist No. 10: "The Same Subject Continued: The Union as a Safeguard Against Domestic Faction and Insurrection." *New York Daily Advertiser,* November 22, 1787.
[93] Id.

elements in the society, elements posing an immediate threat to the safety of the people.

This is where the line can be drawn. On the one hand, the federal government has to make sure that all members of society are given an outlet to voice their opinions; on the other, to exercise its power when those opinions metastasize into actions that jeopardize the structure of the system itself. This balance explains, and I feel, appropriately reconciles federal government action in this arena.

i. Alien and Sedition Acts: Just Another "Scheme", or a Necessary Evil?

Through the lens of the "fed-as-parent" perspective, one can surely see the necessity of the Alien and Sedition Acts, despite history's categorical condemnation of them and the president that signed them into law. Embroiled in volcanic public opinion for and against war with France, President Adams was faced with a choice: feed the ever-vacillating, never-sated Cerberus of mob passion by declaring war on France, or sacrifice his political career. Knowing firsthand both the power and instability of public emotion from his own experience as an instigator of the American Revolution, Adams chose country over politics. By instituting the Alien and Sedition Acts, though he thought some provisions harsh[94], Adams was preserving the republic he had fought to create. Falsehoods against the government and its officials were not merely personally aggrieving but threatening to the stability of the government itself.

[94] McCullough at 607

Without restraint, the press – and the people – could destroy the very institution designed to protect them. While some paragons of the age would disagree[95], the Constitution was not created to allow the people the right to destroy the government if they saw fit: to preserve individual rights in perpetuity, those rights must, from time to time, be hemmed. Adams gamble was successful, the ousting of French expatriates, silencing of inflammatory rabble-rousers and the maintenance of a respectable press forestalled the conflict long enough to where the French would agree to peaceable terms[96].

It becomes difficult to argue then, that this was not the right move on Adams' part. Had he succumbed to attacks from the press and went to war with France, many of the rights the firebrands of the age thought they were exercising may well have been extinguished. Given the *factual* circumstances surrounding the Act, it becomes evident that the Alien and Sedition Acts were not the unlawful manifestations of tyrannical government, or the abandonment of a fundamental and principle right, but an exercise of legislative and executive power that was wholly intended by the Constitution.

ii. Sedition Act of 1918/Smith Act

Twentieth century models of Sedition Acts demonstrate a continuum of sentiments. In 1918, the passage of the Sedition Act was widely lauded as an

[95] Jefferson, Thomas. "I set out on this ground which I suppose to be self evident, "that the earth belongs in usufruct to the living;" that the dead have neither powers nor rights over it. The portion occupied by an individual ceases to be his when himself ceases to be, and reverts to the society." Letter to James Madison, September 6, 1789.

[96] McCullough at 527-8

appropriate move to maintain the focus of the country on subduing the German, Ottoman, and Austral-Hungarian Empires. Even the press, as mentioned *supra*, agreed with restraining instigating and otherwise inflammatory expressions. This should not be a surprise; after all, the act only banned "disloyal, profane, scurrilous, or abusive language"[97], language we have come to know as “obscene” or “defamatory”. The Act was only to operate when the “United States was at war”[98] and was repealed shortly after the war ended.

The Smith Act, though similar in nature, was subject to a much colder reception than its World War I predecessor. Indeed, those in charge of enforcing its provisions were reluctant or even opposed to the Act itself. Many in both government and media repented of the prior generation’s embrace of the Sedition Act and took a decidedly anti-Act stance. Unlike the prior Sedition Act however, the Smith Act was enforced well into the post-war era and adjusted its aim to target those suspected of harboring communist sympathies. This is the point in which these acts seem to have found their limit – the targeting of individuals who hold unpopular political beliefs. Unlike the 1918 Act, which targeted *anyone* found to be propagating lies or distrust of the Federal Government – and in doing so *acting* out against the government – the Smith Act in its later years was targeting people merely for *holding* beliefs, not necessarily for acting upon them.

[97] Espionage Act of 1917**,** Act of October 6, 1917, ch. 106, §10(i), 40 Stat. 422, *codified at* 18 U.S.C. §§ 793-98
[98] Id.

This seems to be the dividing line between Sedition Acts of the *ancien régime* and the modern age: the former targeted *behavior* where the latter targeted *association*. It is this division that makes the Sedition Act of 1918 more palatable, objective and well-intentioned than the Smith Act, which, because of its more "personal" tone, appears more as an emotional reaction to popular fear (and therefore a call for abandonment) than as a method of protecting individual rights in the long term. Understanding that distinction helps to explain the chillier reception of the later Act and that generation's reluctance to embrace it.

b. The "Civilized People"

As was mentioned earlier, after *Brandenburg v. Ohio,* the Federal Government's ability to restrict speech of a non-imminently-threatening nature was effectively neutered. What became left to litigate was the extent to which the government (largely at the state level) could legislate people's feelings. That is, after all, what many of these cases are about. Aforetime, the salient First Amendment concerns to the Federal Government were sweeping indictments of the government and its administration by falsehood, slander and calumny. The laws passed in response were arguably done so to preserve the institutions that could maintain the country's civil liberties in the long term. More recently, state governments have attempted to regulate what individual's can express – not because they pose an imminent threat to the whole of an institution – but because someone's feelings were hurt.

The questioned content in each of the cases discussed herein is distasteful and mean-spirited, but well within the protections offered by the First Amendment. As has been posited, it is when "feelings" get involved, that citizens of this country are most apt to mindlessly discard the very protections they claim to value.

In each of these cases, First Amendment values were "dropped at the first sign of trouble". *Texas v. Johnson* revolved around a Texas statute prohibiting the "desecration of a venerated object."[99] Much like the Smith Act's chink-in-the-armor, the Texas statute had a very personal feel to it. "Venerated object" is subject to whatever prevailing sentiment exists in the legislature at a particular time, allowing for an inconsistent, ultimately detrimental series of laws. The Court in *Johnson* made this distinction clear by hypothesizing that a ban on outdoor fires would be permissible, but a ban on burning flags (presumably to silence speech) would not[100]. When the law begins making value judgments, it loses its ability to be enforced fairly. The Court in that case said as much, in stating: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[101]

This notion was revived in *R.A.V. v. St. Paul* where the Court reasserted that, "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, out of disapproval of the ideas expressed.

[99] Johnson, *passim.*
[100] Id.
[101] Id.

Content-based regulations are presumptively invalid[102]" when the law in question banned conduct which "arouses anger, alarm or resentment in others.[103]" Again, we see a tendency of the Court to avoid upholding statutes that are written to protect individual feelings - there must instead be a lucid threat. The Court adequately describes the difference between the "personal" touch of the ordinance and an acceptable ban on "fighting words":

> As explained earlier… the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their *content* communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey.
>
> [Respondent] has not singled out an especially offensive mode of expression-it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. [104] (emphasis added by Court).

Thereby the Court makes clear that the government cannot (largely) limit *what* one expresses, only the mechanism by which one expresses that sentiment – your "feelings" are not considered.

The most difficult application of this content-neutral requirement by the Court manifests itself In the bittersweet decision in *Snyder v. Phelps.* The Court there held, with respect to the content of the picket signs:

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[102] R.A.V. v. St. Paul, at 391
[103] Id.
[104] Id. at 393

> As a threshold matter, as utterly distasteful as these signs are, they involve matters of public concern, including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens. Such issues…are issues of social, political, or other interest to the community.[105]

The Court here is loath to agree with Respondents, but more loath still to chill the propagation of opinions pertaining to salient socio-political issues. Despite the additional suffering, emotional anguish, and heartbreak Petitioners endured as a result of Respondent's conduct, the Court again sided with objectivity and the threat or benefit to society. Respondents issued neither threats nor personal attacks and merely (merely) displayed publicly a perspective on a series of prominent social issues. The Court can once again be seen to temper not only societal outrage, but their own, in defense of the immutable governance of the First Amendment and its value.

c. Confluence: An Unstoppable Force Meets an Immovable Object

When determining whether a society has abandoned the fundamental principles upon which it was founded, it is necessary to dissect the behaviors of that society. The difference – in this instance – between government action and actions of the people rests with the differences in the roles that each play. The Federal Government, as has been told, was designed as an aloof parent figure, resolving quarrels between the constituent states and acting only when necessary to preserve the universal tranquility of the whole community. In this manner, the Federal Government – as it pertains to the discussion herein – has

[105] Phelps, 131 S.Ct. at 1214

performed that role appropriately. Restricting the ebullience of its citizens in direst need and when restraint was unavoidably necessary.

Contrarily, the people have not upheld their end of the bargain. Encouraging laws that prohibit offensive content because their "feelings were hurt" is an unacceptable and wholly unrealistic perspective in functional society. The restraint of emotion and thus expression is to be assiduously avoided; even when those expressions are abhorrent. The Rauchian[106] model discussed earlier will ultimately prevail if it is universally accepted: allowing ideas to be passed around and discarded only after legitimate discussion has taken place is the most efficient and effective way to silence speech that is objectively offensive[107]. Where the law falls short, social normalcy will compensate. Simply because speech is legal, does not make it acceptable.

d. Judicial Role, or Rolling Judiciary?

In each prominent case involving First Amendment regulation, the Court has played the part of referee: attempting to balance the interests of government in maintaining a government and with the people's right to express themselves freely, compatible with the First Amendment. This begs the question of whether that is the appropriate role for our courts to fill. While the Court has, since the days of *Marbury*[108], held the final word on *interpreting* the law, they have, in many instances, written their own asterisked notations onto

[106] Rauch at 6
[107] Id.
[108] Marbury v. Madison, 5 U.S. 137 (1803)

the First Amendment. The "clear and present danger[109]" test, the "imminent lawless action[110]" test, content-based prohibitions, time, place and manner restrictions; each of these rulings seems to ignore what appears to be an unambiguous restraint on government: "Congress shall make no law…[111]" It seems therefore strange that the Court would impute a number of exceptions into language that seems to have no room for exception.

Stranger still, is the power the Court has taken upon itself to alter the meaning of the First Amendment – a duty constitutionally prescribed to Congress. As representatives of the people, Congress and Congress alone is entrusted with the ability to alter the language of our laws as declared by the will of their constituent citizens. As interpreters, the Courts may only clarify ambiguities:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.[112]

This of course assumes that there is a conflict to begin with. The phrase "Congress shall make no law…" is categorically unforgiving and seemingly without any conflict. In fact, of the first ten amendments to the Constitution, only one other contains such absolute language: the Eighth Amendment

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[109] Schenck, 249 U.S. at 47
[110] Brandenburg v. Ohio, 395 U.S. 444, *passim.*
[111] U.S. Const. Amend. I
[112] Marbury , 5 U.S. at 177

protection cruel and unusual punishment. The courts have not seen fit to find exception to this provision.

So what could this mean? That the Court believes the Constitution is a guideline; flawed and intended to be overborne? Or could it mean that the Court recognizes that the gift of free speech presents threats that exist now that did not in 1791. The damage a single blog post can do is more than any number of newspapers two-hundred years ago. The speed and precision by which media can travel today is greater than the First Amendment can perhaps cover. In many instances, the playing field is not level: the amount of damage a savvy internet user can do to another's reputation before that individual is able to defend himself is debilitating and often chronic. Perhaps the Court understands the precariousness of the age and is honestly seeking the greatest balance between its citizens' interests – even if that means assuming greater powers than it was intended to have. The law is a clumsy instrument for change, perhaps we should not mind if those manning the gearbox are a little clumsy themselves.

IV. Conclusion

If we view First Amendment jurisprudence as a railroad, we see the Federal Government as one rail, the people and the several state governments as the other, and the ties betwixt them as the laws that bind both, we soon realize that all three are necessary for the rail to remain true. While it is not always clear from which side the tie originated, what is certain is that all

constituent elements of the rail must remain in harmony lest the train that is our personal freedoms derail. The purpose of this paper was to demonstrate that in many ways, the railroad is bent and skewed and has led to several inconsistencies along the way. For our rights to be protected adequately, we must be – if not in total agreement – at least travelling in the same direction, a direction each member of our society abides.