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Free Speech and Non-State Censors

Complaints about censorship have once again reached a fever pitch across the liberal West. In other historical periods, such concerns may have marked reactions to book bans and burnings. Often, they followed prosecutions and subsequent jailtime for things spoken or written. During the red scare, they formed the hushed response to chilling state-sponsored watch-lists and employer-supported blacklists designed to ensure victory against communism. Against this history, complaints about the new censorship seem different. Here are some examples, to fix ideas:

- As they have ascended to prominence, social media providers like Facebook, YouTube, Reddit, and Patreon have made controversial moves to “deplatform” those whose speech violates their community standards. For example, Twitter and Facebook banned the accounts of former President Donald Trump, following concerns that his speech incited the January 6 Capitol Riot and risked inciting further violence. Deplatformings, especially when they appear politically motivated, have raised concerns about social media firms’ powers to censor and control the information Americans can access. One journalist has it that Facebook (now Meta) operates “the largest system of censorship the world has ever known.”¹
- People worry about biased reporting in the news, aided by censorial editors eager to protect the integrity of their favored narratives or their bottom lines. New York Times editor Kathleen Kingsbury allegedly killed a Bret Stephens column commenting on an incident involving fellow Times reporter Donald McNeil Jr.² Bloomberg Business killed a positive story reporting on Fox Business that was months in the making.³ Many others may decline to report newsworthy information that cuts against their editorial angle.

¹ (Benesch 2020, 86).

² (Bryant 2021).

³ (Flood 2017).

- Prominent persons in leadership roles have had to step down from their posts following pressure on Twitter and other social media platforms. For example, *Teen Vogue* editor Alexi McCammond resigned weeks into her post after racist tweets from her college days surfaced;⁴ Mozilla co-founder Brandon Eich stepped down following mounting pressure after revelations that he'd contributed some years earlier to an anti-gay marriage campaign.⁵ Policy Analyst Will Wilkinson was fired from the Niskanen Center following conservative outrage in response to a tongue-in-cheek suggestion that the best way for Biden to unify the country was to lynch Mike Pence.⁶ Many others have reportedly shut up in fear of meeting with a similar fate.
- Independent of any social media outcry, company employees face sanctions from their employers for their on- or off-the job political speech, raising concerns about employer domination. For instance, Google fired James Damore after he issued a controversial memo on matters of gender and technology.⁷ NFL owners have been accused of colluding to keep Colin Kaepernick out of a job because he refuses to kneel for the national anthem before NFL games.⁸ Since, the NFL has issued a memo to force players to “stand and show respect for the flag and the [national] anthem.”⁹

With respect to the new censorship, there are no books burnings, no prosecutions, no laws or committees. Indeed, there is no state involvement *at all*.¹⁰ And yet there are congressional hearings and executive orders and wonkish proposals to address it, and things are moving quickly.

⁴ (Kelly 2021).

⁵ (Barr 2014).

⁶ (Shephard 2021).

⁷ (Damore 2017).

⁸ (C. Robinson 2020).

⁹ (Seifert and Graziano 2018).

¹⁰ A notable exception to the current focus on private speech restrictions is a number of laws currently under discussion in state legislatures that would ban discussion of and teaching of Critical Race Theory in schools. For discussion, see: (Sachs 2021). Additionally, republicans have moved to remove certain books from school libraries; Florida Governor Ron Desantis has attempted to stop faculty from testifying in courts and has sponsored the “Parental Rights in Education” bill, which bars age-inappropriate teaching on gender identity and sexual orientation in grades K-3. For discussion, see: (Diaz 2022). An anonymous referee suggests that one way of understanding these trends is as a kind of backlash: “Because the right has less power in the tech world and in popular culture, they are using state censorship to resist the left’s use of private censorship.”

My goal in this book is to slow down and ask some basic questions: What is censorship and why does it strike us as a grave problem? Is censorship the right concept for thinking about the above phenomena, or are complaints couched in the language of censorship confused, perhaps conceptually? Supposing that there is no confusion, what rights do the new censors have and do they act within those rights when they act in the ways described above? Supposing that they do act within their rights, is their behavior beyond reproach? And if it isn't, what exactly is wrong with it? Answering these questions is crucial for addressing a further question: What should be done about all of this? Do existing executive and legislative proposals represent a wise course of action? Or are they hastily drawn and likely to make matters worse?

In addressing these questions, I'll begin at the beginning, with an account of censorship and the reasons it is morally and politically troubling. With this account on the table, we'll see that thinking of the cases above in terms of censorship is perfectly above board. Next, I argue that it is sensible to be concerned about these forms of censorship. This is because, among other things, private censorship can threaten our ability to realize an intellectual environment we have reason to value, if we value free speech. Despite this, questions about the proper response to private censorship are far from straightforward. For although private parties and states can both act as censors, states and private actors enjoy distinct sets of rights and duties. Beyond this, their censorship affects others in importantly different ways. And those differences matter for determining how citizens, executives, and legislators should respond when they censor.

Before we begin, it is worth flagging a methodological point. In the remainder of this chapter, I will be asking you to consider various examples in the service of clarifying concepts or eliciting normative judgments. In discussing these examples, I will be making normative judgments of my own: things like, "such and such is clearly wrong" or "so and so is clearly permissible." It is a background supposition of this work that such judgments can be true or false and that they are no mere matters of opinion. But I will often be unable to argue for the judgments on which I rely. Rather, I invite you to think about the cases yourself and exercise your own judgment. If it departs from mine, think about why that is. If you come up with a compelling explanation, great! That's how valuable philosophical exchanges are born.

Now, let's begin.

1.1 What Censorship Is

Broadly speaking and intuitively, censorship involves stopping someone from expressing or accessing some content (be it a statement, a work of art, a song or video, or an image). But it must also involve more than this. The doctor that removes your tonsils stops you from speaking (and stops me from hearing you). Yet it would be odd to refer to the surgery as an instance of censorship, even if there's something you'd really like to say after the operation. Similarly: I may stop you from speaking by persuading you that it's a bad idea to say what you were going to say. Still, because you are ultimately responding to the strength of my reasons, rather than a threat, it is unnatural to speak of my censoring you. You've simply changed your mind.

Some believe that censorship is inherently a creature of state. The reason that neither tonsillectomy nor rational persuasion counts is the same reason that describing the above phenomena in terms of censorship is loose talk. Although you have been stopped from expressing your ideas, this has happened without the exercise of state power. Absent state power, talk of censorship only muddies the waters.

For others, censorship is all around us.¹¹ Not only do newspaper editors, social media platforms, teachers, judges, lawyers, and parents engage in censorship, you do too. Here's the thought: meaningful communication presupposes censorship. If we said everything that it crossed our minds to say, we would fail to get our true point across. So successful communication requires us to censor *ourselves*. If there were not significant filtering by experts, we would find ourselves drowning in a sea of barely comprehensible information. So successful communication requires *some* to censor *others*. On such an account, we should see the regularity of censorship as a "good thing." It is, after all, what enables us to communicate with one another and to piece the world together.

The truth about censorship is more nuanced than either of these pictures suggests. Sometimes non-state agents censor us and sometimes we censor ourselves, but censorship neither pervades our lives nor is it something for which we should be overly grateful. Censorship is often gravely wrong—especially when conducted by states—but it can also be justified in various circumstances (and is easier to justify for non-state agents).

¹¹ (Fish 1994, 2019). See also (Butler 1998) and (Schauer 1998).

What, then, is censorship? As a first pass, we might say that A censors B when A (1) intentionally prevents B from expressing or accessing an idea or representation in some context or (2) imposes some cost upon B to discourage her from doing so. Unfortunately, this definition generates hard cases.

A professor who docks student-participation grades for those who fail to raise their hands before speaking certainly intentionally imposes a cost on certain kinds of speech to discourage that speech. Still, it would be unnatural to speak here of censorship. Similarly, editors of various publications reject more written content than they accept. And yet it seems to be the exception rather than the rule to categorize exercises of editorial authority as censorship. In most cases, editors do not act censoriously (even though it is often within their power to do so).

It is possible, of course, to respond by accepting that our linguistic intuitions are wrong and the definition is right. Certainly, Fish would have no qualms about finding censorship in these examples.¹² But allowing any kind of restraint on speech to count as censorship makes it mysterious why anyone would care to talk about it. At least on its face, censorship is a special kind of thing. When we specify that a constraint involves censorship, we mean to be identifying something more specific than the kinds of speech norms and editorial practices that help us get on in the world. For this reason, it would be better to take these cases as an opportunity for revision and to try to come up with a definition that rules them out. We should, in other words, seek a conception of censorship according to which it is distinct from: self-restraint in the service of being understood, ordinary exercises of editorial authority, and rules of order that enable our (e.g., educational) institutions to function as designed.

To get a sense of what more censorship might require, it is helpful to look at paradigm cases of censorship—cases where it is natural to speak of censorship—and ask what they share. Consider, then, a few circumstances in which nobody (at least nobody not already in the grips of a theory) would deny that censorship is occurring:

¹² Though more restrained than Fish's account, Cohen and Cohen (2022, 14–15) argue that censorship occurs anytime one agent intentionally stops another from speaking or hearing. On their account, things like keeping a queue are expressly counted in. This too strikes me as too broad for the reasons I emphasize in the main text.

1. In North Korea, subjects receive nearly all their information from the government, under the heading of The Central News Agency. The press is under tight state control, and the internet is inaccessible for most individuals. Additionally, the state produces propaganda to ensure that subjects' attitudes toward subversive content are sufficiently hostile to prevent uptake. Here, there is a regime of state censorship which aims to ensure that opinions are kept within a narrow range in the service of maintaining power.
2. In the 20th-century United States, the Espionage Act prohibited conveying information that officials deemed detrimental to the US military's operations, or helpful to the success of its enemies. In a landmark case, plaintiff Charles Schenck (then general secretary of the American Socialist Party), distributed a pamphlet to draftees, encouraging them to claim their 13th Amendment rights against enslavement and evade the draft. He appealed his conviction. The court rejected the appeal, holding that Schenck's document, circulated as it was in wartime, intended as it was to obstruct the draft, constituted an attempt to incite to illegal activity. Like many other leftists during the same general historical period, Schenck was locked in a cage for what he wrote. Here, a single law functions as a locus of censorship, largely of left-wing political views, although the regime in question purports to protect free speech in other domains.
3. Broadcasting networks have censored speech that is inimical to their corporate interests. Recently, for instance, CBS censored a musical short in *The Good Fight* which was—ironically—critical of Chinese censorship.¹³ Viewers of the show witnessed the words, “CBS has censored this content” flashing across their screens. Here, we have a private party protecting its material interests by ensuring that certain of its financial stakeholders will not be put off by the content that it broadcasts. More troublingly, news organizations dependent on advertising revenues from certain companies have suppressed syndicated stories (e.g., home recipes for soaps) that would, in theory, allow consumers to do without advertisers' products.
4. In 1933, hundreds of university students in several different cities publicly burned works of literature, history, and philosophy deemed to be anti-German (read: subversive to the National Socialist agenda),

¹³ (Nussbaum 2019).

for the purpose of signaling to others that certain ideas would not be publicly tolerated. While the Third Reich had, no doubt, initiated an aggressive program of state censorship, the book burnings themselves (undertaken independently by the students) seem to be paradigm acts of censorship, even without the background conditions of state censorship. The students wished to send a powerful public signal that certain ideas would not be publicly tolerated. In doing so, they increased the costs for public profession of those views in a way that was experienced as censorious.¹⁴

Notice that censors target expressive content *for a reason*. Some seek to suppress ideas or works because they deem those works dangerous (this was the case with the instances of censorship under the Espionage Act). Others (e.g., North Korea) sense a threat to perceived (political, religious, moral) orthodoxy. Still others (e.g., CBS) censor to protect their material interests. Moreover, censors target expression with tools intended to bypass the ordinary channels of rational persuasion. They seek to *prevent* some audience from engaging with the expressed content. Often, they achieve this by means of threats. Schenck was imprisoned for violating a rule intended to stop speakers from undermining the war effort. Dissidents in North Korea can be executed. When censorship is not achieved by sanction or threat of sanction, it is achieved by withholding certain material from the public view, destroying it, or otherwise expressing that the ideas are not to be tolerated (the relevant scene in *The Good Fight* was removed from view; book burners try to create a climate of fear around certain ideas).¹⁵

I suggest, then, that we understand censorship as *the attempted suppression of expressive content*¹⁶ *on the grounds that it is dangerous, threatening to (moral, political, or religious) orthodoxy, or inimical to the material interests of the agent aiming to suppress it*. This definition has several advantages over the one with which we began.

¹⁴ (Berkowitz 2021, 186–87).

¹⁵ Attention to these cases shows that censorship is not a success term. What I mean is that to act as a censor, you need not prevent uptake or expression, only to try. As (Berkowitz 2021) points out, *most* censorship is unsuccessful. Schenck's argument has been read by far more people given his imprisonment than it would have been otherwise. CBS censored a scene from *The Good Fight* despite the fact that the content of the scene is accessible elsewhere. And many of the books banned by church and state authorities have achieved a kind of permanence for the experience.

¹⁶ I refer to expressive content rather than speech to capture the full range of media that can find itself within the censor's crosshairs. This might include speech, writing, works of art (even that which seeks to avoid expression), and so on.

First, it explains why ordinary rules of order (e.g., the rule to raise one's hand before speaking in class) are not cases of censorship. These kinds of procedural rules are not aimed at suppressing content at all, much less because it is judged dangerous (etc.). They are aimed instead at ensuring that the conversation proceeds without chaos.

The definition also explains why the biology professor is not engaged in censorship when she requires that questions in class be relevant to the subject matter at hand. She might have no interest whatsoever in suppressing speech surrounding the military industrial complex and nevertheless put a stop to my diatribe about the same.¹⁷

Finally, this account explains the difference between editorial censorship and ordinary exercises of editorial authority. As an editor of a newspaper or an executive at a broadcasting corporation, I must necessarily make myriad decisions about how to fill a scarce number of pages or hours. These decisions will result in disappointment for writers and other people with things to say. In the ordinary course of doing things, I will need to reject pilots and stories and op-eds. And yet as the above case with CBS shows, sometimes I will do so not because I face space constraints, but instead because I deem the content inimical to my financial or political interests. When I block the content in *these* instances, I do so for reasons other than simply making space for content that I deem better. Accordingly, I act as a censor.

One might object that the above definition fails to capture very well the behavior of real-world professional censors in the places and times that they were employed. For example, the historian Robert Darnton points out that those who were actually employed under the title "censor" often thought of themselves as men of letters and intellectuals. Real, historical censors were often just as eager to approve and certify brilliant works they thought the public would appreciate and to spare the public from reading poorly written drivel as they were to prevent the publication of works offensive to religion, morality, or state. Authors and censors often "worked together . . . they shared the same assumptions and values;" indeed, "most censors were authors themselves," while others were professors and enlightenment thinkers enthusiastic about ideas, not fearful of them.¹⁸ In short, a good bit of the work of the censor consisted precisely in acting as an editor.

¹⁷ This does not mean of course that teachers *cannot* censor their students. They can, namely by preventing students from raising points that are appropriate within the classroom. For instance, a teacher that requires that politically controversial viewpoints be kept out of a discussion to which they are relevant is recognizably acting to censor the students that wish to raise those points.

¹⁸ (Darnton 2014, 36).

The history Darnton tells is illuminating, but I do not think it reveals any deficiency in the definition above. Instead, it shows clearly that, in addition to censoring, those who held the office and title “censor” did a whole lot more. They were state-appointed editors and literary critics who felt a responsibility to help their fellow readers determine what was worth their time. Given the proliferation of written material the printing press enabled, they performed valuable functions in this regard. But officials *also* assigned to them the work of suppressing publications offensive to religion, morality, and state. Such suppression was achieved not merely through state laws prohibiting works with those characteristics, but also by means of threats that those who would publish or print them would be punished. Censors did, in short, censor in the sense defined above, even if they acted in other capacities, too. Censors censored even though censorship was, paradoxically, a mere part of their job description.

Importantly, our definition makes no reference to states. This means that it can readily accommodate the new worries about censorship with which we began this chapter. Still, the definition is not without an explanation for why we so strongly associate censorship with states. After all, states need to coordinate collective action and maintain power. Such needs confer upon them extraordinarily strong interests in restricting and sanctioning expression. And their centralized power and wide authority to punish confers upon them an impressive capacity to effectively block speech.

But private parties, too, have interests in suppressing speech and powers to do so. In my view, when they exercise these powers in pursuit of these interests, private parties act as censors. They do so in exactly the ways that are fueling today’s concerns about censorship. Social media companies prevent, sanction, and remove expressive content from their platforms, often because they judge the content dangerous (or harmful), sometimes in pursuit of a kind of community they hope to realize (sometimes for financial reasons). Media organizations seek to suppress ideas that threaten their monetary and political interests. Ordinary citizens mount social pressure campaigns to stamp out deviant speech. And our employers protect their interests by monitoring and sometimes punishing us for the things we say. In each case, I will say that they engage in *private censorship*—by which I just mean censorship by private (non-state) actors.

Now that we have a clearer idea about what talk of private censorship *means*, it will help to ask distinct questions about its normative status. Astute readers will have noticed that the definition I have offered is *descriptive*. It is

no part of the definition that censors must act wrongly or badly in suppressing speech. There are, at any rate, two questions, and it aids clarity to keep them separate. The first question is whether some party is engaged in censorship. The second question is whether she acts well or justifiably.¹⁹

To see that the questions come apart, consider a variant of the CBS case. Rather than a scene critical of Chinese censorship, executives are considering a scene in which the characters walk through an accurate, step-by-step construction of a bomb from easily accessible household goods. The bomb is then detonated at a political rally designed to refer to an upcoming real-world event about which tensions are high. Worried about inspiring viewers to violence in a politically delicate moment, the executives remove the scene when the episode airs. Note that their action continues to satisfy our definition of censorship. Executives suppress the scene because they judge that it is dangerous. Still, provided they are correct about the dangers (suppose there is, in fact, a .99 probability that, if they run the segment, violence will result), they act permissibly and arguably under a duty of due care. Identifying a case of censorship is one thing. Showing that it is wrong requires further steps.

In the next section, I offer an account of the importance of free speech. This will allow us to better understand under what conditions censorship is wrongful, which is the first step toward understanding how to wisely respond to concerns about it.

1.2 Why Censorship Is (Often) Wrong

Censorship has long been an attractive tool for powerful governing bodies to achieve their goals. It is easier for states to act with the veneer of legitimacy and to retain power despite horrific behavior when they can quiet dissent. What's more is that states' track record when it comes to determining what speech warrants suppression is remarkably poor.²⁰ For these reasons, there is now a powerful consensus that state censorship needs to be kept within extremely tight bounds. According to John Stuart Mill, such a consensus had already solidified as early as 1859. "No argument," Mill wrote in *On Liberty*, "can now be needed, against permitting a legislature or an executive, not

¹⁹ Strictly speaking, things are more complicated. One could hold the view that censorship is always pro tanto wrong, but that it can be justified, and sometimes the justification is so strong that we cease noticing the negative valence inherent in acts of censorship.

²⁰ (Berkowitz 2021).

identified with the people, to prescribe opinions to them, and determine what doctrines or what arguments they shall be allowed to hear.”²¹

The consensus Mill observed left two crucial questions wide open: First, may the government ban expression or prevent the spread of dangerous ideas when it is asked to do so by the people? Second, may the people—acting independently of the government—permissibly exercise social pressure to censor their peers? Mill famously answered these still-open questions in the negative. In short, he held that the “complete liberty” of thought and opinion was so crucial to the progressive development of humankind that it could not be permissibly restricted by states, even if citizens voted (even unanimously) for the restrictions. So crucial was this value that citizens ought not to restrict the expression of opinions even through informal social pressure.

These broad pronouncements stand in need of justification. What exactly is so bad about censorship? Here’s Mill:

the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.²²

With a flair for the dramatic, Mill characterizes the suppression of opinions as a kind of *robbery*. As he sees it, there are really just two options with respect to any given act of suppression: Either the opinion suppressed contains some truth or it doesn’t. In the first case, the would-be censor robs humanity (or some part of it) of the opportunity to appreciate the truth in it. In the second, she robs humanity (or some part of it) of the opportunity to understand what’s really true more fully, in the view of its contrast with error. But if so, then genuine truths can quickly become “dead dogmas,” empty husks of ideas that contain no motive force. In short, Mill thought that censorship was bad news for us as *epistemic agents*. It compromises our access to true propositions and stops us from fully understanding what justifies them. To this general argument, Mill adds three considerations.

²¹ (Mill 2003, 86).

²² (Mill 2003, 87).

The first is that human beings are fallible—and massively so. We are, in other words, likely to be overconfident in our judgment that the opinions that we wish to restrict are mistaken. Thus, even if you're skeptical that collision with error is really anything so valuable, you should worry—as a censor—that you'll have gotten things wrong.

The second hinges on the ways limited creatures like us can be justified in holding beliefs in the first place. For us, to be warranted to believe requires remaining open to criticism from others. Since suppressing others' views walls our own off from criticism, such suppression can only reduce our justification for believing what we believe.²³ Put differently, if others can't challenge our views by offering us reasons to go a different way, we are, in a real sense, left acting and reasoning in the dark.

The third is that, in addition to its relationship to the truth, freedom of thought and expression are important for allowing us to envision and enact experiments in living, by which we depart from the common ways of doing things and carve out our own paths. The ways in which censorship can impede the development of these experiments is not merely bad news for our autonomous self-development and capacity to develop as individuals, it can also stop us from discovering problems in our local culture and better ways of doing things. But if so, then suppressing opinions impedes the progress of humankind and impedes democratic decision-making.

Along with these Millian arguments that free expression promotes the pursuit of truth, the development of individuality, and the quality of collective decision-making, theorists have found other reasons for protecting the freedom of expression. For instance, for some, freedom of expression is important for accommodating diversity.²⁴ For others, it is important for enabling persons to autonomously choose a course of life.²⁵ And for yet others, allowing states to silence opinions gives governments powers we have reason to fear will be turned against us.²⁶

In my view, these defenses of free speech present so many perfectly good reasons to be concerned about the suppression of ideas. The freedom to speak unmolested is constitutive of autonomy; without it, our development as individuals would be very difficult. In atmospheres where expression is suppressed, our understanding withers in darkness. And when

²³ (Joshi forthcoming).

²⁴ (Schauer 1982).

²⁵ See (Scanlon 1972), though see also (Scanlon 2011).

²⁶ (Messina 2020).

we're reasoning together about what to do, it is just as important that we are exposed in our deliberations to dissent as it is to ensure that it is as difficult as possible for those in charge to stamp it out. We need not choose between these grounds. If we refuse to do so, then we accept a kind of pluralism about why just states enshrine rights to free speech, and we reject that free expression needs to maximize or invariably advance any single value for it to be worthy of strong protection.

Legal and political developments in the roughly 150 years following the publication of *On Liberty* have been good news for those sympathetic with these arguments against government censorship. Constitutions in most Western democracies recognize that individuals have rights to free speech that most forms of state censorship violate. What's more is that when those constitutions have been read and interpreted by judges, those judges have found ever more kinds of speech to lie beyond the scope of permissible state interference (especially in the United States). The result is that state suppression of opinions is these days rare.²⁷ If the freedom of expression is threatened in the West now, it is not, in the main, threatened by governments, at least not so far as they regulate in a direct manner what their citizens can say.

But Mill's argument against censorship does not apply only to states. He saw that social groups and private organizations could also act as censors, and that their censorship could result in a "tyranny more formidable than many kinds of political oppression."²⁸ Although private censors have less severe sanctions at their disposal than states, they often leave "fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself."²⁹ For this reason, a free society cannot stop at protecting against state censorship. It must also offer "protection against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them."³⁰

And yet our constitutions, most of them, offer no protection of this kind. Laws, especially in the United States, protect our rights to speak *only* against

²⁷ In a certain narrow sense, legally permissible state censorship in the United States is limited to incitement (narrowly construed), defamation, obscenity, fraud, true threats, and other forms of unprotected speech. Beyond categories of unprotected speech, it is generally acknowledged that schools must teach certain things and that they might be restricted from teaching others and that states can regulate here. When they do so within reasonable limits and for the reasons laid out in our definition, it can be sensible to talk of permissible censorship here, too.

²⁸ (Mill 2003, 76).

²⁹ (Mill 2003, 76).

³⁰ (Mill 2003, 76).

state interference. They offer virtually no protection against social and corporate tyranny. They tolerate wide powers of censorship on the part of private parties. Those who worry about the new censorship sometimes argue that this fact stands in urgent need of correction. If we value free speech, we must bar private censorship in the same way we bar state censorship.

1.3 Do State and Non-State Censorship Merit the Same Response?

Worries that our current legal environment inadequately protects against private censorship are widespread. Those on the political left observe that private corporations often possess substantially more power than ordinary individuals. Such power can distort public discourse by allowing the wealthy and powerful an outsized influence in our political conversations. Moreover, employers are often in a position to punish vulnerable persons for their speech and will be motivated to do so when that speech mobilizes for political change that cuts against the employers' interests.³¹ Those on the political right worry that, when public discourse takes place on platforms controlled by those who share a certain narrow set of viewpoints (like Silicon Valley executives seem to), opinions inconsistent with those viewpoints are likely to be suppressed, resulting in an atmosphere of uniformity that impedes the pursuit of the truth.³² We respond to worries about state censorship by enshrining rights against it. So perhaps we should do the same with respect to private censorship.

Proponents of the position that state and private censorship ought to receive similar treatment argue by analogy.

- (1) State censorship ought to be prohibited because it inhibits free speech values (e.g., autonomy, individuality, the pursuit of the truth, and democratic deliberation).
- (2) Private censorship also inhibits these values.
- (3) So, private censorship ought to be prohibited, too.

³¹ See: (Anderson 2017). Such appeared to be the motivation behind efforts by South Carolina and Louisiana to ban "discrimination against most private employees based on 'political opinion'" (Volokh 2012, 42).

³² See: (Carl 2017).

Because state and private censorship both inhibit free speech values, and because we know that state censorship merits prohibition on this basis, we may infer that private censorship likely merits prohibition as well. The trouble with the argument is threefold.

First, there is a problem with the first premise. For although it's true that state censorship is troubling insofar as it makes it difficult to realize these positive values, this isn't the only reason it is worthy of condemnation. Another major reason is that we have historically well-grounded fears concerning what politicians specifically will do when we provide them with even narrow powers for censoring speech.³³

Oliver-Wendell Holmes's early decisions under the Espionage Act are a case in point. In upholding convictions under this act, Holmes perpetuated an unjust censorship regime in which persons were prohibited from expressing their political beliefs to the extreme advantage of state orthodoxy. Such persons were disproportionately punished with jailtime when they failed to comply. Their convictions impeded political progress.

Consider, again, Schenck's conviction for distributing pamphlets urging men to evade the draft. Conscripted, he had argued, was inconsistent with the constitutional right against enslavement. For simply making this argument, he was jailed. Given the chance to overturn, the court instead upheld the punishment. There was, Holmes argued, no constitutionally protected right to shout fire in a crowded theater. And that's effectively what Schenck had done.

Schenck's conviction demonstrates the importance of restraining the state from engaging in even what seems like uncontroversially acceptable censorship. *Everyone* agrees that there's no good reason to protect the right to shout *fire!* in a crowded theater. The problem is that public officials (even those whose vocation is to curb legislative excess) will often read even reasonable constraints on speech as justification for quelling political dissent. Schenck's pamphlet was nothing like shouting fire in a crowded theatre. But the rule that states might regulate such speech nevertheless created extensive powers that led to severe abuse. The process of disempowering states from acting in this way would take decades.

If these worries about the abuse of power apply to non-state censors, they are here apparently much less weighty. Consider that extensive private powers of censorship are commonplace. Newspaper editors and publishers

³³ (Cass 1987)

get to decide what gets printed and in what form; TV networks decide what goes on the air (and what doesn't); professors can decide which views are heard in their classrooms. Ordinarily, when things are going well, those occupying these roles do not censor much. But the roles do create *powers* to censor. And yet when these powers are abused and wrongful censorship is the result, no one winds up in jail and the truth has a chance to find its way out (often in other publications or on other networks or in other classrooms). Thus the first premise occludes the fact that one of the most powerful reasons for prohibiting state censorship does not apply as strongly to private parties, if it applies to them at all.

Beyond this, it's reasonable to worry that a state prohibition on private censorship itself grants to the state new powers that it might well abuse in ways that conflict with the common good. Consider: if private organizations are barred by law from censoring, the state acquires a new power over the editorial authority of newspapers and broadcasters and publishers and over the content management of social media companies. It doesn't take much imagination (and history helps it along) to envision how these new powers might serve the interests of the already powerful, at the expense of the rest of us.

Perhaps this sounds a bit paranoid to you. (It doesn't to me.) Or perhaps you think it undersells the degree to which we have reasons to fear private powers. Even so, the argument by analogy fails. For there are problems as well with the second premise. To see this, notice that, although Facebook, Twitter, and YouTube govern their platforms in ways that prohibit certain kinds of speech, it is nevertheless plausible that—on net—their existence has democratized speech and resulted in a more inclusive marketplace of ideas.

Before these platforms existed, the class of persons who had access to an audience for their political views extending beyond their immediate social circle was remarkably small, including those influential and well-educated enough to obtain publication in print media or in television or radio broadcast.³⁴ “Tech giants” have given a voice and audience to literally billions of people whose speech would have otherwise been confined to a soap box in a local park, if it made it that far.³⁵ Moreover, when Facebook censors me,

³⁴ For this reason, it strikes me as not quite fair to say that social media moderation compromises persons' “fair opportunity to participate” in discourse on matters of concern to them (Klonick 2018, 1603).

³⁵ As of 2020, Facebook had 2.85 billion daily active users. Every minute, 510,000 comments are posted, 293,000 statuses are updated, and 136,000 photos are added. This is all content that would not previously have received any audience at all. Photos are relegated to dusty photo albums; comments are kept to oneself; one's “status” is shared with those who can observe it or hear stories about it. See: <https://kinsta.com/blog/facebook-statistics/>. For similar statistics on YouTube and Twitter, see

the options that were available to me for expressing myself before Facebook existed remain available: I can start a website or a blog or try to place an op-ed, or speak at local meetings, and so on. The audience's attention might have shifted, but these kinds of shifts are the ordinary stuff of social and technological change. The same is true when someone starts a new publication: The editor creates additional space for the expression of views, and this needs to be factored into the equation when assessing its practice of turning down some speech. Whether, then, private powers are a net boon or net cost to the marketplace of ideas is at least questionable.

Things are worse yet: for even if we grant both the argument's premises, there are relevant dissimilarities between states and private parties that suggest that they merit different moral responses, similarities notwithstanding.

The chief dissimilarity is that one can typically avoid private censorship at a reasonably low cost, say, by using a different platform (or none at all), by seeking information from non-corporate sources (public radio, public libraries, universities, etc.), or by seeking another employer.³⁶ By contrast, it is very difficult to avoid sanctions for violating laws that impose prior restraints on speech.³⁷ Exiting states is notoriously difficult. In addition to the various costs (financial and otherwise) involved with leaving one's home (including expatriation taxes), one must find a willing state to accept your residence, and indeed one that does not impose the relevant restrictions on speech. Escaping state censorship may be practically impossible.

By contrast, where it is hardest to avoid private censorship—in the long-term effects of social shaming campaigns which can be so damaging to an individual's social standing—legal remedies would themselves restrict people's most basic freedoms of speech and association. Indeed, prohibiting private censorship often introduces a conflict between the First Amendment freedoms of expression and association.³⁸ If employers cannot fire employees

<https://www.omnicoreagency.com/youtube-statistics/> and <https://www.omnicoreagency.com/twitter-statistics/>.

³⁶ According to the 2016 Census, there are 5.6 million firms in the United States alone, and many of these are struggling to fill their posts, with available jobs outnumbering jobseekers (see: <https://www.bls.gov/charts/job-openings-and-labor-turnover/unemp-per-job-opening.htm>). In July alone, 3.7 million workers quit their jobs—and more voluntarily left their posts than were fired. These numbers are, of course, only suggestive. But what they suggest is that the labor market is sufficiently competitive as to give employees robust exit options. The pandemic has only increased workers' bargaining power, as firms struggle to find help.

³⁷ The notion of prior restraint is central to constitutional law. A prior restraint is a legislative effort to prohibit speech before it happens.

³⁸ On the connection between these freedoms, see: (Emerson 1964).

for their political speech, if platforms must host speech that they loathe, if editors must publish opposing views, the state is effectively forcing persons to associate with persons and amplify positions they may reasonably prefer to avoid. Similarly, requiring platforms to host content they'd prefer not to host effectively forces them to deploy resources to serve persons and viewpoints they might reasonably prefer not to serve. Thus whether we should prohibit private censorship in the way that we prohibit state censorship depends on its being true that the improvements to the marketplace of ideas achieved by the prohibitions justify infringing the similar rights of others.

I suggest that this is a difficult case to make. First, forcing people to associate with those they loathe seems an especially strong violation of their rights. Second, it is difficult to show that limited spheres of censorship, freely entered into, are not beneficial. To see the latter point, notice that some degree of non-state content moderation might help weed out hatred and false speech, leaving our discourse healthier than it would be if every conversational space mirrored the public square. When people opt into content moderation of this kind, it makes sense to let them. They sometimes have good reasons, and even when they don't, the choice is properly theirs to make.

A third dissimilarity is that firms plausibly have a duty to ensure that their corporate culture functions well. But accommodating political disagreement of certain kinds in line with the First Amendment may compromise their ability to discharge these duties.³⁹ Consider the following case for illustration.

Good Boss: Lucky Dogs hotdog outfit serves a diverse body of hotdog lovers and consists in a diverse group of employees. One of its employees, Ignatius Riley, takes to Twitter to post a racist manifesto, which the customers and other employees see. Lucky's staff descends into disorder and customers head for the exits. In response, Lucky Dogs informs Ignatius that, if he does not remove the tweets and issue a public apology, he will be let go.

Management at Lucky's, it seems to me, acts appropriately. Even if you don't think that Lucky's has a duty to ensure an atmosphere of equal respect between its workers, she is clearly *permitted* to pursue such an atmosphere.

³⁹ Indeed, there are statutes that expressly forbid employer discrimination on the grounds of protected political speech that occurs outside the workplace (Volokh 2012). But since the courts have held that hate speech is protected speech, this seems to imply that an employee cannot be let go after uttering racist speech. But consider the costs in terms of corporate culture that might attend keeping such a person on a diverse staff that includes members targeted by the speech.

Tolerating Ignatius's behavior is at odds with that goal. Sanctioning his behavior is an attractive remedy. This is so even if Ignatius is stopped from speaking as he wishes, even if he is censored thereby.

Fourth (and relatedly), for-profit companies have fiduciary duties to their investors, co-owners, and shareholders to keep patrons coming back to maintain profitability. This is—to be sure—not their only duty. But it does confer upon them a legitimate interest in regulating content accordingly—one that states lack. If censors often suppress speech to protect their material interests, duties to shareholders might justify them in engaging in some content suppression. It might be, for example, that users of a platform will not continue to return if they encounter too much pornography or hate speech. If so, these kinds of firms should be empowered to act accordingly, even if doing so results in censorship.

Finally, companies that began with private investment have a right to operate to realize a creative vision, whereas states lack such duties and such interests. Consider the case of Rightbook to illustrate the latter point:

Rightbook: A new social media company aims to cultivate a space for right-wing political views and so has an explicitly politicized set of community standards. It instructs its team of content-moderators to ensure that content posted to Rightbook is politically appropriate, and within the bounds of conservative thought.

Despite the fact that Rightbook suppresses speech due to its inconsistency with a certain political orthodoxy (censoring left-wing views), private organizations ought to be able to carve out spaces for partisan purposes. Barring private censorship would mean disallowing this kind of thing.

The above arguments have all challenged the strength of the analogy above. They have done so either by suggesting that private censorship is less concerning than public or state censorship or by suggesting that states have fewer compelling reasons to censor than private parties. One might object, however, that there are conditions under which many of these disanalogies between states and private parties look less stark. This appears especially true when private parties enjoy monopoly (or near-monopoly) power.

Consider the share of the market for search engine advertisement controlled by Google, which has recently been sued by Tulsi Gabbard for violation of her First Amendment rights for “censoring” her campaign contribution page. Ignore for now that Gabbard lacks legal standing and that her

claims appear to be unsubstantiated. Still, when a firm enjoys dominance like Google does (capturing nearly 90% of search engine hits), and consumers face high costs of exit (doing without Google is unimaginable for many), we might think that they should be treated like states and barred from censoring content. I offer a deeper analysis of the case to regulate Google and other alleged monopolies in later chapters. For now, it suffices to note that there are traditionally two responses to the existence of monopoly power.

The first response is to leverage the state's anti-trust powers to constrain firms from attaining monopoly status and from engaging in anti-competitive practice. But this supports, rather than undermines, the point that state censorship and private censorship require different approaches. For it is just not true that we respond to concerns about state censorship by breaking up the state's monopoly on, say, force. And, recall: my point here is only that the well-studied response to state censorship does not apply straightforwardly to private censors. Generally, private censorship warrants a separate treatment.

The second response—most useful when we have reason to suspect the existence of a natural monopoly—is to regulate the monopoly according to public principles. If we anticipate that the market in which the monopoly firm operates is one in which a single provider will emerge (or is one in which we have reason to think that additional firms would introduce waste), then we might choose to simply enshrine the existing firm and subject it to regulations such that it cannot exercise its market position to the detriment of citizens and consumers. In doing so, government might shield the firm from competition in exchange for legal assurance, e.g., that it does not overcharge or discriminate against consumers. When such monopoly affects speech, perhaps it can be regulated to ensure that it does so without compromising citizens' interests in free expression.

But notice that even in the quite special case of private censors that are natural monopolies, it is plausible that the regulations we will want to subject them to will differ from the restrictions we place upon the state. (Indeed, as I argue in Chapter 6, is not at all obvious what the First Amendment regulation of Google would even look like.) Thus, recognizing the existence of natural monopolies does not straightforwardly entail that private censors are to be treated analogously with state censors.

If what I've argued for so far is correct, we should accept a kind of institutional pluralism.⁴⁰ It is false as a general matter that the norms appropriate

⁴⁰ (Levy 2015).

to the state are appropriate to the norms of other institutions within its jurisdiction, even when these other institutions act in similar ways. As I argue throughout this book, the appropriate response to state censorship is distinct from the appropriate response to private censorship. This is partially, we have seen, because private parties will often have moral rights to engage in the kinds of activities associated with their censorship, whereas states will not.

1.4 (When) Is Private Censorship Wrong?

Some will take the last section's arguments to mean that Mill was wrong to worry about private censorship. After all, if private parties have rights to act as censors, then their conduct is beyond reproach. Minimally, any reproach should be directed at the instrumental rationality of their behavior.⁴¹

As above, this conclusion has appealed to partisans on both sides of the political aisle. Those on the left have argued that, because there is no right to a platform, conservative antagonists who are deplatformed are not mistreated thereby.⁴² On the right, those who are consistent in supporting whatever follows from persons' private property rights have sometimes accepted the argument's conclusion as a genuine (if sometimes unwelcome) implication of their foundational principles.

Consider one way of supporting this conclusion:

- (1) Private parties have rights to (a) associate with (and dissociate from) others as they see fit, (b) direct their resources in pursuit of their creative visions and pecuniary interests, (c) speak, and (d) blame as they see fit.

⁴¹ For Stanley Fish, for instance, an organization may censor speech just in case doing so advances its goals better than toleration (Fish 1994, 108). But this is false. More is required to gain a permission to censor than simply efficiency in pursuing one's goals. After all, my only hope of securing a zoning regulation that helps my business might be to threaten to fire you if you publish your devastating op-ed against it. Surely, however, this would be morally wrong. Additionally, it isn't *necessary* to permit one to censor that one is thereby doing better at realizing one's goals than one could through toleration. One might, in contexts of deep injustice, profit more by tolerating some racist or sexist speech among one's workforce than by disciplining it. Yet it is clear that, in ordinary contexts, and for sufficiently bad speech, weeding it out is the right course. Thus, non-state institutions may censor permissibly—indeed, might be required to censor—even when their goals would be better advanced by toleration.

⁴² Though he is speaking specifically to the legal question of whether Facebook's community standards violate First Amendment freedoms, the tone of Aria Waldman's recent testimony seem to be in this vein: <https://www.nyls.edu/news-and-events/nyls-news/professor-ari-waldmans-capitol-hill-testimony-makes-news/>.

- (2) Private censors typically suppress speech by exercising rights (a)–(d).
- (3) Thus, when private parties censor, they typically act within their rights.
- (4) If one has the right to do something, then it is permissible to do it.
- (5) So, private censors typically act permissibly.

The crucial premise is (4), which implies, in effect, that rights do not protect wrongful behavior. But this premise is false.⁴³

To see why, consider a pair of stories.

Bad Citizen: Vincenzo is a well-off citizen of the United States about to cast his vote for president. Throughout her campaign, Vincenzo has felt like he could have a beer with candidate A. Aware that this would be a poor reason to help someone gain political power, he has plans to research her policies the evening before the polls close. On his way to the library, however, he runs into an old friend. They catch up, drinking late into the evening. The next day, he wakes up just in time to make it to the polls. His time for research has run out. Nevertheless, he casts his vote for A.

Family Business: Bethany owns an Italian restaurant and advertises for a new assistant manager position. She receives 10 applications, one of whom is her cousin Michael. Of the applicants, Michael is the least well-qualified, having a demonstrated history of unreliability and theft. Despite this, she hires him, blood being thicker than water.

Vincenzo and Bethany remain well within the boundaries of their rights, at least in the sense that it would be ludicrous to suggest that anyone is permitted to stop them from acting as they do. Still, each commits a serious wrong. The sort of right that makes premise (1) true is the sort of right that implies that no one can prevent you by force of law from behaving in certain ways. But such rights do not imply freedom from moral criticism. And they do not imply freedom from social pressure and other sanctions that are available to agents but stop short of state power. Thus, premise (4) is too general, and the argument fails to generate the conclusion that private censorship is permissible by default. To secure the argument's conclusion in the face of the right to do wrong, one needs to show that there's some special reason for

⁴³ (Waldron 1981).

thinking that private censorship is ordinarily permissible. How might one establish such a conclusion?

One strategy begins by noting that censorship constitutes a wrong insofar as it violates the right to free speech. Proponents of this strategy will then note that the right to free speech is a specific kind of thing that can be violated only by a specific kind of agent (namely a state agent). As Stanley Fish notes, for instance, free speech is “a right you hold against the government’s efforts to curb it; it is not a right you hold against nongovernmental actors who may wish, for a variety of reasons, to silence you.”⁴⁴ Notably, Fish does not deny that nongovernmental agents can silence and censor. His claim is not conceptual but normative: though nongovernmental agents might censor, they do not violate any right that you have when they do so.

But although the right to free speech may be held against states, still, one can commit a wrong (or act badly) without violating any right that a person has. Consider: no one has a right against the bad voting practices of others. In a democracy committed to equal representation, we tolerate behavior like Vincenzo’s, even if Vincenzo wrongs us by subjecting us to incompetently exercised political power. Likewise, none of the better-qualified candidates at Bethany’s restaurant have a right to the job her cousin Michael was offered. But in passing them over for a dunce, Bethany surely treats the more deserving candidates badly.

Mill’s remarks on social tyranny suggest that private censorship can wrong others by compromising their ability to live as individuals. Even if we do not want to say that persons’ free speech rights are violated when they are the targets of censorship, it does seem plausible that they can find themselves dominated as speakers, and this might suffice to wrong them. Consider another example to illustrate.

Bad Boss: Ignatius Riley, an employee of Lucky’s hotdog outfit, has recently begun advocating for a zoning restriction that would bar Lucky’s from placing its distinctive carts anywhere in the French Quarter. The owner of Lucky’s threatens to fire Ignatius if he carries on.

Although the owner of Lucky’s pursues a legitimate interest in opposing the new zoning, it strikes me that he wrongs Ignatius by using his economic power over him to suppress his political activism. Even if we want to suppose

⁴⁴ (Fish 2019, 12).

that Ignatius's *right* to free speech was not violated by his boss, surely his interest in expression and political agency are compromised. If so, perhaps this is because it is wrong to wield private power to intimidate others into supporting your causes. If so, that's the sort of thing that can be wrong even if there's no assignable right that makes it wrong.

Moreover, sometimes rights other than the right to free speech make private censorship wrong. Consider a variant on the Rightbook case considered in Section 1.3.

Partisanbook: Despite paying lip service to the goal of creating an open community, a social media company develops vague community standards and instructs its moderators that these are to be interpreted such that those advocating positions outside those included in the Republican party platform are to be removed.

Partisanbook behaves badly. It is wrong to lead people to believe that they are participating in an open forum while covertly pursuing personal political ends that they might not share. Members of Partisanbook might reasonably object that the platform uses them as a mere means, provides a fraudulent description of its services, and so on, without appealing to their right to free speech. And plausibly, there is a right against being used as a mere means or being defrauded.

These cases demonstrate clearly that the wrongs of censorship need not begin and end with the ways in which censorship inhibits the right to free speech. But Mill's worries about social tyranny were not reducible to worries about fraud or other kinds of misconduct. Instead, he was worried specifically about the ways in which private powers could compromise individuality by making inquiry and experimentation difficult. Keeping this in mind, I want to suggest that, when private censorship is a distinctive wrong (reducible neither to the violation of a person's political right to free speech nor to some other right), it is because it compromises the kind of *intellectual atmosphere* we have reason to value, if we value free speech.⁴⁵

Those committed to a basically Millian view about the value of open dialogue seek more than rights to free speech guaranteed against state authorities. They seek, in addition, an atmosphere in which political minorities, not just political majorities, are empowered to discuss their views, to present and

⁴⁵ This way of framing the issue is not new. See e.g. (Chartier 2018).

respond to the evidence as they understand it, free of (undue) social pressure from their peers.

Part of what ensures such an atmosphere, Mill called the *real morality of public discussion*. The real morality of public discussion triumphs when arguments are assessed on their merits and vices are not inferred “from the side which a person takes.”⁴⁶ It requires giving “merited honour to every one, whatever opinion he may hold,” as well as the “calmness to see and honesty to state” what our opponent’s “opinions really are, exaggerating nothing to their discredit, keeping nothing back which tells, or can be supposed to tell, in their favor.”⁴⁷ When private parties exercise their rights in ways that vilify persons for the views they hold in good faith before giving them the benefit of the doubt, this unduly raises the costs of holding and airing views that are held without any vice. When organizations exercise their rights in ways that stop people from expressing their opinions, this can result in those opinions not receiving a fair hearing. This is a problem, in part, because the benefits of free speech in helping to realize the truth cannot be realized if people are not willing to state their views in the public sphere or if those views cannot get out in the first place.

Of course, vilifying good-faith speakers for their views or explicitly censoring content are just two ways of compromising an open environment for discourse. As critics of laissez-faire interpretations of free speech have spent decades pointing out, simply enshrining the formal freedom to speak can yield a situation that is not optimal for discourse. For example, feminists argue that enshrining formal rights to speak where many will use such rights to spout misogyny can silence women.⁴⁸ Marxists and critical theorists have argued that enshrining such rights in contexts of material inequality predictably allows the rich and powerful an outsized voice.⁴⁹ Others argue that laissez-faire approaches to discourse allow nonsense and misinformation to drown out reason.⁵⁰ Finally, liberal perfectionists fear that merely formal freedoms of thought and opinion do not suffice to guarantee against free-riding in the epistemic commons: faced with social stigma for speaking our minds, many prefer to leave the hard work of saying it like it is to others.⁵¹

⁴⁶ (Mill 2003, 119).

⁴⁷ (Mill 2003, 119–20).

⁴⁸ (MacKinnon 1994); (Langton 1993); (McGowan 2009, 2014).

⁴⁹ (Marcuse 1965).

⁵⁰ (Leiter 2014; Sunstein 2021).

⁵¹ (Joshi 2021).

Many such theorists urge that we replace a negative understanding of free speech that merely bars state censorship with a material understanding, according to which some censorship (e.g., bans on certain kinds of pornography, hate speech, or certain kinds of corporate speech) better realizes free speech values than *laissez-faire*. I've argued elsewhere that such positions are too quick in rejecting the importance of formal freedoms from state censorship.⁵² But they're also onto something crucial: a healthy atmosphere for discussion—one which conduces to truth, allows for diverse experiments in living, and befits free adult persons—is not guaranteed simply by means of constitutional provisions against government interference.⁵³ Rather than seeking some general principle capable of capturing all the cases of censorship that might arise, then, we should ask how private powers to censor affect our speech environment.

We might wonder, for example, how various different institutions can combine to ensure that there is adequate space not just for the exchange of opinions, but also for the genuine exchange of reasons. One helpful way of thinking about the issue involves accepting a division of labor between state and non-state bodies. The state secures the kind of formal freedom that is a necessary condition for individuals and communities to speak without threat of imprisonment or state interference. At the same time, social norms and intermediate institutions structure discourse in ways that put participants in a good position to exchange ideas productively.⁵⁴ Having the ability to structure discourse in this way implies the power to censor, and some non-state agents will *exercise* those powers. When they do, we need to ask: to what effect? On this front, there are both individual and systemic effects to consider.

On the individual level, we can ask whether an individual's interest in free expression was compromised by an act of censorship. On the systemic level, we can ask whether the overall atmosphere for discourse was enhanced or degraded by an instance of censorship or a pattern thereof.

⁵² (Messina 2020).

⁵³ This is the truth—and it is a limited truth—in Stanley Fish's claim (widely represented among free speech scholars) that "[A]ny celebration of [the value of free speech] typically includes a list of the benefits free speech provides . . . But if these are the goals the First Amendment helps us to realize, there must be some forms of speech that impede rather than aid their realization . . . If you have any answer at all to the question "What is the First Amendment for?" you are logically committed to censorship somewhere down the line because your understanding of the amendment's purpose will lead you to regulate or suppress speech which serves to undermine that purpose" (Fish 2019, 24–25). As a claim about the First Amendment, this is far too quick. But as a claim about censorship—considered as something that private parties may engage in (and we may engage in with respect to ourselves)—Fish's is the right view.

⁵⁴ Compare (Balkin 2020, 6–7).

This is the strategy I pursue in this book. We will look at the ways in which private parties can restrict speech and ask in each instance: are they contributing to or detracting from a healthy speech environment? In the course of surveying the landscape in this way, we will want to keep in mind several of the questions raised already in this first chapter.

1. Is the censoring party pursuing a legitimate aim (e.g., ensuring they satisfy their fiduciary duties to shareholders, pursuing a creative vision, or acting to give voice to the vulnerable)?
2. Is the censoring party pursuing that aim transparently or covertly?
3. Does the censoring party enjoy *de facto* monopoly power?
4. Are the sanctions for undesired speech proportionate, where they exist?
5. Is the censoring party acting in a way that promotes or maintains an atmosphere in which people feel free to express their unpopular views or an atmosphere of uniformity?

I do not mean to pretend that this is an exhaustive list, and I want to caution against thinking that the answer to any of these questions is straightforward. In any given case, delivering answers will be a difficult matter that requires interpretation and considerable care and effort.

Difficulties aside, attempting answers matters. It matters, in part, because the answers determine our duties with respect to parties that engage in private censorship. If the relevant entities act inappropriately, they may be subject to blame, boycott, regulation, or other kinds of sanctions. Whether such sanctions are wise is a further question, depending for its answer on how likely they are to deter bad behavior, how likely they are to be in line with norms of proportionality, and what unintended effects they might have.

1.5 Summing Up and Looking Ahead

We've covered a lot of ground. It's worth taking stock. We've seen, first, that there is a core concept unifying various paradigm instances of censorship. Moreover, this core concept allows that it is possible for non-state entities to act censoriously. We've seen, second, that, though censorship is not necessarily wrong, concerns about censorship are grounded in a plurality of values—values which seem to take no account of whether the censor is a state

or private entity. Finally, we have seen that private censorship requires a different treatment than state censorship. While some exercises of non-state power that make the air of our intellectual atmosphere hard to breathe and frustrate persons' individuality, other exercises are perfectly above board, and some even aim to improve the same atmosphere. For this reason, it is not at all obvious what to do about private censorship. Simply adopting our well-studied response to state censorship risks running roughshod over private parties' rights to expression and association. What's more is that sometimes those parties exercise those rights in response to genuine wrongdoing by unscrupulous speakers.

In what follows, I will often stress the degree to which the ills in our speech environment (including incivility, polarization, misinformation, and hate speech) are in us. To some substantial degree, we can't fix the problems we face without becoming better than we are at present. In practice (and less in the mode of self-help), this means making investments to ensure that people are capable of and interested in assessing information and arguments without being sucked in by the allure of partisan spin and misinformation. This is not easy work. But nor am I optimistic that regulatory fixes or better oversight by corporate bodies are promising ways of avoiding it. Such fixes tend to leave the core underlying issues unaddressed. They also risk making things worse long term by entrenching new powers more subject to abuse than is wise to tolerate.

The plan for the rest of the book is to move beyond the stylized cases considered here in this first chapter—cases, which, however useful for evaluating matters of general principle, are too unmoored from the messiness of the real world to help guide our thinking about the kinds of private censorship we confront in our daily lives. Since this censorship takes so many different forms, I focus on five crucial areas in which the notion of private censorship is helpful for thinking through the kind of atmosphere for deliberation that we live in.

I begin in Chapter 2 with an extended discussion of the values that support a healthy public sphere and the various ways in which certain kinds of bad speech compromises its realization. I argue that there are strong reasons for us as individuals to hold back in conversation. Still, too much of our discourse now involves policing how others participate in discourse and too little concerns frank and honest talk about the issues that shape our lives. Our failures as speakers generate reasons for non-state institutions to step in to clean up the mess we've made.

Chapter 3 picks up on informal attempts by employers to police their employees' speech. In this chapter, I develop more fully the relationship between freedom of association and freedom of speech. I argue that limiting firms' freedom to associate is no surefire way of better realizing an atmosphere of freedom for expression. Still, there are strong moral and prudential reasons for firms to avoid playing censor.

Chapter 4 begins a series of three chapters on speech intermediaries by treating general issues of press freedom and editorial authority. In this chapter, I examine how television networks, broadcasting companies, publishers, and newspapers censor content. In addition to making clear how professional journalism helps to fill an epistemic need—one which facilitates a healthy atmosphere for discourse when it goes well—the chapter lays the ground for the discussions of social media and search which follow it. We will see in this chapter that the concerns raised by critics of new technologies have in fact plagued us before today's bells and whistles were even imaginable.

Chapter 5 undertakes a similar exercise with respect to various new media forms, particularly social media platforms, which have been at the center of recent controversies regarding private censorship. I distinguish between various kinds of platforms and think through their rights and duties, in view of the place they occupy in our lives. I also indicate where they might do better and the limits of proposals to regulate them.

Finally, in Chapter 6, I consider the unique case of search censorship. Since the major player in that space is currently being charged with anti-competitive practice, I offer a brief history of antitrust law and indicate how we should approach companies that enjoy the kind of dominance that Google enjoys. While our approach is sure to differ in certain respects from our approach with respect to state censorship, the case for sweeping regulation is strongest here.

The concluding chapter brings the various lessons from these case studies together, emphasizing the liberal view that emerges therefrom. I try to give voice to the anxieties that this view causes reasonable people and why we should not respond to these anxieties by rejecting the view. By the end of this last chapter, I hope to have provided enough real-world legal, social scientific evidence for my conclusions to eliminate any concerns that my analysis benefits from trafficking in abstraction. What I will not have been able to do is advance these arguments in a way that will satisfy everyone beyond a reasonable doubt. For that, I'll have to wait for others to articulate objections that I cannot yet see clearly.