



A Failed Case Against Free Speech

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P. E. MOSKOWITZ is frustrated by the state of free speech in America. In *The Case Against Free Speech: The First Amendment, Fascism, and the Future of Dissent*, they (Moskowitz's preferred pronoun) explain why. Unfortunately, Moskowitz's book is frustratingly myopic and disappointing in its muddled analysis and failure to offer any incisive guidance about the future of dissent.

Let's start with the title. This book does *not* present a case *against* free speech. The title smacks of an editor's calculated decision to choose an eye-catching title rather than reflect the author's project. Indeed, Moskowitz's first sentence reads more like an embarrassed disclaimer than a proud introduction: "This book is not anti-free speech. It is anti-the-concept-of-free-speech." The distinction remains obscure throughout the book. Moskowitz disavows any intention to "argue that the United States should adopt laws banning racist speech like the ones that have proliferated throughout Europe," which are "counterproductive" because they "end up being used against leftists instead of racists." Nor is Moskowitz arguing "that Nazi speech should be outlawed, as it is in Germany." The clarity of these early statements dissipates over the course of the book.

Moskowitz, a freelance journalist and former staff writer for *Al Jazeera America*, has written for the *Guardian*, *The New York Times*, *The New Republic*, *Wired*, and *BuzzFeed* and is the author of the 2017 book *How to Kill A City: Gentrification, Inequality, and the Fight for the Neighborhood*. They admit that *The Case Against Free Speech* is "not unbiased." Moskowitz professes to be "an anticapitalist" whose views on free speech "emanate from a materialist understanding of the world," which is based on "the idea that people are free only when their material conditions are equal." Moskowitz sympathizes with victims of inequality and identifies with students of color who feel alone and isolated on many college campuses. "As a queer person in college," even one of the most progressive in the country — Hampshire College — "I remember feeling isolated" because colleges "can be so insular, their worlds so constricting."

Essentially, Moskowitz claims that "free speech, as a concept, is meaningless." It is more a "dialectical smokescreen" because "in a grossly unequal society, in which a few corporations control the means of media dissemination and a small group of the ultrawealthy bankroll entire political movements, there can be no meaningful definition of free speech." Free speech "has never really existed because freedom and liberty have never really existed for the vast majority of Americans." Instead, "the US has systematically acted against those values, suppressing the opportunities, speech, movements, and actions of the masses, especially people of color and anticapitalists, in order to favor the free flow of capital to the owning class." Consequently, this "oppression and suppression have been constant since the founding of this country, and therefore

free speech is a hollow signifier — pointing to a past that never existed.” Moskowitz wants “to encourage people to pick apart the rhetoric we encounter daily, go beyond headlines and opinion pieces, and ask of free speech the same questions we ask of other political tools — who benefits from them, and who doesn’t?”

This is an intriguing start, and Moskowitz gets credit for conducting extensive interviews with a wide array of people involved in free speech controversies, including antifascist protestors who confronted white supremacists in Charlottesville on August 17, 2017; protestors at Standing Rock and at rallies the day after Trump’s inauguration; students who protested the appearance of Charles Murray, author of the controversial book *The Bell Curve*, at Middlebury College; professors embroiled in a controversy over diversity and equity at Evergreen State College; and professors at SUNY Plattsburgh, New York, and Rutgers University, who were harassed for their work connecting feminism, gender, and ethnographic research to the movement for Palestinian rights. These accounts are engaging and make the abstract debates over free speech far more personal and immediate.

But Moskowitz betrays an appalling ignorance of the field into which they are venturing. They make the astonishing claim that there is “relatively little literature and philosophy on free speech” and goes so far as stating that “the legal history of the First Amendment is sparse for something so foundational to the values of this country.” In truth, library and bookstore shelves are groaning under the weight of the thousands of books (supplemented by an endless stream of scholarly journals, articles, and academic conferences) that have been written about the origins, development, and history of the First Amendment, and the theory, interpretation, and exercise of free speech. Very few of these seminal works are cited in the book’s text or footnotes. Instead, Moskowitz offers their own brief history of the First Amendment. It is more or less fine until they selectively describe the history of the ACLU, skewing it to serve their pre-conceived narrative that the hundred-year-old civil liberties organization was originally “explicitly leftist,” representing union leaders and socialists, and only gradually took “a more universalist approach to free speech — defending people regardless of political belief.” Or as Moskowitz sneers at one point, the ACLU turned “from militancy to milquetoast progressivism.”

Having served on the board of directors of the ACLU of Southern California for over 25 years, I’ve studied the history of the ACLU and was highly skeptical of Moskowitz’s account. To verify it, I consulted the work of Aryeh Neier, whom Moskowitz themselves cite. Neier, who was born in Berlin and became a refugee at the age of two in 1939, started at the ACLU in 1963 and served as executive director for eight years. In his book *Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom* (1979), Neier not only explains the ACLU’s decision to represent the Nazis, but places the controversy in the context of the organization’s long history of representing a wide array of outcasts and despised groups across the political spectrum — thereby demolishing the essential premise of Moskowitz’s false narrative.

Indeed, the very first annual report issued by the ACLU in 1920, the year it was founded, entitled *The Fight for Free Speech*, clearly stated the theory of universal protection, which Moskowitz inaccurately claims was not adopted until decades later. “We stand on the general principle,” the report asserted, “that all thought on matters of public concern should be freely expressed without interference.”

By 1921, the second-wave Ku Klux Klan had expanded nationwide with an estimated 100,000 members, many of whom were armed night riders. While the ACLU devoted significant time and

effort to securing prosecutions of Klansmen for their crimes and violent interference with the rights of others, it also defended their free speech rights. The second annual ACLU report, entitled *A Year's Fight for Free Speech*, reported that the "New York City police break up meetings of the Ku Klux Klan and [...] [handled] Klan activities in the same lawless manner as they often handle radicals." Note the immediate connection between protecting the Klan and radicals alike: "Although we are, of course, uncompromisingly opposed to the principles and activities of the Klan," the ACLU reported, "we have demanded for them as for everyone else the free exercise of their civil rights without official interference." The universal principle of protecting all views could not be clearer.

Even during the dark days of World War II, the ACLU insisted that American Nazis and fascists had a constitutional right to speak, issuing a leaflet in October 1940, entitled *Why We Defend Civil Liberty Even for Nazis, Fascists and Communists*.

"How can you," their critics asked,

defend the civil liberties of movements which, if they achieved power, would destroy civil liberties? Have not events abroad revealed the danger of these movements? Should we not sacrifice their liberties to save our democracy in a crisis where national unity is imperative? Can we allow propaganda in behalf of foreign dictatorships to endanger our own democracy?

Facing defections and criticism, the ACLU refused to waver in its defense of free speech for all:

The defense of democracy demands the maintenance of freedom of speech, press, assembly and the right to the ballot for all minorities, whatever their character or purposes. Once the liberties of unpopular minorities are sacrificed, no liberties are safe. The heart of democracy is civil liberty for everyone without distinction.

The ACLU was very clear to distinguish between speech and illegal criminal conduct. In 1943, after having been at war with Germany for more than a year, the US government prosecuted 30 American Nazis and their sympathizers under the Smith Act. The ACLU publicly condemned those aspects of the prosecutions based on conspiracy charges that punished the Nazis for their speech, but declined to provide legal representation because the Nazi defendants appeared to be enemy agents who had gone beyond the exercise of First Amendment rights and had committed separate overt acts aiding and abetting Germany.

In the 1940s and 1950s, the ACLU defended the free speech rights of such rabid bigots as Gerald L. K. Smith and Father Arthur Terminiello. In the case of Father Terminiello, the US Supreme Court held that the conviction of the defrocked Catholic priest for his inflammatory speech in 1946 to the Catholic Veterans of America, condemning Jews, blacks, communists, Franklin Delano Roosevelt, Eleanor Roosevelt, and others, in violation of a city ordinance prohibiting speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance," violated the First Amendment.

Although the case involved a racist and antisemite, *Terminiello v. City of Chicago* became a very important First Amendment precedent which has been cited thousands of times by the Supreme Court and lower courts all over the country in defense of the entire span of speakers from left to right. For example, in 1963, in *Edwards v. South Carolina*, the Supreme Court specifically cited *Terminiello* in reversing the convictions of 187 black high school and college students who had been charged with the crime of "angering" white onlookers, for gathering at a church in

Columbia, South Carolina, and marching to the state house to protest racial discrimination. And in 1965, in *Cox v. Louisiana*, the Supreme Court cited *Terminiello* to overturn the conviction of Reverend B. Elton Cox, field secretary of the Congress of Racial Equality, because his speech to 2,000 students at Southern University condemning racial discrimination was “inflammatory” and prompted “muttering” and “grumbling” from white onlookers. For the majority, Justice Arthur Goldberg wrote that “as in *Terminiello* and *Edwards* the conviction under this statute must be reversed [...] in that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly.”

Had the Supreme Court done Moskowitz’s bidding and upheld the conviction of the racist, antisemitic Father Terminiello because it disagreed with his message, it would have set a dangerous precedent that could easily have been used to uphold the convictions of the civil rights protestors in *Edwards* and *Cox* and later cases, denying the free speech rights of the very people whose messages Moskowitz favors.

Before lecturing others on free speech, Moskowitz would do well to study the vast literature on the First Amendment and its defenders like the ACLU.

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Moskowitz makes the unremarkable point that the Constitution and First Amendment were written only by white men, who amounted to about six percent of the US population who owned property (including enslaved men, women, and children). Within just a few years, these very same men enacted the infamous Alien and Sedition Acts, which were used to punish political opponents and imprison journalists. Moskowitz then recounts other shameful times when free speech and free press were suppressed, summarizing it this way:

Free speech in the United States began as a right reserved only for property-holding white men and was gradually expanded over hundreds of years to include everyone, though some of its largest expansions came in defense of slaveholders, Nazis, and the KKK, while the largest exceptions to those expansions were (and, as we’ll see in the second half of this book, still are) almost universally used against leftists, abolitionists, and antiracists.

This summary is intended to advance Moskowitz’s pessimistic theme (this “is not an optimistic book”) but unfortunately does a disservice to both the heroic people throughout American history who have tenaciously fought to exercise their right to free speech in the face of government censorship and repression and to the hundreds of thousands of people today who are actively doing the same. What they don’t need in this moment of rising authoritarianism is a skewed, depressing, hopeless, and misleading account of the history of the brave men and women who have struggled to breathe life into the words of the First Amendment.

Contrary to Moskowitz’s skewed account, despite fits and starts, the First Amendment has repeatedly protected those outside the mainstream, who hold controversial and unorthodox views, many in line with the views Moskowitz espouses, including, for example, the makers of the film *The Miracle*, condemned as “sacrilegious” (*Burstyn v. Wilson* [1952]); a theater manager convicted of obscenity for exhibiting Louis Malle’s award-winning film *The Lovers* (*Jacobellis v. Ohio* [1964]); recipients of material sent in the mail deemed “communist political propaganda” (*Lamont v. Postmaster General* [1965]); public school teachers forced to sign a loyalty oath (*Keyishian v. Board of Regents* [1967]); students wearing black armbands in school protesting

the Vietnam War (*Tinker v. Des Moines* [1969]); a protestor who wore a jacket in a courthouse hallway bearing the message “Fuck the Draft” (*Cohen v. California* [1971]); members of the Students for a Democratic Society seeking recognition of their student chapter (*Healy v. James* [1972]); a protestor who burned the American flag (*Texas v. Johnson* [1989]); homeowners who put a sign on their front lawn reading, “Say No the War in the Gulf, Call Congress Now.” (*City of Ladue v. Gilleo* [1994]); a Christian evangelical student publication seeking funding on a par with other student publications (*Rosenberger v. University of Virginia* [1995]); government-funded legal services agencies seeking to advocate for changes in welfare laws (*Legal Services Corp. v. Velazquez* [2001]); charities and AIDS organizations opposed to affirming a government imposed message about prostitution that would interfere with their international efforts to reduce HIV rates (*Agency for International Development v. Alliance for Open Society International Inc.* [2013]); an anti-abortion group seeking the right to display billboard messages during an election campaign (*Susan B. Anthony List v. Driehaus* [2014]); protestors seeking to protest within 35 feet of a reproductive health facility (*McCullen v. Coakley* [2014]); non-union health-care workers who objected to paying union security fees (*Harris v. Quinn* [2014]); and public employees demoted on the mistaken belief that they were supporting a challenger to the city’s mayor (*Heffernan v. City of Paterson* [2016]).

While protecting free speech has hardly been without its lapses, and while no doubt the repression of speech disfavored by the government happens all too frequently, this history does not support Moskowitz’s shrunken retelling. Instead, it describes outspoken individuals and organizations who have courageously exercised their freedom of speech and the judges who have frequently upheld a broad and expanding definition of the First Amendment.

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Moskowitz is on firmer ground challenging the misleading claim by conservatives that there is a “free speech crisis” at American colleges and universities because conservative and white nationalist speakers have been disrupted, disinvited, or forced to cancel appearances. Moskowitz makes a strong case that this is an overblown, manufactured “crisis,” citing research by the Foundation for Individual Rights in Education (FIRE), itself a conservative-funded libertarian free speech organization. The data show that among the 4,700 universities and colleges in the United States, only 36 incidents of such disruption have been documented. The real crisis, according to Moskowitz, is not that conservative ideas are being suppressed on American campuses but that they are flourishing as the result of a little-known, well-funded, and long-term conservative campaign.

Moskowitz is at their best when they expose how conservatives have spent almost 50 years funding think tanks, organizations, and educational programs to influence who is teaching and what is taught on American campuses. As a reaction to advances in civil rights, feminism, and liberal political movements of the 1960s, wealthy conservatives began to act. Charles and David Koch were there from the beginning. In 1974, the Charles Koch Foundation was founded and two years later replaced the Koch name with the classicist-sounding name, the Cato Institute. It became an influential libertarian think tank that began funding and supporting the work of dozens of anti-government scholars and pundits. At a 1976 conference, Charles Koch told the audience that conservatives could no longer rely on their ideas prevailing on their own; those ideas needed to be funded through schools and youth programs. Meanwhile, the Olin Foundation, established by John Olin, the executive of one of the world’s largest ammunition

companies, funded far-right causes, especially professorships, academic centers, and conservative law schools, as well as dozens of books by conservative authors such as Dinesh D'Souza (*Illiberal Education*) and Allan Bloom (*The Closing of the American Mind*).

By the 2000s, Betsy DeVos, Donald Trump's Secretary of Education, had joined in the funding, and together with the Koch Brothers and Olin Foundation, spent billions subsidizing hundreds of professors, creating conservative student newspapers, and funding entire centers to advance conservative policies in the name of "free speech." By 2017, the Kochs alone had subsidized programs in at least 307 institutions of higher education and the DeVos family had spent more than \$200 million funding conservative causes at universities and think tanks, and helped found the James Madison Center for Free Speech.

But an even more nefarious result of this long-term effort which Moskowitz skillfully exposes is that universities have become dependent on conservative funding: "In states where Koch-backed politicians have been elected, university budgets have been slashed, while billionaire money further influences the hiring decisions and curricula of schools." For example, in Virginia "the Kochs had a direct say in the hiring and firing of professors at the state's largest public university." Everyone who cares about academic freedom, intellectual independence, and keeping partisan politics out of decisions regarding the selection of faculty and curricula at American colleges should be alarmed by Moskowitz's thorough research and incisive analysis in this area.

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Ultimately the most serious problem that pervades Moskowitz's approach to free speech is its endorsement of violence to achieve political ends. Moskowitz repeatedly flirts with the idea that violence is — or at least *may* be — a necessary tactic in fighting white supremacy, racism, and capitalism. Moskowitz begins by trying to dilute the meaning of violence itself, calling the traditional definition of "actual physical bodily harm" too narrow and claiming that "a bill stripping health care from millions, for example, is an example of violence that we currently consider acceptable in our democracy." Moskowitz's attempt to water down and thereby justify violence goes nowhere.

Confronted with real violence, Moskowitz applies a double standard, condemning the alt-right as "an armed and dangerous nationalist group" but placidly describing antifa counterprotestors as "putting on their face masks and helmets," some carrying "batons." Moskowitz reports that a "leftist group called Redneck Revolt, a kind of armed version of what the media has termed 'antifa,' showed up with rifles." Moskowitz quotes an organizer with apparent approval who asks: "We knew there were really specific plans for violence. We engaged with the police, we engaged with the state, and we got no response. What are you supposed to do?"

As the Charlottesville rally intensified, Moskowitz describes the scene: "Then the tear gas and pepper spray started. Antifa groups had some, the white supremacists had more." Later, Moskowitz describes "sporadic beatings doled out by the white nationalists and counterprotestors throughout the day." The only murder committed was when James Alex Fields Jr., who had espoused neo-Nazi and white supremacist beliefs, killed counterprotestor Heather Heyer. (Fields was subsequently convicted of first-degree murder under Virginia law of hit and run and was sentenced to life in prison plus 419 years. He also pled guilty to federal hate crimes, which resulted in a separate life sentence.)

Moskowitz seems oblivious to the dangers and consequences posed by the violence of both the alt-right and the antifa. Stretching free speech to protect violence runs counter to the theory of nonviolent resistance taught by Mahatma Gandhi, the Reverend James Lawson, and Dr. Martin Luther King Jr. Moskowitz seems equally oblivious of the companion theory of civil disobedience, which is not mentioned once in the book. Gandhi, Lawson, and King taught that there are times when breaking unjust laws (such as sitting at a “White Only” lunch counter) to test their illegality in court or when peacefully blocking the street and accepting the consequences, are effective tactics to gain public and media attention by bringing attention to a greater evil.

But any doubt about Moskowitz’s refusal to embrace nonviolent resistance and instead to endorse violence is removed in the last chapter of the book, curiously entitled “Toward a Smarter Definition of Free Speech.” It is the shortest chapter. Freedom of speech, Moskowitz asserts, is inextricably linked to economic, gender, and racial inequality. If freedom of speech is to mean anything, “if we truly deserve the same right to be heard, then we have to fight for everyone to have a level playing field. Only then, when an activist has the same ability to speak and influence policy as a billionaire, will free speech exist in this country.” Surely a worthy goal but the only way Moskowitz offers to level the playing field is with this explosive threat:

Realizing a meaningful definition of free speech — one that encompasses everyone, not just those with privilege who want to uphold our current system — will likely require massively overhauling our government through illegal actions, and perhaps violence. Only then will free speech apply to all. Until then, we should recognize that our current definition — given all its limitations, and the ways it replicates power while dissuading dissent — is at best inconsistent and flawed. More accurately, I believe, it is totally meaningless.

That’s it. That’s the end of the book. Moskowitz offers no suggestions on how to achieve greater freedom of speech, let alone economic, gender, and racial equality, short of “massively overhauling our government through illegal actions, and perhaps violence.” Moskowitz says this was “not an optimistic book, but hopefully it is a fun one (at least I had some fun writing it).” Fun? It’s not fun; it’s irresponsible.

Moskowitz is lucky we have a First Amendment, which protects a book advocating the violent overthrow of the government. Tell people for 200 pages the situation is desperate and hopeless, they have no free speech, and they never will until full equality is reached by “massively overhauling our government through illegal actions, and perhaps violence.” Ignore Gandhi, Lawson, and King; ignore the great movements for social change in America that succeeded through nonviolent resistance; ignore voting rights; ignore the students at Stoneman Douglas High School; ignore Indivisible, People Power, and the thousands of churches, mosques, temples, and civil rights and social justice organizations struggling every day to achieve economic, gender, and racial equality. Ignore all that and instead have “fun” writing a book drenched in despair and hopelessness, full of sound and fury, signifying what?

And what would free speech and dissent look like in the world according to Moskowitz, the world after our government, after the Constitution, after the First Amendment, have been massively overhauled through illegal actions and perhaps violence? Certainly there would be no milquetoast definition of free speech which foolishly protects everyone’s free speech.

Moskowitz is in the company of others who have imagined such societies. During the Russian Revolution, Vladimir Lenin also complained about the lack of free speech and free press under the czars. And like Moskowitz, Lenin argued that the “capitalists have always used the term ‘freedom’ to mean freedom for the rich to get richer and for the workers to starve to death.” But as soon as Lenin secured power he had quite a new definition of freedom:

Why should freedom of speech and freedom of press be allowed? Why should a government which is doing what it believes to be right allow itself to be criticized? It would not allow opposition by lethal weapons. Ideas are much more fatal things than guns. Why should any man be allowed to buy a printing press and disseminate pernicious opinions calculated to embarrass the government?

Fifty years later, Herbert Marcuse, the German-American philosopher, sociologist, and political theorist who was highly influential in the 1960s and 1970s, became known by many as the “father of the New Left.” In his 1965 essay “Repressive Tolerance,” he argued that tolerance of reactionary speech was “inauthentic.” “Liberating tolerance, then, would mean intolerance against movements from the Right and toleration of movements from the Left.” If the wishes of the people in a democracy are “blocked by organized repression and indoctrination, their reopening may require apparently undemocratic means.”

They would include the withdrawal of toleration of speech and assembly from groups and movements that promote aggressive policies, armament, chauvinism, discrimination on the grounds of race and religion, or which oppose the extension of public services, Social Security, medical care, et cetera. Moreover, the restoration of freedom of thought may necessitate new and rigid restrictions on teachings and practices in the educational institutions which, by their very methods and concepts, serve to enclose the mind within the established universe of discourse and behavior — thereby precluding a priori a rational evaluation of the alternatives.

Marcuse claimed it was possible

to define the direction in which prevailing institutions, policies, opinions would have to be changed in order to improve the chance of a peace which is not identical with cold war and a little hot war, and a satisfaction of needs which does not feed on poverty, oppression, and exploitation.

Therefore, according to Marcuse, it was “also possible to identify policies, opinions, movements which would promote this chance, and those which would do the opposite. Suppression of the regressive ones is a prerequisite for the strengthening of the progressive ones.” With unabashed bluntness, Marcuse endorsed the “cancellation of the liberal creed of free and equal discussion.” We must, he said, be “militantly intolerant,” protecting the “violence of defense” but not the “violence of aggression.”

Marcuse made brutally explicit the inevitable result about which Moskowitz is far more circumspect. But Marcuse’s strategy never took hold. In a 2014 assessment in *Dissent* magazine, Stephen J. Whitfield, a professor of American Studies at Brandeis University and author of *Into the Dark: Hannah Arendt and Totalitarianism*, asked, “[H]as the stature of any intellectual fallen more dramatically than that of Herbert Marcuse?” After a searching analysis, Whitfield concluded that insofar “as the most pressing challenge that confronts the left today is how to

enlist the political will to address the injustice of economic inequality, the intellectual and moral legacy of Herbert Marcuse won't be due for a revival anytime soon."

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Justice Robert Jackson in *West Virginia State Board of Education v. Barnette* (1943), wrote that if "there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." In upholding the First Amendment rights of Nazis to march in Skokie, the Seventh Circuit Court of Appeals argued:

The ability of American society to tolerate the advocacy even of the hateful doctrines espoused by the plaintiffs without abandoning its commitment to freedom of speech and assembly is perhaps the best protection we have against the establishment of any Nazi-type regime in this country.

Contrary to Moskowitz's myopic view that there is "relatively little literature and philosophy on free speech" and "sparse" legal history of the First Amendment, that literature, philosophy, and history is rich and compelling and makes a strong case *in favor of* robust, wide-open, and unflinching free speech. By ignoring all that, Moskowitz fails to make the case against free speech.