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MUZZLING DEATH ROW INMATES: Applying The First Amendment to Regulations that Restrict a Condemned Prisoner’s Last Words

Kevin Francis O’Neill*

I. INTRODUCTION

As Nathan Hale stood on the gallows in 1776, awaiting execution by his British captors, he was asked whether he had any last words. His dying speech, brief but eloquent, resounds through history: “I only regret that I have but one life to lose for my country.”

The privilege to utter a last dying speech in the moments just before one’s execution is a freedom that is deeply ingrained in Anglo-American history and tradition. Visible as early as 1388, the privilege was consistently honored at English executions throughout the sixteenth century and took root on this side of the Atlantic in the seventeenth

* Assistant Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. In composing this Article, I received invaluable help from research assistants Melissa Day and Alex Gertsburg, and generous financial support from the Cleveland-Marshall Fund. I owe a special debt of gratitude to my colleague, Professor Adam Thurschwell, who drew my attention to the striking parallel between the right of allocution (that is, the right of a criminal defendant to be heard just prior to sentencing) and the traditional privilege to be heard just prior to being executed. Finally, the reader should know that I was lead counsel in a First Amendment challenge by Death Row inmates to an Ohio prison policy that, until recently, barred them from uttering a last dying speech in the moments before being executed. Treesh v. Taft, No. C-2-99-624 (S.D. Ohio filed July 6, 1999). That lawsuit, which has now been settled, prompted the State of Ohio to restore the traditional privilege to utter one’s last words. Alan Johnson, Last Words Back in Ohio’s Execution Ritual, COLUMBUS DISPATCH, Apr. 10, 2001, available at http://www.dispatch.com/news/news01/apr01/655029.html.


2. 1 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS 89, 118-19 (London, R. Bagshaw 1809) [hereinafter 1 COBBETT’S] (discussing the trial of Nicholas Brambre (Parliament 1388)).

3. See, e.g., id. at 395, 406-08 (discussing the trial of John Fisher (K.B. 1535)); id. at 433, 437-38 (discussing the trial of Thomas Cromwell (K.B. 1541)); id. at 515, 523-24 (discussing the trial of Edward, Duke of Somerset (K.B. 1551)); id. at 715, 728-30 (discussing the trial of Lady Jane Grey (Q.B. 1553)); id. at 1085, 1085-88 (discussing the trial of John Felton (Q.B.
It was available to everyone: from kings, queens, and aristocrats to the poorest of the poor. Indeed, the privilege was extended to individuals conspicuously bereft of most rights: including “witches,” slaves, and prisoners of war. Even a Tennessee lynch mob saw fit to afford its victim the right to deliver a last dying speech.

1. James, Earl of Mortoun (Q.B. 1581); id. at 947, 952–53 (discussing the trial of James, Earl of Mortoun (Q.B. 1581)); id. at 1141, 1156–60 (discussing the trial of Edward Abington (Q.B. 1586)); id. at 1161, 1210 (discussing the trial of Mary, Queen of Scots (Q.B. 1586)). By 1606, with the execution of Guy Fawkes and his coconspirators in the Gunpowder Plot, the privilege to make a dying speech was already well established. ANTONIA FRASER, FAITH AND TREASON: THE STORY OF THE GUNPOWDER PLOT 229–34, 265 (1996).

4. At their hanging on Boston Common in 1659, three Quaker missionaries were given the privilege to utter their last words. DRIMMER, supra note 1, at 138–39. Last words were also afforded George Burroughs, executed in Massachusetts for witchcraft in 1692. Id. at 142. The privilege was also extended to a murderer executed in Boston in 1726. Id. at 135.


6. See GEOFFREY BRYAN, OFF WITH HIS HEAD 79 (1934) (discussing the trial of Anne Boleyn in 1536); L.A. PARRY, THE HISTORY OF TORTURE IN ENGLAND 132–33 (1975) (same); KAINES, supra note 5, at 37 (same). See also 1 COBBETT’S, supra note 2, at 1161, 1210 (discussing the trial of Mary, Queen of Scots (Q.B. 1586)).

7. 1 COBBETT’S, supra note 2, at 515, 523–24 (discussing the trial of Edward, Duke of Somerset (K.B. 1551)); id. at 947, 952–53 (discussing the trial of James, Earl of Mortoun (Q.B. 1581)); id. at 1333, 1359–60 (discussing the trial of Robert, Earl of Essex (House of Lords 1600)); 7 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS 1293, 1564–68 (London, R. Bagshaw 1810) [hereinafter 7 COBBETT’S] (discussing the trial of William, Viscount Stafford (House of Lords 1680)); 9 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS 577, 683–84 (London, R. Bagshaw 1811) [hereinafter 9 COBBETT’S] (discussing the trial of Lord Russell (K.B. 1683)).


9. George Burroughs, executed in Massachusetts for witchcraft in 1692, was allowed to deliver a dying speech in the moments before his hanging. DRIMMER, supra note 1, at 142. Professing his innocence, Burroughs spoke so eloquently that many in the audience were moved to tears. Id.

10. The privilege was extended to Nat Turner, a black slave who led an 1831 revolt in which fifty-five whites were shot, beheaded, or hacked to death. DRIMMER, supra note 1, at 152–54.

11. The privilege was afforded a British prisoner of war, John Andre, when he was executed under orders from General George Washington in 1780. DRIMMER, supra note 1, at 147–50; LOSSING, supra note 1, at 105; SCOTT SLATER & ALEC SOLOMITA, EXITS: STORIES OF DYING MOMENTS & PARTING WORDS 21–22 (1980).

Condemned prisoners use their last words for a broad variety of purposes. Often they apologize to the victim's family or say goodbye to kin of their own. Many profess their innocence. Some express

13. See Texas Department of Criminal Justice, Executed Offenders Website, at http://www.tdcj.state.tx.us/stat/executedoffenders.htm (last visited Jan. 2, 2002) [hereinafter Executed Offenders Website]. This website offers information on every Texas execution since December 7, 1982—including the name and race of the prisoner, the date of his execution, and a quotation of his last words, if any.

14. Executed in Texas on October 12, 1999, Alvin Crane's last words were: "I just want to say I'm sorry to the family. I know I caused you a lot of pain and suffering and I hope that you will find some peace and comfort in [my execution]." Executed Offenders Website, supra note 13. Warren McCleskey, executed in Georgia on September 25, 1991, used his dying speech to declare: "To the Schlatt family, I am deeply repentant for the suffering, hurt and pain you have endured. I wish there was something I could do or say that would bring comfort to you, though I'm sure these words offer very little comfort... [I know] the words I express will never give you the peace you ask for. I wish this execution could give it to you, but I know it won't, only temporary satisfaction." Bill Montgomery, Infamous Last Words, ATLANTA JOURNAL-CONSTITUTION, Apr. 2, 1995, available at 1995 WL 6518032. Executed in Utah in 1988, Arthur Gary Bishop's last words were: "Give my apologies to the families of the victims." Prisoners' Last Words Cover Wide Spectrum, LAS VEGAS REVIEW-JOURNAL, May 4, 1992, available at 1992 WL 5971829 [hereinafter Prisoners' Last Words]. Condemned Texas prisoner Dennis Dowthitt, executed on March 7, 2001, used his dying speech to tell the bereaved family: "I am so sorry for what y'all had to go through.... I can't imagine losing two children. If I was ya'll, I would have killed me. I am really so sorry about it, I really am." Executed Offenders Website, supra note 13. William Kitchens, executed in Texas on May 9, 2000, issued an extended apology to the victim's family, repeatedly stressing his inability to express how sorry he was. Id. At his execution on November 17, 1999, Texas prisoner John Michael Lamb used his last words to say: "I'm sorry, I wish I could bring him back. I can't. Goodbye. Do it." Id.; David Isay & Stacy Abramson, No. 587: A Death Row Inmate Tells His Own Life Story, NEW YORK TIMES MAGAZINE, Jan. 2, 2000, at 34.

15. Ted Bundy, the serial killer who died in Florida's electric chair on January 25, 1989, used his last words to say: "Give my love to my family and friends." Prisoners' Last Words, supra note 14. Tony Chambers, executed in Texas on November 15, 2000, used his dying speech to say: "Mom, I just want ya'll to know that I love you. No matter what in life, I want you to stay strong." Executed Offenders Website, supra note 13. At his execution in Alabama on November 20, 1992, Cornelius Singleton directed his last words to his brother, who was present among the witnesses. "Let mama know I still love her," he said, adding, "Keep that chin up." Garry Mitchell, Man Convicted of Killing Nun Executed, ASSOCIATED PRESS, Nov. 20, 1992, available at 1992 WL 5326210. Henry Francis Hays, another Alabama prisoner, likewise addressed his last words to his brother, saying simply: "I love you." Paul Vitello, It Was Just Your Average Execution, NEWSDAY, June 10, 1997, available at 1997 WL 2698298.

16. At his Georgia execution on January 9, 1985, Roosevelt Green used his last words to proclaim: "I am about to die for a murder that I did not commit, that someone else committed." Prisoners' Last Words, supra note 14. Executed on March 31, 1994, another Georgia prisoner, William Henry Hance, used his dying speech to assert: "Right at this very moment I can prove my innocence.... There was no motive. There were no witnesses. There were no clues." Montgomery, supra note 14. The last words of Eugene Wallace Perry, executed in Arkansas on August 6, 1997, were simply: "I am innocent of this crime." Paisley Dodds, Arkansas Killer Executed as Victims' Kin Watches; Prisoner Denies Crime in Last Words, ASSOCIATED PRESS, Aug. 7, 1997, available at 1997 WL 11964992. Executed in California on July 14, 1998,
forgiveness. Others turn reflective or confessional: lamenting a wasted life, admitting their guilt, or ruminating about their imminent demise.

Thomas M. Thompson used his last words to declare: “For 17 years, the attorney general has been pursuing the wrong man.” Larry D. Hatfield & Michael Dougan, Insists on His Innocence to the End, SAN FRANCISCO EXAMINER, July 14, 1998, available at 1998 WL 5187658. Each of the following Texas prisoners used his dying speech to profess his innocence: Richard Jones, executed on August 22, 2000 (“I want the victim’s family to know that I didn’t commit this crime. I didn’t kill your loved one. [Then, turning to the prosecutor:] Ya’ll convicted an innocent man and you know it.”); Orien Cecil Joiner, executed on July 12, 2000 (“I am innocent of this crime and God knows I am innocent and the four people that was murdered know I am innocent and when I get to heaven I’ll [find] you and we’ll talk.”); Thomas Mason, executed on June 12, 2000 (asserting that his conviction was based on “more than 30 altered or falsified records”); Frank Basil McFarland, executed on April 19, 1998 (“I owe no apologies for a crime I did not commit. Those who lied and fabricated evidence against me will have to answer for what they have done.”); Carl Johnson, executed on September 19, 1995 (“I want the world to know that I’m innocent and that I’ve found peace. Let’s ride.”); Leonel Torres Herrera, executed on May 12, 1993 (“I am innocent, innocent, innocent. Make no mistake about this; I owe society nothing.”). Executed Offenders Website, supra note 13.

At his May 4, 1999 execution, California prisoner Manuel Pina Babbitt directed his last words to San Quentin’s warden, saying: “I forgive all of you.” Larry D. Hatfield; Babbitt’s Last Words: ‘I Forgive . . . You’, SAN FRANCISCO EXAMINER, May 4, 1999, available at 1999 WL 6872501. The following Texas prisoners likewise used their last words to forgive their executioners: Gary Miller, executed on December 5, 2000 (“Lord, be merciful with those who are actively involved with the taking of my life, forgive them as I am forgiving them.”); Billy C. Gardner, executed on February 16, 1995 (“I forgive all of you—hope God forgives all of you too.”); Thomas Barefoot, executed on October 30, 1984 (“I want everybody to know that I hold nothing against them. I forgive them all.”); Ronald Clark O’Bryan, executed on March 30, 1984 (“forgiving all who have taken part in any way in my death”). Executed Offenders Website, supra note 13.

At his execution on January 27, 2000, Texas prisoner James Moreland used his last words to declare: “I stole 2 lives and I know it was precious to ya’ll. That’s the story of my whole [life], that’s what alcohol will do for you.” Executed Offenders Website, supra note 13. Executed in Nevada on March 30, 1996, Richard Moran directed his last words to the victim’s family: “To those I’ve hurt, I would never ask you to forgive me for what I’ve done to you by killing the [person] you love. . . . I chose my lifestyle of drugs and alcohol so there is no one to blame but me.” Sean Whaley, Men See Sister’s Killer Die, LAS VEGAS REVIEW-JOURNAL, Mar. 31, 1996, available at 1996 WL 2338119. In his dying speech on February 29, 1984, Louisiana prisoner Johnny Davis Taylor Jr. said: “I’ve done a lot of wrong . . . I guess this is the price I pay. . . . Living has been hard, and now it’s time to die.” Killer’s Final Words: ‘Now It’s Time To Die’, SAN DIEGO UNION-TRIBUNE, Feb. 29, 1984, available at 1984 WL 2271686.

Emblematic of these dying confessions are the following examples from Texas executions: Jeffery Dillingham, executed on November 1, 2000 (“I would just like to apologize to the victim’s family for what I did. I take full responsibility for that poor woman’s death . . . .”); Robert Carter, executed on May 31, 2000 (“It was me and me alone.”); David Herman, executed on April 2, 1997 (“It was horrible and inexcusable for me to take the life of your loved one . . . .”). Executed Offenders Website, supra note 13.

Robert Alton Harris, executed in California on April 21, 1992 (“You can be a king or a street sweeper, but everybody dances with the Grim Reaper.”). Last Words, ASSOCIATED PRESS, May 5, 1993, available at 1993 WL 9591524. David Gibbs, executed in Texas on August 23, 2000 (“Death is but a brief moment’s slumber and a short journey home. I’ll see
Still others turn political: criticizing the death penalty, excoriating the justice system, or expressing solidarity with a movement or cause. Finally—and, given the circumstances, it is surprising that this is so rare—a


21. Warren McCleskey, executed in Georgia on September 25, 1991, concluded his dying speech by declaring: “I pray that one day this country, which is supposed to be civilized, will abolish barbaric acts such as this death penalty.” Montgomery, supra note 14. At his Texas execution on October 30, 1984, Thomas Barefoot said with his last words: “I hope that one day we can look back on the evil that we’re doing right now like the witches we burned at the stake.” *Executed Offenders Website,* supra note 13. At his execution on January 4, 1995, Jesse Jacobs asserted: “This is pre-meditated murder by the appointed district attorney and the state of Texas.” *Last Words of Some of the 99 Executed in Texas Since 1982,* NEW YORK BEACON, Oct. 11, 1995, available at 1995 WL 15448596. “Remember,” added Texas inmate Robert Nelson Drew at his August 2, 1994 execution, “the death penalty is murder.” *Executed Offenders Website,* supra note 13. At his execution in California on February 23, 1996, William Bonin used his last words to declare: “The death penalty is not an answer to the problems at hand.” Mark Katches & Keith Stone, *Families Finally Feel Sense of Relief,* LOS ANGELES DAILY NEWS, Feb. 24, 1996, available at 1996 WL 6547932. One inmate actually used his last words to alert the witnesses—including his lawyer and the press—that his own execution was being botched. Bennie Demps, executed in Florida on June 7, 2000, used his dying speech to plead for an investigation into the way that his executioners had handled him. Demps asserted that the state’s technicians, struggling to insert the lethal intravenous drip into his veins, had twice sliced painfully into his body, stitching up one wound before wheeling him into the execution chamber. “They butchered me back there,” said Demps from his gurney. “I was in a lot of pain. They cut me in the groin, they cut me in the leg. I was bleeding profusely.” Rick Bragg, *Inmate Says Execution Was Botched,* CLEVELAND PLAIN DEALER, June 9, 2000, at 10-A.

22. Gary Graham, executed in Texas on June 22, 2000 (professing his innocence, asserting that exculpatory evidence was withheld from the jury, and describing the justice system as perpetrating the institutionalized “lynching” of impoverished blacks). *Executed Offenders Website,* supra note 13. John C. Young, executed in Georgia on March 20, 1985 (asserting that our justice system favors the rich while “manipulat[ing]” the poor) (“The poor . . . don’t have a chance because the courts don’t really recognize them. People look on them as between human and animals, but we’re all from the same creation. . . . This is the way America will always be . . . . I’m not sorry to be leaving this world. Being born black in America was against me.”). Montgomery, supra note 14.

23. Executed in Chicago in 1887, the Haymarket defendants were prominent leaders of the anarchist movement. Seconds before they were hanged en masse, they shouted from the scaffold: “Hurrah for anarchy!” PAUL AVRICH, THE HAYMARKET TRAGEDY 393 (1984); HENRY DAVID, THE HISTORY OF THE HAYMARKET AFFAIR 463 (1958). The anarchist Nicola Sacco, executed in the electric chair 1927, used his last words to declare: “Long live anarchy!” *Drimmer,* supra note 1, at 35. Much more recently, James Beathard (executed in Texas on December 9, 1999) used a portion of his dying speech to castigate the United States for “harming innocent children” through “[t]he ongoing embargo and sanctions against places like Iran and Iraq [and] Cuba.” *Executed Offenders Website,* supra note 13.
few turn angry: raging against their accusers, their prosecutors, or their executioners.24

Notwithstanding its ancient lineage and frequent use, this privilege has never been recognized by an American court as a First Amendment right. It is not that our courts have rejected the notion; they have simply never been asked to decide the question. But that is about to change. Several states—including Pennsylvania, Illinois, North Carolina, South

24. The last words of Jimmie Wayne Jeffers, executed in Arizona by lethal injection on September 13, 1995, were an eruption of rage at his executioners. With the lifting of the curtain that separated him from the witnesses, Jeffers glared through the thick glass window, thrust out his middle finger, and let loose with a torrent of obscenities. His fury was focused on the law enforcement and prison officials who had come to see him die. This tirade continued for 30 seconds until Jeffers, overcome by the sodium pentathol, began heaving violently and then fell still. Even in death, his middle finger remained extended. Michael R. Graham, Jeffers Uses Last Words to Curse, TUCSON CITIZEN, Sept. 14, 1995, available at 1995 WL 8973304; Susie Steckner, Defiant to the End; Killer’s Last Words a Stream of Curses, PHOENIX GAZETTE, Sept. 14, 1995, available at 1995 WL 2828631; Witnesses to Death; What Was it Like?, ARIZONA REPUBLIC, Jan. 22, 1998, available at 1998 WL 7745110 [hereinafter Witnesses to Death]. Donald Eugene Harding, executed in Arizona’s gas chamber on April 6, 1992, likewise used his middle finger to bid an obscene farewell. With a bitter smile, Harding waited until the gas began billowing up before twice gesturing at the witnesses. Witnesses to Death, supra; Prisoners’ Last Words, supra note 14. Executed on April 19, 1995, Arkansas prisoner Richard Wayne Snell used his last words to threaten the governor, suggesting that his execution would be avenged. “Governor Tucker,” he said, “look over your shoulder; justice is coming.” Arkansas Executes White Supremacist; Killer’s Last Words Threat to Governor, NEW YORK TIMES, Apr. 21, 1995, available at 1995 WL 6873268. At his December 9, 1999 execution, Texas prisoner James Beathard asserted that the prosecutor knowingly used perjured testimony to gain his conviction. Executed Offenders Website, supra note 13. Finally, at his execution on March 3, 1992, Texas prisoner Edward Ellis used his dying speech to declare: “I just want everyone to know that the prosecutor and Bill Scott are sorry sons of bitches.” Executed Offenders Website, supra note 13.

25. E-mail from Michael Lukens, Pennsylvania Department of Corrections, to Alex Gertsburg, Research Assistant to Professor Kevin Francis O’Neill, Cleveland-Marshall College of Law ( Feb. 29, 2000, 12:00:54 EST) (on file with author) (“[N]o final statement to the public will be made from the injection chamber. The only final statement permitted must be in written form [and] the final statement must be completed one-half hour prior to the scheduled execution. . . . The final statement generally is read to execution witnesses by a department staff member after the execution, and the department’s press secretary distributes the statement to the news media.”) (emphasis added). See Dennis B. Roddy, Secrecy Governs Execution Process, PITTSBURGH POST-GAZETTE, Apr. 23, 1995, available at 1995 WL 3378530 (confirming that condemned prisoners in Pennsylvania are not afforded the chance to express any last words inside the execution chamber).

26. E-mail from Erik Lyons, Illinois Department of Corrections, to Alex Gertsburg, Research Assistant to Professor Kevin Francis O’Neill, Cleveland-Marshall College of Law ( Jan. 24, 2000, 10:10:37 EST) (on file with author) (explaining that Illinois has no written policies or procedures regarding the last words of condemned prisoners, but that the practice has been for the inmate to put them in writing, to be relayed to the media at a press conference after the execution). See Scott Fornek, How Gacy Would Be Put to Death; Details Include Restriction on Last Words, CHICAGO SUN-TIMES, Apr. 11, 1994, available at 1994 WL 5557181
Carolina,\textsuperscript{28} and, until just recently, Ohio\textsuperscript{29}—do not allow a condemned prisoner to utter a last dying speech in the execution chamber. Other

(Quoting Nic Howell, a state corrections department spokesman, on how the last words of condemned prisoner John Wayne Gacy would be communicated: "If he wants to say something profound or long, we will ask that he do it in writing in his cell.") (Adding that any oral comments that Gacy might make will be uttered before the visitors' gallery will be opened).

27. E-mail from Stephanie Teachey, North Carolina Department of Corrections, to Alex Gertsburg, Research Assistant to Professor Kevin Francis O'Neill, Cleveland-Marshall College of Law (Feb. 7, 2000, 08:29:05 EST) (on file with author) (under North Carolina's policy, any last words must be written out by the prisoner and submitted to the warden 30 minutes prior to the execution; the warden's office transcribes the statement and issues it to the news media only after the prisoner is dead). Death penalty opponents in North Carolina confirm that this is how the State conducts its executions—and they report that trying to speak one's last words is futile because witnesses cannot hear anything through the thick glass that separates them from the execution chamber. E-mail from Sara Sanders to Alex Gertsburg, Research Assistant to Professor Kevin Francis O'Neill, Cleveland-Marshall College of Law (Jan. 12, 2000, 11:35:11 EST) (on file with author). But one North Carolina prisoner, by screaming at the top of his lungs, did manage to communicate a message. The prisoner, David Lawson, was put to death in 1994. As a fog of lethal gas began rising around him, Dawson, screaming with all his might, seemed to be saying: "I'm human! I'm human!" \textit{Executed Murderer's Final Words: 'I'm Human, I'm Human!,' ASSOCIATED PRESS, June 15, 1994, available at 1994 WL 6480938}.

28. E-mail from John Barkley, South Carolina Department of Corrections, to Alex Gertsburg, Research Assistant to Professor Kevin Francis O'Neill, Cleveland-Marshall College of Law (Mar. 2, 2000, 14:43:31 EST) (on file with author) ("In South Carolina the condemned is allowed to have their last statement read by their attorney a few minutes before the execution. The statement must be written so that it can be read by the attorney. Copies of the statement are then provided to the media following the execution.").

29. Treesh v. Taft, 122 F. Supp. 2d 881, 882 (S.D. Ohio 2000) (describing Ohio's policy as "prohibit[ing] death row inmates from making a final oral statement, audible to spectators, in the moments before their executions," requiring them instead to put their last words in writing six hours prior to the execution, and authorizing the release of a transcribed version of the prisoner's last statement only after he is dead); Alan Johnson, \textit{Last Words Will Be Posthumous Ones for Ohio's Condemned, COLUMBUS DISPATCH, July 27, 1997, available at 1997 WL 12513136 [hereinafter Last Words Will Be Posthumous]; John Nolan, \textit{Ohio Sets Stage for Execution, ASSOCIATED PRESS, June 29, 1997, available at LEXIS, News Library, AP File; Ohio to Allow No Last Words Before Execution, ASSOCIATED PRESS, Jan. 9, 1998, available at 1998 WL 4114315 [hereinafter No Last Words]; Ohio to Stifle Condemned's Last Words, THE PANTAGRAPH, Jan. 6, 1998, available at 1998 WL 5460002 [hereinafter Ohio to Stifle Last Words]. In response to the Treesh lawsuit, Ohio prison officials acted in April 2001 to restore the traditional privilege to utter a dying speech. Johnson, \textit{supra note *}. Pursuant to the settlement of that lawsuit, Ohio's execution policy was rewritten to incorporate specific protections for last words. Under the new policy, issued in September 2001, the prisoner must be allowed to deliver an uncensored speech inside the execution chamber immediately before the lethal injection commences. The policy requires that the prisoner be afforded a microphone to ensure that his last words are audible to the assembled witnesses, who view the scene from behind thick panes of glass. See Ted Wendling, \textit{Settlement Allows Condemned to Say Last Words Uncensored, CLEVELAND PLAIN DEALER, Sept. 14, 2001, available at 2001 WL 20550362}.}
states—including Maryland, Virginia, California, and Nevada—allow the speech to be made, but only outside the presence or

30. In Maryland, the condemned prisoner must privately confide his last words to the warden, outside the presence of the witnesses. His only opportunity to utter a final statement takes place before the witnesses are ushered into the viewing chamber. Paul W. Valentine, A Look at . . . Executions; The Death I Didn’t See; Maryland’s Ritual Shrouds the State’s Awesome Power, WASHINGTON POST, July 20, 1997, available at 1997 WL 11974835.

31. In Virginia, the prisoner is invited to utter a last statement inside the execution chamber—but his words are inaudible to those in the witness room. Frank Green, Watkins Dies for Danville Fatal Robbery: Born-Again Christian’s Last Words: Apologies to Families, RICHMOND TIMES-DISPATCH, Mar. 26, 1998, available at 1998 WL 2030658. A prison official stands next to the inmate, listens to his last words, and then transcribes them for release to the news media after the execution. E-mail from Larry Traylor, Director of Communications, Virginia Department of Corrections, to Alex Gertsburg, Research Assistant to Professor Kevin Francis O’Neill, Cleveland-Marshall College of Law (Feb. 14, 2000, 14:21:43 EST) (on file with author).

32. A spokesperson for the California Department of Corrections conceded that the last words of California prisoners are inaudible to the assembled witnesses because San Quentin’s death chamber is walled with thick glass and the prisoner is afforded no microphone. Telephone Interview with Margot Bach, Information Officer, California Department of Corrections (July 6, 2001). Though California’s prison regulations do not specifically address last words, the practice, she said, is for the prisoner to confide his last words to the warden shortly before being put to death. Id. This takes place, she said, inside the execution chamber, with the prisoner already strapped to a gurney and the witnesses already watching. Id. The prisoner simply speaks his last words, often in a whisper, directly to the warden, who promptly relays them by phone to the Emergency Operations Center, which is situated within the Administration Building inside the San Quentin Prison not far from the death chamber. Id. Later, after the execution, the warden discloses the prisoner’s last words to the news media. Id.

Recent news reports confirm that California prisoners are effectively denied the chance to address a dying speech to the assembled witnesses and that their last words are communicated only through the warden. The executions of William Bonin (Feb. 23, 1996), Thomas Thompson (July 13, 1998), and Manuel Babbitt (May 4, 1999) each involved a procedure in which the condemned prisoner could communicate his last words only through the warden. None of them featured a dying speech from the execution chamber. Indeed, the account of Thompson’s execution makes clear that no microphone was available to him, and that all he could do was mouth goodbyes to friends and relatives who watched from behind a thick pane of glass. See Hatfield & Dougan, supra note 16 (describing the Thompson execution); Katches & Stone, supra note 21 (describing the Bonin execution); Maria L. La Ganga, California and the West; Executions Eliciting a Growing Indifference: Justice: Pace of Capital Punishment in State is Gaining Momentum, But Media, Public Interest Seem to be Waning, LOS ANGELES TIMES, May 5, 1999, available at 1999 WL 2155684 (describing the Babbitt execution).

But these reports conflict with the spokesperson’s account in one crucial respect. Contrary to her assertion that the prisoner confides his last words only moments before being executed, these accounts describe a 30- to 60-minute delay between the utterance of his “last words” and his death by lethal injection. Katches & Stone, supra note 21 (describing a 30-minute delay in the Bonin execution); Hatfield & Dougan, supra note 16 (describing a 45-minute delay in the Thompson execution); La Ganga, supra (describing a 60-minute delay in the Babbitt execution). Such an approach would seem effectively identical to the policies in Pennsylvania, Illinois, and North Carolina, where a spontaneous brink-of-death speech is banned and the prisoner must
beyond the hearing of the witnesses. These policies invite constitutional challenge, and one such challenge has already been launched in Ohio.34

This Article asserts that the privilege to deliver a last dying speech—uttered in the presence of, and made audible to, the assembled witnesses in the moments just before one’s execution—is a First Amendment right, and that prison policies departing from its traditional exercise are unconstitutional. After canvassing the state prison policies that govern last words,35 this Article will recount the long historical tradition surrounding their utterance—a history that reveals the extraordinary degree to which Anglo-American governments have honored the privilege.36 Next, this Article will draw a parallel between the right to utter one’s last words and the well-established right of “allocution”—the right to be heard just prior to sentencing.37 Finally, this Article will perform a First Amendment analysis of the prison policies that restrict last words. This analysis will begin with “first principles,”38 examining the policies in terms of the reasons why our law protects free expression. The analysis section will then proceed by invoking a succession of First Amendment doctrines. We will perform, in turn, a prior restraint analysis,39 a content-neutrality analysis,40 a public

submit his “last words” at least 30 minutes before entering the execution chamber. See supra notes 25–27.

33. In Nevada, witnesses cannot hear the last words of condemned prisoners; they are inaudible through the thick glass of the viewing windows. Nevada Killer, 26, Executed by Injection, LOS ANGELES TIMES, June 4, 1990, available at 1990 WL 2386083. Reporters learn of a prisoner’s final statement only through the warden, who discloses the statement after the execution. See Sean Whaley, Double Murderer Executed, LAS VEGAS REVIEW-JOURNAL, Apr. 6, 1999, available at 1999 WL 9280569.


35. See infra Section II.

36. See infra Section III.A.

37. See infra Section III.B.

38. See infra Section IV.A.

39. See infra Section IV.B.

40. See infra Section IV.C.
forum analysis, an overbreadth analysis, a restricted environment analysis, and an original intent analysis.

II. CONTEMPORARY PRISON REGULATIONS THAT RESTRICT THE LAST WORDS OF CONDEMNED PRISONERS

State prison policies governing last words come in many forms. Texas does it the old-fashioned way: As the last act prior to execution, the warden is required to ask the prisoner if he has any last words. If the prisoner wants to speak, he must be allowed to give his speech in full. The policy imposes no durational or editorial restrictions, and the prisoner makes his statement in full view of the witnesses (who watch from an adjacent chamber behind thick glass windows), made audible to them by means of a microphone. Florida and Louisiana have similar policies.

41. See infra Section IV.D.
42. See infra Section IV.E.
43. See infra Section IV.F.
44. See infra Section IV.G.
45. Prison policies governing the final hours (and, hence, the last words) of condemned prisoners are usually unpublished. They are not to be found in statutory or administrative codes. Instead, they tend to be maintained far from public view—in file cabinets at the state department of corrections and at the prison where executions are conducted. Thus, it was extremely difficult to research the substantive content of these policies. Nevertheless, we sent inquiries by email to the department of corrections in each of the 38 states where the death penalty is currently in force: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. We received responses from virtually every state—and we supplemented that information in two ways: (1) by collecting news reports describing how executions in various states were conducted; and (2) through listserv inquiries of death penalty scholars and public defenders across the nation. Texas is the only state whose “last words” policy has been published, and the policy appears not in a codebook but in an appendix to a history book: JAMES W. MARQUART ET AL., THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923–1990 (1994) (Appendix C) [hereinafter CAPITAL PUNISHMENT IN TEXAS].

46. The Texas policy provides that after the inmate has been strapped to the gurney in the execution chamber, with catheters placed in each arm, and after the witnesses have been ushered into the adjacent viewing chamber, “The Warden will then ask the condemned inmate for his last statement. If the inmate has a statement, he is allowed to make it. The Warden then states, ‘We are ready.’” At this point, the lethal injection immediately commences. CAPITAL PUNISHMENT IN TEXAS, supra note 45, at 238–39.
47. Id. at 238.
48. Id.
49. Rick Halperin, Witness to an Extermination, OCADP Home Page (Oregon Coalition to Abolish the Death Penalty), at http://members.tripod.com/ocadp (last visited Jan. 2, 2002) (furnishing an eyewitness account of a Texas execution—the lethal injection of Frank...
Many states are more restrictive. In Kentucky\(^5\) and Utah,\(^5\) the prisoner is allowed to give a dying speech, but it cannot exceed two minutes. In Nevada,\(^4\) Virginia,\(^5\) and California,\(^6\) the prisoner is allowed to speak, but he is denied a microphone—so his words are *inaudible* to the witnesses. In Maryland,\(^7\) likewise, the witnesses never *hear* his last words, because the prisoner is compelled to give his speech *before* they are ushered in.

Some states forbid the utterance of a dying speech altogether. In Pennsylvania,\(^5\) Illinois,\(^9\) North Carolina,\(^6\) South Carolina,\(^6\) and (until just recently) Ohio,\(^6\) the prisoner is simply not allowed to utter his last words in the execution chamber. Instead, the prisoner is required to write them out in

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50. E-mail from Debra Buchanan, Florida Department of Corrections, to Alex Gertsburg, Research Assistant to Professor Kevin Francis O’Neill, Cleveland-Marshall College of Law (Jan. 25, 2000, 08:32:08 EST) (on file with author).

51. According to death penalty opponents in Louisiana, condemned prisoners are freely allowed to utter their last words in the moments just before being executed. E-mail from Kathy Gess, Director of Louisiana CURE, to Alex Gertsburg, Research Assistant to Professor Kevin Francis O’Neill, Cleveland-Marshall College of Law (Jan. 13, 2000, 18:10:00 EST) (on file with author). See Killer’s Final Words: ‘Now It’s Time to Die,’ SAN DIEGO UNION-TRIBUNE, Feb. 29, 1984, available at 1984 WL 2271686 (recounting a Louisiana execution in which the prisoner read a three-minute statement just before his death).

52. E-mail from Philip Parker, Warden, Kentucky State Penitentiary, to Alex Gertsburg, Research Assistant to Professor Kevin Francis O’Neill, Cleveland-Marshall College of Law (Feb. 7, 2000, 15:34:42 EST) (on file with author) (confirming that the inmate, though afforded a microphone so that his last words are audible to witnesses, is allowed no more than two minutes to speak).

53. At executions in Utah, the condemned is afforded a microphone in the death chamber, but his last words may not exceed two minutes. Greg Burton, Parsons Gets Wish: Execution, SALT LAKE TRIBUNE, Oct. 15, 1999, available at 1999 WL 3383493.
advance and then surrender them for delivery by someone else. In South Carolina, the prisoner’s lawyer is allowed to read them at some point prior to the execution. In the other four states, the prisoner must entrust his statement to the warden’s office for transcription and release only after he is dead.

A closer look at Ohio’s approach will offer insight into the nature and purpose of these restrictive policies. Until April 2001, condemned prisoners in Ohio were not allowed to speak at the time of their execution. Instead, their “last words” were to be written out six hours in advance and submitted to the warden, to be released only after the prisoner was dead. When this policy was first adopted, Ohio prison officials asserted that the warden would enjoy “complete editorial rights” over the prisoner’s statement, with unfettered discretion to change it, cut it, summarize it, or censor it altogether. The aim of the policy, they said, was to shield the friends and relatives of murder victims from “potentially spiteful, profane, or abusive remarks” by those condemned to die. Thus, prisoners would be barred from speaking to the assembled witnesses, and even their written statements would be carefully screened for unpleasant remarks. The prison officials said that when reviewing the condemned’s written statement, the warden would scan it for any passage that was “potentially offensive,” and, upon finding such a passage, would send the statement back to the prisoner with instructions to change it. Should the prisoner refuse, the warden “will have discretion to [censor] that part of the statement—or the entire

63. See supra notes 25–29.
64. See supra note 28.
65. See supra notes 25–27, 29.
66. See Johnson, supra note *.
68. Treesh, 122 F. Supp. 2d at 882.
69. Id.
70. Last Words Will Be Posthumous, supra note 29.
71. No Last Words, supra note 29; Ohio to Stifle Last Words, supra note 29; Last Words Will Be Posthumous, supra note 29.
72. No Last Words, supra note 29; Ohio to Stifle Last Words, supra note 29. The chief impetus for Ohio’s policy was an inflammatory statement by a convicted killer—but, ironically, that statement was uttered in open court prior to sentencing; it was not the killer’s last words. In justifying their policy, Ohio prison officials pointed to the 1996 California sentencing of Richard Allen Davis for the murder of 12-year-old Polly Klass. Davis, afforded the traditional privilege to speak before sentencing, used the opportunity to make the outrageous suggestion that the dead girl’s father had molested her. Thomas Suddes, Death Row Bill Restricts Last Words, CLEVELAND PLAIN DEALER, Jan. 26, 2000, at 4B.
73. Nolan, supra note 29.
text if it is potentially offensive."\(^7\)\(^4\) Ohio abandoned this policy only after being sued by the American Civil Liberties Union.\(^7\)\(^5\) Pursuant to a settlement of that suit, Ohio’s policy was rewritten to incorporate an affirmative right to last words.

III. HISTORICAL BACKGROUND

A. For Centuries, Anglo-American Tradition Has Afforded Condemned Prisoners the Freedom to Utter Their Last Words When Standing on the Brink of Execution.

In an unbroken tradition that stretches back at least 500 years, condemned prisoners in Anglo-American culture have been afforded the privilege to make a last dying speech, free from state censorship, in the moments before their execution.\(^7\)\(^6\)

Visible as early as 1388,\(^7\)\(^7\) the privilege was consistently honored at English executions throughout the sixteenth century. Scaffold speeches were delivered by Sir Thomas More\(^7\)\(^8\) and John Fisher\(^7\)\(^9\) at their executions in 1535; by Anne Boleyn in 1536;\(^8\)\(^0\) by Thomas Cromwell in 1541;\(^8\)\(^1\) by the Duke of Somerset in 1551;\(^8\)\(^2\) by Edward Seymour in 1552;\(^8\)\(^3\) by Lady Jane Grey in 1553;\(^8\)\(^4\) by John Felton in 1570;\(^8\)\(^5\) by the Earl of Mortoun in 1581;\(^8\)\(^6\)

\(^7\)\(^4\) Nolan, supra note 29.
\(^7\)\(^5\) See supra note 34.
\(^7\)\(^6\) Gatrell, supra note 8, at 36. See also Justin Atholl, Shadow of the Gallows 49 (1954); Fraser, supra note 3, at 229; Thomas M. Mcda, The Annals of Murder xxxii (1961); Parry, supra note 6, at 112.
\(^7\)\(^7\) 1 Cobbett's, supra note 2, at 89, 118–19 (discussing the trial of Nicholas Brambre (Parliament 1388)).
\(^7\)\(^8\) Id. at 385, 395–96 (discussing the trial of Sir Thomas More (K.B. 1535)). Though the King willed that More’s scaffold speech be brief, he was allowed to give one. Peter Ackroyd, The Life of Thomas More 405 (1998).
\(^7\)\(^9\) 1 Cobbett's, supra note 2, at 395, 406–08 (discussing the trial of John Fisher (K.B. 1535)).
\(^8\)\(^0\) Parry, supra note 6, at 132–33; Bryan, supra note 6, at 79.
\(^8\)\(^1\) 1 Cobbett's, supra note 2, at 433, 437–38 (discussing the trial of Thomas Cromwell (K.B. 1541)).
\(^8\)\(^2\) Id. at 515, 523–24 (discussing the trial of Edward, Duke of Somerset (K.B. 1551)).
\(^8\)\(^3\) Herbert Lockyer, All the Last Words of Saints and Sinners 91 (1969).
\(^8\)\(^4\) 1 Cobbett's, supra note 2, at 715, 728–30 (discussing the trial of Lady Jane Grey (Q.B. 1553)).
\(^8\)\(^5\) Id. at 1085, 1085–88 (discussing the trial of John Felton (Q.B. 1570)).
\(^8\)\(^6\) Id. at 947, 952–53 (discussing the trial of James, Earl of Mortoun (Q.B. 1581)).
and by Edward Abington\textsuperscript{87} and Mary Queen of Scots\textsuperscript{88} at their executions in 1586. By 1606, with the execution of Guy Fawkes and his co-conspirators in the Gunpowder Plot, the privilege to make a dying speech was already well established in England.\textsuperscript{89} On this side of the Atlantic, the privilege had taken root by the mid-1600s.\textsuperscript{90} It was afforded to a British spy, executed by order of General George Washington during the Revolutionary War.\textsuperscript{91}

The privilege was extended to everyone: from kings,\textsuperscript{92} queens,\textsuperscript{93} and aristocrats,\textsuperscript{94} to the lowest of the low—\textsuperscript{95} even to prisoners of war\textsuperscript{96} and those convicted of treason.\textsuperscript{97} The most hated criminals were allowed to

\textsuperscript{87} \textit{id.} at 1141, 1156–60 (discussing the trial of Edward Abington (Q.B. 1586)).

\textsuperscript{88} \textit{id.} at 1161, 1210 (discussing the trial of Mary, Queen of Scots (Q.B. 1586)).

\textsuperscript{89} \textsc{fraser, supra} note 3, at 231–34, 265.

\textsuperscript{90} At their hangings on Boston Common in 1659 and 1660, three Quaker missionaries were given the privilege to utter their last words. \textsc{driimmer, supra} note 1, at 138–39. Last words were also afforded George Burroughs, executed in Massachusetts for witchcraft in 1692. \textit{id.} at 142. And the privilege was extended to a murderer executed in Boston in 1726. \textit{id.} at 135.

\textsuperscript{91} \textsc{driimmer, supra} note 1, at 147–50; \textsc{lossing, supra} note 1, at 105.

\textsuperscript{92} Executed in 1649, King Charles I of England gave a long speech from the scaffold. \textsc{kaines, supra} note 5, at 62–65.

\textsuperscript{93} Anne Boleyn, executed in 1536: \textsc{bryan, supra} note 6, at 79; \textsc{kaines, supra} note 5, at 37. Mary Queen of Scots, executed in 1586: 1 \textsc{cobbett's, supra} note 2, at 1161, 1210.

\textsuperscript{94} 1 \textsc{cobbett's, supra} note 2, at 515, 523–24 (discussing the trial of Edward, Duke of Somerset (K.B. 1551)); \textit{id.} at 947, 952–53 (discussing the trial of James, Earl of Mortoun (Q.B. 1581)); \textit{id.} at 1333, 1359–60 (discussing the trial of Robert, Earl of Essex (House of Lords 1600)); 7 \textsc{cobbett's, supra} note 7, at 1293, 1564–68 (discussing the trial of William, Viscount Stafford (House of Lords 1680)); 9 \textsc{cobbett's, supra} note 7, at 577, 683–84 (discussing trial of William, Lord Russell (K.B. 1683)).

\textsuperscript{95} \textsc{gatrell, supra} note 8, at 8, 34–35, 439.

\textsuperscript{96} Nathan Hale, captured by British troops and executed in New York City in 1776, delivered a scaffold speech that is justifiably famous; he declared: "I only regret that I have but one life to lose for my country." \textsc{driimmer, supra} note 1, at 145–46; \textsc{henry phelps johnston, nathan hale 1776: biography and memorials} 128–29 (1914); \textsc{lossing, supra} note 1, at 23. A British prisoner of war, John Andre, was afforded the same privilege to deliver a scaffold speech when executed under orders from General George Washington in 1780. \textsc{driimmer, supra} note 1, at 147–50; \textsc{lossing, supra} note 1, at 105. Even the Nazis convicted of war crimes at the Nuremberg Trial were afforded the privilege to deliver a last dying speech in the moments before they were hanged. \textit{see} \textsc{joseph e. persico, nuremberg: infamy on trial} 425–27 (1994).

\textsuperscript{97} 1 \textsc{cobbett's, supra} note 2, at 385, 395–96 (discussing the trial of Sir Thomas More (K.B. 1535)); \textit{id.} at 395, 406–08 (discussing the trial of John Fisher (K.B. 1535)); \textit{id.} at 433, 437–38 (discussing the trial of Thomas Cromwell (K.B. 1541)); \textit{id.} at 715, 728–30 (discussing the trial of Lady Jane Grey (Q.B. 1553)); \textit{id.} at 1141, 1156–60 (discussing the trial of Edward Abington (Q.B. 1586)); \textit{id.} at 1409, 1414–16 (discussing the trial of Sir Christopher Blunt (Q.B. 1600)); 2 \textsc{cobbett's complete collection of state trials} 1, 40–45 (London, R. Bagshaw 1809) [hereinafter 2 \textsc{cobbett's}] (discussing the trial of Sir Walter Raleigh (K.B. 1603)) (though tried in 1603, Raleigh languished in the Tower of London until his scaffold speech and beheading in 1618); 5 \textsc{cobbett's complete collection of state trials} 1008, 1230–37


deliver a dying speech, including the assassins of Presidents Lincoln, Garfield, and McKinley. Individuals conspicuously bereft of most rights were nevertheless afforded their last words. The privilege was extended, for example, to Nat Turner, a black slave who led an 1831 revolt in which fifty-five whites were shot, beheaded, or hacked to death. Even a Tennessee lynch mob saw fit to afford its victim the right to deliver a last dying speech.

(London, R. Bagshaw 1810) (discussing the trial of Thomas Harrison (K.B. 1660)). The privilege to deliver a dying speech was extended to each of the Gunpowder Plot conspirators when they were hanged in 1606. Fraser, supra note 3, at 231–34, 265. William Laud, Archbishop of Canterbury, was impeached in 1640 on grounds of “popery” and treason. Will & Ariel Durant, The Age of Reason Begins 208 (1961). Upon his execution in 1645, id. at 214, Laud was afforded a last dying speech from the scaffold. Bulstrode Whitehead, Memorials of the English Affairs 364 (Oxford 1853).

98. Confederate Captain Henry Wirz, commandant of the notorious Andersonville prison, was afforded last words when executed by federal troops in 1865. Drimmer, supra note 1, at 164–65. Likewise afforded last words were the anarchists Sacco and Vanzetti, executed in 1927. id. at 34–36. The “Molly Maguires,” radical labor activists who waged war against coal mine owners in Pennsylvania, were afforded last words when executed in 1877. Id. at 186–88; August Mencken, By the Neck: A Book of Hangings 98–108 (1942).

99. Last words were afforded the conspirators in the Lincoln assassination, who, surviving John Wilkes Booth, were hanged en masse in 1865. Drimmer, supra note 1, at 186–88; Mencken, supra note 98, at 81–90.

100. President James A. Garfield’s assassin, Charles Julius Guiteau, was afforded last words when executed in 1882. Drimmer, supra note 1, at 188–93; Mencken, supra note 98, at 81–90.

101. President William McKinley’s assassin, Leon Czolgosz, was afforded last words when executed in 1901. Drimmer, supra note 1, at 193–95.

102. Drimmer, supra note 1, at 152–54.


What is striking about this privilege is just how infrequently it was denied or curtailed. In stark contrast to the overwhelming number of times that last words were fully afforded, our research has uncovered only a handful of instances where it was not. At an 1875 triple hanging in New York, one of the three prisoners “‘begged’ to be allowed to ‘say a few words before he died.’” The deputy sheriff rejected his request. Michael Madow, Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York, 43 Buff. L. Rev. 461, 527 (1995). Perhaps it is no coincidence that these three prisoners were black. Id. at 527–28. Even so, there is evidence that blacks were delivering long scaffold speeches in upstate New York in the late nineteenth century, see id. at 528 n.294, which makes the foregoing incident all the more an aberration. Indeed, our research has uncovered only one other significant example of the privilege being flatly denied: Ruy Lopez, a Portuguese Jew who had served as Queen Elizabeth’s physician, was convicted of conspiracy in a Spanish plot to assassinate the Queen. He was strung up before being given a chance to address the crowd in June 1594. Parry, supra note 6, at 122–23. Equally few and far between are those instances where last words were cut short rather than denied altogether. History affords only two significant examples. The first involves Sir Thomas More, executed in 1535.
The freedom to communicate one’s last words was a freedom not just to speak, but to speak offensively, even seditiously:

On the scaffold likewise, custom had long entitled the condemned to address the crowd as they pleased, seditiously if they chose. Although every effort was made to force them to public professions of guilt and penitence, they were not checked if they betrayed that role. Jacobites had betrayed the role spectacularly, some making seditious speeches “plainly calculated,” as Dudley Ryder had observed, “for nothing else but to incense the people against the government. . . .” In 1791 d’Archenholz reported the English belief that “humanity requires that such an alleviation should be permitted to one who is about to be launched out of the world by a violent death.”

The privilege to utter one’s last words was a freedom not just to speak but to be heard. The spectators who attended an execution came with a keen interest in hearing what the condemned would say.

The dying speeches of two presidential assassins, Charles Julius Guiteau and Leon Czolgosz, were famously offensive and seditious. Guiteau, executed in 1882 for killing President James A. Garfield, used his scaffold speech to proclaim: “This nation will go down in blood . . . My murderers, from the Executive to the hangman, will go to hell.” Czolgosz, executed in 1901 for shooting President William McKinley, used his dying speech to declare: “I killed the President because he was an enemy of the good people—of the working people. I’m not sorry for my crime.”

The spectators who attended an execution came with a keen interest in hearing what the condemned would say.

Though the King willed that his scaffold speech be brief, he was allowed to give one. ACKROYD, supra note 78, at 405; JAMES MONTI, THE KING’S GOOD SERVANT BUT GOD’S FIRST: THE LIFE AND WRITINGS OF SAINT THOMAS MORE 449 (1997); THOMAS STAPLETON, THE LIFE AND ILLUSTRIOUS MARTYRDOM OF SIR THOMAS MORE 188–89 (Philip E. Hallett trans., 1928) (1966). Finally, at the 1887 mass hanging of the Haymarket defendants in Chicago, the prisoners began to address the crowd after the nooses had been placed around their necks. Their exhortations were brutally curtailed—in mid-sentence—when the executioner sprang the trap door beneath their feet. AVRICH, supra note 23, at 393; DAVID, supra note 23, at 463.

104. GATRELL, supra note 8, at 36 (quoting, respectively, THE DIARY OF DUDLEY RYDER, 1715–1716 at 336 (W. Matthews ed., 1939) and J. D’ARCHENHOLZ, A PICTURE OF ENGLAND: CONTAINING A DESCRIPTION OF THE LAWS, CUSTOMS, AND MANNERS OF ENGLAND 148 (1791)).

105. DRIMMER, supra note 1, at 191.

106. Id. at 194–95.

107. GATRELL, supra note 8, at 355 (“The meanings of executions depended on [what the condemned might say with his last words]. Every ear strained to hear them.”).

108. Id. at 89 (describing the customs of the scaffold crowd: “the hope that the victim might speak and the straining to hear (death spoke, after all)”; accord JOHN D. BESSLER, DEATH IN
speech served as a communication to the citizenry and as an opportunity for the condemned to place a stamp of individuality on his death. 109

Although encouraged to be penitent110—and many prisoners obligingly delivered cautionary tales of a life gone astray111—the condemned was free to reject that role.112 Indeed, he was at liberty to use his scaffold speech for any message he desired:

In his scaffold speech in particular, the condemned man had a wide range of options: he could confess his guilt or protest his innocence, mock or bless authority, forgive or curse his judges and executioners, blame or exculpate his parents. He could seek the sympathy and support of the crowd, excoriate enemies, incriminate confederates, or simply prolong his life a few extra minutes.113

Sir Walter Raleigh turned his scaffold speech into a point-by-point refutation of the charges against him.114 James Ings, one of the Cato Street Conspirators,115 employed his last words to challenge the legitimacy of the government.116 A nineteenth century New Yorker used his dying speech to
accuse the government's witnesses of perjury. 117 And at the dawn of the twenty-first century, many prisoners devote their last words to a condemnation of capital punishment itself. 118

Remarkably, the state exerted no editorial control over the condemned’s message and allowed it to be delivered spontaneously, without any advance review. 119 Nor did the state do much to limit the duration of the prisoner’s speech. 120 A dying declamation might last forty-five minutes; 121 one prisoner, executed in Utah in 1859, went on speaking for four hours. 122

At the turn of the century, when executions were moved behind prison walls, 123 the dying speech grew shorter and less theatrical, 124 but the tradition did not die. Time and time again throughout the intervening years, prisoners at “private” executions have uttered a dying speech to the assembled witnesses. 125 Since those witnesses invariably include
representatives of the news media, the condemned is still afforded a conduit by which to address the citizenry—just as he did in centuries past when they crowded around the scaffold to hear his parting words or purchased the pamphlets that printed them. The essence of that tradition is the privilege to make a spontaneous, unedited speech with one’s dying breath. Indeed, these were the very qualities that riveted the crowd’s attention when the prisoner began to speak. And if he could rise to the occasion, such a platform gave the speaker a unique opportunity to inspire. For radical labor leader William D. Haywood, the last words of August Spies were a galvanizing moment in his life. Shouting from the scaffold as the Haymarket Defendants were fitted with nooses, Spies declared: “The time will come when our silence will be more powerful than the voices you strangle today.” Those words, recalled Haywood, were “a turning point in my life.” He went on to form and lead the Industrial Workers of the World.

Having surveyed the pertinent history, this Article has shown that current policies restricting last words would stamp out a privilege that condemned prisoners have enjoyed for at least 500 years. The privilege afforded Anne Boleyn in 1536, invoked by Sir Walter Raleigh in 1618, and extended

supra note 98, at 42–43; William Kemmler, the first man to die in the electric chair, executed at Sing Sing in 1890, DRIMMER, supra note 1, at 6; Sacco and Vanzetti, executed in Massachusetts in 1927, id. at 34–36; the Clutter murderers, who prompted Truman Capote to write IN COLD BLOOD, executed in Kansas in 1965, id. at 178–79; and Charlie Brooks, the first prisoner to die by lethal injection, id. at 74. 126. See, e.g., OHIO REV. CODE ANN. § 2949.25(A)(7) (1997) (authorizing the attendance of media representatives at executions).

127. GATRELL, supra note 8, at 89, 355.


129. GATRELL, supra note 8, at 36; Madow, supra note 103, at 483–85.

130. See Madow, supra note 103, at 484 (“[T]he mere possibility that a condemned man, with ‘nothing more to lose,’ might ‘curse the judges, the laws, the government and religion’ probably supplied much of the dramatic suspense of these occasions.”) (quoting MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 60 (Alan Sheridan trans., 1977) (1975)).

131. AVRICH, supra note 23, at 434. Spies was one of four anarchist leaders hanged in Chicago in 1887. Id. at xi, 260–93.

132. Id. at 434; DAVID, supra note 23, at 463.

133. AVRICH, supra note 23, at 434 (footnote omitted).


135. PARRY, supra note 6, at 132–33; BRYAN, supra note 6, at 79.
by General George Washington to a British spy in 1780\textsuperscript{137} is the same privilege consistently honored today in Texas.\textsuperscript{138} When a privilege has existed for so long; when it has crossed the Atlantic and taken root in our soil; when it has survived revolution, civil war, and the social upheavals of half a millenium, that privilege may safely be deemed a legal right. Indeed, how many of our \textit{established} rights can claim the same lineage in history and tradition?

\section*{B. The Right of Allocution as a Compelling Parallel}

If our courts are at all reluctant to recognize such a right, they need look no further than the right of allocution—the right to speak before one is sentenced.\textsuperscript{139} Like last words, allocution originated as a privilege, emerging from early English tradition.\textsuperscript{140} Like last words, allocution extends to criminal defendants, affording them an opportunity to be heard. Like last words, allocution arises in the moments just before a final disposition of the case. And, like last words, allocution rests upon a lineage that goes back hundreds of years.\textsuperscript{141} Early English authors like Hale,\textsuperscript{142} Blackstone,\textsuperscript{143} and Chitty\textsuperscript{144} refer to allocution as a mandatory and well-established component
of criminal trials. As far back as the sixteenth century, English tribunals were honoring the privilege to speak before sentencing. As early as 1689, English courts had recognized that a judge’s failure to ask the defendant if he had anything to say in the moments before sentencing required reversal.

Those deep historical roots prompted the United States Supreme Court to recognize an affirmative right of allocution. That right is now expressly protected by the Federal Rules of Criminal Procedure, and federal circuit courts consistently treat the violation of that right as reversible error. Holding that the right of allocution must be afforded the defendant personally and that it will not suffice merely to invite an address by counsel, the Supreme Court observed: “The most persuasive counsel may not be

Before judgment is pronounced upon the defendant . . . [i]t is now indispensably necessary . . . that the defendant should be asked by the clerk if he has any thing to say why judgment of death should not be pronounced on him; and it is material that this appear upon the record to have been done; and its omission after judgment in high treason will be a sufficient ground for the reversal of the attainder.

Id. (footnotes omitted).

145. *E.g.*, 1 CABBETT’S, *supra* note 2, at 1141, 1154–55 (discussing the trial of Edward Abington (Q.B. 1586)).

146. Anonymous, 87 Eng. Rep. 175, 175 (K.B. 1689); The King v. Geary, 91 Eng. Rep. 532, 532–33 (K.B. 1689); accord The King v. Speke, 91 Eng. Rep. 872, 872 (K.B. 1694). Defense counsel in the *Geary* case recalled that he had asserted four assignments of error, the fourth being that his client had been denied the right of allocution prior to sentencing. The King’s Bench reversed the judgment because “[a]ll held the last to be a fatal exception.” The King v. Geary, 89 Eng. Rep. 495, 495 (K.B. 1689).

147. Green v. United States, 365 U.S. 301, 304 (1961) (plurality opinion) (Frankfurter, J.) (recognizing a right of allocation under American law that is traceable to English common law precedent from the seventeenth century); accord Boardman v. Estelle, 957 F.2d 1523, 1530 (9th Cir. 1992) (holding that allocation “is a right guaranteed by the due process clause of the Constitution”); United States v. Jackson, 923 F.2d 1494, 1496 (11th Cir. 1991) (“A defendant is entitled to be present when his sentence is imposed, and this right to be present and speak is constitutionally based.”) (citations omitted); Ashe v. North Carolina, 586 F.2d 334, 336 (4th Cir. 1978) (“Petitioners contend that refusal of a defendant’s request to speak to the sentencing court constitutes a denial of due process under the fourteenth amendment, and we agree.”); cf. Groppi v. Leslie, 404 U.S. 496, 501–04 (1972) (holding that contempt proceedings by Wisconsin state legislature violated the 14th Amendment’s Due Process Clause by denying the contemnor his right of allocation).

148. *FED. R. CRIM. P.* 32(c)(3)(C) (specifying that “[b]efore imposing sentence, the court must . . . address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence”). At the state level, allocation “is recognized in most jurisdictions by court rule or statute and in some states by the state constitution.” LAFAVE ET AL, *supra* note 139, § 26.4(g) at 1231.

149. See, e.g., United States v. De Alba Pagan, 33 F.3d 125, 129–30 (1st Cir. 1994); United States v. Adams, 252 F.3d 276, 289 (3d Cir. 2001); United States v. Myers, 150 F.3d 459, 463 (5th Cir. 1998); United States v. Riascos-Suarez, 73 F.3d 616, 627 (6th Cir. 1996); United States v. Patterson, 128 F.3d 1259, 1261 (8th Cir. 1997) (per curiam).
able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.\textsuperscript{150} That observation applies with equal force to a condemned prisoner's last words.\textsuperscript{151}

Given the striking similarities between allocution and last words, there is no principled reason for denying one while recognizing the other. Our courts, following the path laid down in the allocution precedents, should not hesitate to recognize an affirmative right to utter one's last words in the moments before being executed.

IV. ANALYSIS: APPLYING THE FIRST AMENDMENT TO REGULATIONS THAT RESTRICT A CONDEMNED PRISONER'S LAST WORDS

This Article discusses a constitutional question of first impression. No judicial decision has come to our attention addressing the government's power to restrict the last words of a condemned prisoner.\textsuperscript{152} No court has ever decided whether there exists a First Amendment "right" to utter one's last words free from state censorship. Though such a right has yet to be recognized, the strongest basis for any right is whether it has been honored from time immemorial\textsuperscript{153}—and this is certainly true of the privilege to make a last dying speech. For centuries, Anglo-American historical tradition has afforded the condemned a consistent privilege to address the spectators at

\textsuperscript{150} Green, 365 U.S. at 304.

\textsuperscript{151} Indeed, the allocation statements of the Branch Davidian defendants, available at http://www.cia.com.au/serendipity/waco/allocut.htm (last visited July 10, 2001), are remarkably similar to death chamber utterances where prisoners profess their innocence. E.g., supra note 16. In both situations, the speaker expresses outrage at governmental misconduct in a uniquely personal address that no other speaker and no other medium could ever equal.


\textsuperscript{153} In Hague v. CIO, 307 U.S. 496, 515 (1939), where the Supreme Court first recognized an affirmative right to use streets, sidewalks, and public parks for assembly and debate on public issues, Justice Roberts observed:

\textbf{[Streets and parks] have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.}

\textit{Id.} at 515.
his execution—a privilege not just to speak but to speak offensively, even seditiously.\textsuperscript{154} It would be difficult to imagine a speech right with deeper historical roots. Accordingly, this Article will perform an original intent analysis,\textsuperscript{155} arguing that the privilege to utter a dying speech was more firmly established by 1791 than most, if not all, of the expressive freedoms recognized today.

Before delving into original intent, this section of the Article will proceed as follows. It will begin with “first principles,”\textsuperscript{156} examining the censorship of last words in terms of the basic reasons that our law protects free expression. Then, it will demonstrate that the restrictive policies\textsuperscript{157} outlined in Section II of this Article are vulnerable to challenge under a variety of First Amendment doctrines:

**Prior Restraint.\textsuperscript{158}** In two different respects, these policies operate as unconstitutional prior restraints. They do so, first, by giving the warden advance review and approval power over the prisoner’s statement. Such power is akin to the vesting of unfettered discretion in a licensing official—a power that the First Amendment flatly forbids. Second, these policies operate in advance to silence the prisoner at the very end of his life, foreclosing any spontaneous communication of the unique thoughts and feelings that may occur to him as he stands on the brink of extermination.

**Content-Based Discrimination.\textsuperscript{159}** To the extent that these policies are designed to shield witnesses from unpleasant remarks by condemned prisoners, they should be struck down under the strict scrutiny reserved for content-based restrictions on speech. Ohio, for example, adopted its policy because of the communicative impact of potential statements by condemned prisoners\textsuperscript{160}—and that is the very definition of a content-based restriction.

**Public Forum Doctrine.\textsuperscript{161}** Since these policies restrict expressive access to publicly owned property, they are governed by the public forum doctrine. Under any of the three prongs of public forum analysis—governing traditional, designated, or nonpublic fora—these policies are vulnerable to

\textsuperscript{154} See GATRELL, supra note 104 and accompanying text.
\textsuperscript{155} See infra Section IV.G.
\textsuperscript{156} See infra Section IV.A.
\textsuperscript{157} When referring to “restrictive” policies, the analysis section of this Article is focusing on the policies that either bar a condemned prisoner from uttering a last dying speech inside the execution chamber (Pennsylvania, Illinois, North Carolina, South Carolina, and, until recently, Ohio, supra notes 25–29) or cause those statements to be made outside the presence or beyond the hearing of the spectators (Maryland, Virginia, California, and Nevada, supra notes 30–33).
\textsuperscript{158} See infra Section IV.B.
\textsuperscript{159} See infra Section IV.C.
\textsuperscript{160} See supra note 72 and accompanying text.
\textsuperscript{161} See infra Section IV.D.
First Amendment challenge. Through centuries of history and public custom, the gallows\textsuperscript{162} has served as a traditional—or, at the very least, a designated—public forum. To the extent that these policies are aimed at suppressing last words that are "offensive" or unpleasant, they should be struck down under the strict scrutiny that governs content-based restrictions in traditional or designated public fora. Even if the gallows is deemed a nonpublic forum, these policies violate the First Amendment by imposing viewpoint-based restrictions on such a forum. Finally, even if they are deemed content-neutral, these policies flunk the narrow tailoring and ample alternative channels requirements by blocking access to a unique and precious forum: the irreplaceable opportunity to communicate the thoughts and feelings that surface in the final moments of one's life.

Overbreadth.\textsuperscript{163} These policies run afoul of the overbreadth doctrine because, in their effort to suppress a tiny fraction of dying speeches (the very few that feature spiteful or profane remarks to the victim's family), they deny to all prisoners the opportunity to speak from the brink of death.

Prisoner Speech Cases.\textsuperscript{164} Finally, Supreme Court decisions employing a deferential standard to uphold restrictions on prisoner speech are inapplicable here because none of them involved a form of expression honored by Anglo-American governments since the sixteenth century.

\textbf{A. First Principles: To Censor Last Words is to Contradict Our Basic Reasons for Protecting Free Expression}

The first layer of analysis proceeds from first principles: Restricting the last words of a condemned prisoner is inconsistent with the basic reasons that Anglo-American law protects free expression.

What \textit{are} the reasons for protecting speech?\textsuperscript{165} Scholars have identified,\textsuperscript{166} and Supreme Court decisions reflect,\textsuperscript{167} three distinct

\footnotesize
\begin{itemize}
\item For the sake of convenience, I use the word "gallows" here to refer to the many forms (e.g., scaffold, gibbet, gas chamber, etc.) that execution sites have taken in our history.
\item See infra Section IV.E.
\item See infra Section IV.F.
\end{itemize}
justifications: (1) a \textit{search-for-truth} rationale, which holds that knowledge is best obtained through the clash of rival viewpoints in an unrestricted "marketplace of ideas"; (2) a \textit{self-governance} rationale, which holds that responsive government and enlightened public policy are best achieved through unfettered political debate; and (3) a \textit{self-fulfillment} rationale, which holds that expressive freedom is a necessary aspect of individual dignity, autonomy, and self-realization.

The search-for-truth rationale is often traced to John Stuart Mill,\textsuperscript{168} but it found eloquent expression even earlier, in the writings of Thomas

\textit{knowledge}," the "consensual participation in government," and the "dignity of self-expression").

167. Though the Court has invoked these justifications in a sporadic and sometimes overlapping manner, each of the three rationales has appeared at pivotal moments in First Amendment history. \textit{See, e.g.}, New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (invoking the search-for-truth rationale) ("The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'") (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)); Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (invoking the self-governance rationale) ("[I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected."); Cohen v. California, 403 U.S. 15 (1971) (invoking a combination of the self-governance and self-fulfillment rationales):

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

\textit{Id.} at 24.

All three rationales are eloquently combined in the seminal concurrence by Justice Brandeis in \textit{Whitney v. California}, 274 U.S. 357 (1927):

Those who won our independence believed that the final end of the state was to make men free to develop their faculties . . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

\textit{Id.} at 375 (Brandeis, J., concurring).


[T]he 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
Jefferson. Its first Supreme Court proponent was Oliver Wendell Holmes, Jr., whose seminal dissent in *Abrams v. United States* introduced the "marketplace of ideas" as a justification for protecting free expression:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Thus, the search-for-truth rationale is based upon the notion—the implausible notion, some critics assert—that good ideas will prevail over bad ideas when juxtaposed in the marketplace of public opinion. Such a 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.


169. As Jefferson observed, "[T]he public judgment will correct false reasonings and opinions, on a full hearing of all parties." SAUL K. PADOVER, THOMAS JEFFERSON AND THE FOUNDATIONS OF AMERICAN FREEDOM 132 (1965) (quoting second inaugural address). See also Whitney, 274 U.S. at 375 n.3 (Brandeis, J., concurring) (quoting Jefferson's first inaugural address) ("If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.").

170. 250 U.S. 616 (1919) (upholding Sedition Act convictions of six defendants who, in opposition to U.S. military intervention against the Bolshevik Revolution in Russia, printed and distributed leaflets in New York City denouncing the incursion, advocating solidarity with Russian workers, and urging that production of ordnance and ammunition be curtailed).

171. *Id.* at 630 (Holmes, J., dissenting).

172. See, e.g., Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1130 (1979) ("It is naive to think that truth will always prevail over falsehood in a free and open encounter, for too many false ideas have captured the imagination of man."); *id.* at 1130 ("In the long run, true ideas tend to drive out false ones. The problem is that the short run may be very long ... "); Baker, *supra* note 168, at 974–81 (identifying flaws in the "marketplace of ideas" rationale—including its tendency to favor society's presently dominant groups and its erroneous assumption that public opinion is shaped solely by rational, and not also by emotional, appeals).

173. The "marketplace of ideas" theory was described with great precision by one of its harshest critics:
view leaves the government largely powerless to restrict access to that market; rather than acting as a content-conscious gatekeeper, the state must acquiesce in "the dissemination of noxious doctrine," even in "the expression of opinions that we loathe and believe to be fraught with death." Since the clash of competing viewpoints is the path to truth, "the fitting remedy for evil counsels is good ones." Fallacies are to be exposed through "more speech, not enforced silence." This search-for-truth rationale supports a prominent feature of First Amendment jurisprudence: the Supreme Court's hostility to content-based regulation.

Competition among ideas strengthens the truth and roots out error; the repeated effort to defend one's convictions serves to keep their justification alive in our minds and guards against the twin dangers of falsehood and fanaticism; to stifle a voice is to deprive mankind of its message, which, we must acknowledge, might possibly be more true than our own deeply held convictions. Just as an unfettered competition among commodities guarantees that the good products sell while the bad gather dust on the shelf, so in the intellectual marketplace the several competing ideas will be tested by us, the consumers, and the best of them will be purchased.


[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech [is accorded heightened protection] . . . . For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.


In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader . . . at times, resorts to exaggeration, to vilification . . . and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Id. at 310; accord Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (permitting the regulation of "fighting" words, and thus departing from the heightened scrutiny normally
Another influential justification for protecting speech is the self-governance rationale, which holds that unfettered political debate is essential to achieving responsive government and enlightened public policy. Supreme Court decisions evince great respect for this rationale and consistently describe political speech as occupying "the core" of First Amendment protection. The self-governance rationale has four distinct themes. First, democratic self-rule entails a process of collective decision-making that requires an informed citizenry; this deliberative process functions best in an atmosphere of unfiltered debate, where the body politic is exposed to every perspective on a given issue. Second, reserved for content-based regulations, only because such statements "are no essential part of any exposition of ideas" and are of only "slight social value as a step to truth").


181. See, e.g., Cohen, 403 U.S. at 24 ("The constitutional right of free expression ... is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity . . . ."); Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").


183. GUNTHER & SULLIVAN, supra note 165, at 1027.

184. The classic articulation of this theme comes from Alexander Meiklejohn: When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. It is that mutilation of the thinking process of the community against which the First Amendment ... is directed. The principle of the freedom of speech springs from the necessities of the program of self-government . . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26–27 (1948).

This theme is echoed in Supreme Court decisions construing the First Amendment. Whitney, 274 U.S. at 375 (Brandeis, J., concurring) ("Freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("A profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); Roth v. United States, 354 U.S. 476, 484 (1957) ("[The First
unfettered discourse on public affairs prevents the entrenchment of government power and clears the path to political change. Third, unrestricted speech serves as a check on the abuse of power by public officials. Fourth and finally, free speech promotes political stability by affording a safety valve for dissent.

Though it supplies a strong basis for protecting speech on public affairs, the self-governance rationale offers only meager support for protecting art and literature. Creative expression is embraced, however, by the last of the principal justifications for protecting speech: a self-fulfillment rationale, which holds that expressive freedom is a necessary aspect of individual dignity, autonomy, and self-realization. Under this rationale, it is not just
political speech but all forms of self-expression that warrant constitutional protection. Broad intellectual freedom—to communicate, to inquire, to create—is a concomitant to political freedom and a precondition to realizing one’s full human potential.

The search-for-truth and self-governance rationales offer strong support for unfettered speech on the death penalty—and many condemned prisoners use their last words as a plea for abolishing state executions. Such a plea, coming from a person whose own life is about to be taken, is uniquely capable of grabbing public attention and changing public sentiment. Thus, policies that restrict spontaneous, brink-of-death speeches by condemned


This self-fulfillment rationale occasionally surfaces in Supreme Court decisions. See, e.g., Whitney, 274 U.S. at 375 (Brandeis, J., concurring) (“Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . .”); Cohen, 403 U.S. at 24 (observing that the constitutional right of free expression “put[s] the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests”).

190. The Value of Free Speech, supra note 189, at 604 (“[T]he appropriate scope of the [F]irst [A]mendment protection is much broader than Bork or Meiklejohn would have it. Free speech aids all life-affecting decisionmaking, no matter how personally limited, in much the same manner in which it aids the political process . . . . There thus is no logical basis for distinguishing the role speech plays in the political process.”).

191. Id. at 601 (“[O]ur nation adopted) a democratic system [because of] an implicit belief in the worth of the individual that has [F]irst [A]mendment implications extending well beyond the borders of the political world. Indeed, political democracy is merely a means b—or, in another sense, a logical outgrowth of—the much broader value of individual self-realization.”).


193. See supra note 21 and accompanying text.
prisoners offend the search-for-truth and self-governance rationales by eliminating the most riveting form of death penalty criticism. 194

Whether our government should have the power to take a person’s life is a moral and political question that eminently deserves public debate. It is a question that implicates the search-for-truth rationale because it poses a stark and difficult choice, it is deeply divisive, and it cries out for thoughtful resolution. It is a question that implicates the self-governance rationale because it involves a matter of public policy and requires society to decide how much power we will cede to our government. Thus, two prominent rationales supporting free expression combine to suggest that speech on the death penalty should be utterly unfettered.

Many condemned prisoners use their last words to criticize the death penalty. A Georgia prisoner concluded his dying speech by declaring, “I pray that one day this country, which is supposed to be civilized, will abolish barbaric acts such as this death penalty.” 195 A Texas prisoner used his last words to assert, “This is premeditated murder by the appointed district attorney and the State of Texas.” 196 Another Texas prisoner used his dying speech to say, “I hope that one day we can look back on the evil that we’re doing now [and view it] like the witches we burned at the stake.” 197

Because they emanate from a person who stands on the brink of extermination, these utterances are more likely to influence public opinion than any billboard, banner, or editorial. No other condemnation of capital punishment is as likely to resonate in people’s minds, because in no other context is the message linked with the messenger’s death. But these utterances cannot reach the public if prison officials prohibit dying speeches. Thus, prison policies that disallow a traditional dying speech leave the public unexposed to a form of death penalty protest that is more likely than any other to command their attention. To eliminate the most

194. The search-for-truth and self-governance rationales are implicated by many other messages that prisoners choose to convey with their last words. Many prisoners use their dying speech to criticize the government, see supra note 116, to criticize the justice system, see supra note 22, or to express solidarity with a political movement or cause, see supra note 23.
196. Last Words of Some of the 99 Executed in Texas Since 1982, supra note 21. This theme—that capital punishment is institutionalized murder by the state—surfaces again and again in the dying speeches of condemned prisoners. “Remember,” said Texas inmate Robert Nelson Drew at his 1994 execution, “the death penalty is murder.” Executed Offenders Website, supra note 13. Hanbury Price, hanged in England in 1828, used his scaffold speech to declare that the government was committing murder. Gatrell, supra note 8, at 34. Gary Graham, executed in Texas in 2000, used his dying speech to describe the justice system as perpetuating the institutionalized “lynching” of impoverished blacks. Executed Offenders Website, supra note 13.
197. Executed Offenders Website, supra note 13.
riveting form of death penalty criticism is to contradict the search-for-truth and self-governance rationales by skewing the debate on capital punishment. In the words of Alexander Meiklejohn:

Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment ... is directed.*198

In addition to the search-for-truth and self-governance rationales, the self-fulfillment rationale likewise supports a First Amendment right to deliver a dying speech. The self-fulfillment rationale holds that expressive freedom is a necessary aspect of individual dignity, autonomy, and self-realization.199 This rationale is offended by policies that silence a prisoner as he stands on the brink of death—because such policies, by sending the prisoner to a muffled and anonymous end, serve to squelch his humanity and individuality. Their effect—and, undoubtedly, their design—is to throw a blanket over the fact that the government is killing a *person* here. What better way to anesthetize public perception that a human life is being taken than to bar the prisoner from placing a stamp of individuality on the proceedings? And the best way to accomplish that objective is to prevent the prisoner from speaking:

To allow the condemned to speak in the moments before his death is to acknowledge his individual existence, to confer a unique, personal identity upon him that prompts others more clearly to perceive that a person is in fact dying. Such perceptions can be inhibited by prohibiting speech, especially a *speech.*200

Arguing, then, from first principles, we see that restrictions on last words contradict the basic reasons that our law protects freedom of expression. Each of the three principal rationales supporting free speech—the search-for-truth rationale, the self-governance rationale, and the self-fulfillment rationale—is offended by policies that prohibit a traditional dying speech.

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198. MEIKLEJOHN, supra note 184, at 26.
199. See Richards, supra note 189.
MUZZLING DEATH ROW INMATES

B. Prior Restraint Analysis

These restrictive policies run afoul of the prior restraint doctrine in two different respects. First, by giving the warden advance review and approval power over the prisoner's written statement (as was attempted, at least, in Ohio), the policies offend the "unfettered discretion" prong of prior restraint precedent. Second, by foreclosing in advance any spontaneous brink-of-death utterances by condemned prisoners, the policies offend even Sir William Blackstone's narrow conception of expressive freedom.

1. The Warden's Advance Review and Approval Power as a Fatal Flaw

In reaction to the now-vilified press licensing systems of the sixteenth and seventeenth centuries, the doctrine of prior restraint imposes severe limits on the power of government to regulate speech before it is uttered or published. Any regulatory scheme that subjects expression to advance editorial review and approval flatly constitutes a prior restraint. Any prior restraint that vests "unbridled discretion" in the reviewing official "will not be tolerated."

Courts have consistently invalidated permit schemes vesting government officials with unfettered discretion to forbid or allow certain speech activities—striking down discretionary limits on parades and

201. See supra notes 70–74 and accompanying text.

202. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225–26 (1990) (identifying "two evils" in speech licensing schemes "that will not be tolerated": (1) vesting "unbridled discretion" in the licensing authority, and (2) "fail[ing] to place limits on the time within which the decisionmaker must issue the license").

203. In 1769, Blackstone observed: "The liberty of the press . . . consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." 4 BLACKSTONE, supra note 143, at 151–52.

204. Lovell v. City of Griffin, 303 U.S. 444 (1938) (striking down a licensing scheme that restricted the distribution of literature in public places—requiring written permission from, and vesting unfettered discretion in, the city manager); id. at 451–52 (invoking the English experience with press licensing, and Milton's protest against it, in asserting that a principal aim of the First Amendment was to free public expression from the prior restraint of a licensor).

205. Id. at 451–52.


207. See, e.g., City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988) (discussing a permit to place newsracks on public property); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (discussing a permit to use city auditorium).

demonstrations, sidewalk preaching and leafleting, rallies in public parks, and the use of sound amplification equipment. Any scheme that vests arbitrary discretion in the licensing official “has the potential for becoming a means of suppressing a particular point of view.”

Recall that when Ohio adopted its last words policy, prison officials asserted that the warden would enjoy “complete editorial rights” over the prisoner’s statement, with unfettered discretion to change it, cut it, summarize it, or censor it altogether. When reviewing the condemned’s written statement, they said, the warden would scan it for any passage that is “potentially offensive,” and, upon finding such a passage, would send the statement back to the prisoner with instructions to change it. Should the prisoner refuse, the warden “will have discretion to [censor] that part of the statement—or the entire text if it is potentially offensive.”

Such a policy, vesting unfettered editorial discretion in the warden, is utterly inconsistent with the prior restraint precedents set forth above. By subjecting speech—and not any speech, by the way, but a 500-year-old tradition of expressive freedom—to this sort of editorial meddling, the policy offends the First Amendment.

2. Foreclosing Near-Death Communication as a Fatal Flaw

The policies that bar or disable the oral communication of last words from inside the death chamber—even if they allow some sort of written statement to be submitted beforehand—constitute a prior restraint on speech. This is because they operate in advance to silence the prisoner at the very end of his life. That moment—that existential precipice, that climax—is qualitatively different from any other moment we experience. It is certainly different from the comparative tranquility that the prisoner experiences in his cell. Who is to say that the difference between those situations will not produce differences in the content of a prisoner’s last words? What a prisoner might write in the isolation of his cell six hours

211. E.g., Schneider v. New Jersey, 308 U.S. 147 (1939).
215. Last Words Will Be Posthumous, supra note 29.
216. No Last Words, supra note 29; Ohio to Stifle Last Words, supra note 29; Last Words Will Be Posthumous, supra note 29.
218. Id.
before the execution will likely be a far cry from the torrent of thoughts and feelings that surge inside him as he stands on the brink of extermination. To silence him at that moment—and to kill him in the next—is to cut off his only chance to communicate those special thoughts and feelings.

Thus, these policies foreclose in advance an entire category of speech, and thereby offend even Blackstone's narrow conception of expressive freedom as liberty solely from prior restraint.219

C. Content-Neutrality Analysis

What unites these restrictive policies is the effort to filter or sanitize the prisoner's last words—to make them palatable to the victim's family and, by extension, to the public. The aim of the Ohio policy, remember, was to shield the friends and relatives of murder victims from "potentially spiteful, profane, or abusive remarks" by those condemned to die.220 If that is the purpose behind these policies, then they are content-based (indeed, viewpoint-based) restrictions on expression. By its own admission, Ohio adopted its policy because of the communicative impact of potential statements by condemned prisoners—and that is the very definition of a content-based restriction.

"It is axiomatic," the Supreme Court has stressed, "that the government may not regulate speech based on its substantive content or the message it conveys."221 Content-based restrictions are subject to strict scrutiny.222 In gauging content-neutrality, the controlling factor is the government's purpose or intent.223 A restriction will be deemed content-based if the government is regulating speech because of its communicative impact,224 or out of disagreement with the message it conveys.225 Indeed, "[d]iscrimination against speech because of its message is presumed to be unconstitutional."226 When government targets not subject matter but, even

219. See supra note 203.
220. See supra note 72 and accompanying text.
221. Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 828 (1995); see also O'Neill, supra note 206, at 235–38 (offering an expository account of content-neutrality analysis).
222. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995). To survive judicial review under strict scrutiny, the speech restriction must be "necessary, and narrowly drawn, to serve a compelling state interest." Id.
225. Ward, 491 U.S. at 791.
more narrowly, particular views on a given subject, the First Amendment violation "is all the more blatant." Viewpoint discrimination is thus an egregious form of content discrimination." Accordingly, "the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."

Here, the government's purpose—according to its own public statements—is to suppress particular meanings, to silence particular sentiments. The prisoner is barred from delivering a spontaneous, unedited speech out of fear that he will say the wrong thing, out of fear that the witnesses will be wounded or disturbed by his message. Thus, Ohio's policy (and, by extension, the other restrictive policies identified in Section II, even if their promulgation did not produce an Ohio-type smoking gun) is presumptively unconstitutional as a viewpoint-based restriction, or, at the very least, is subject to strict scrutiny as a content-based restriction.

D. Public Forum Analysis

Access to public property for speech-related activity is governed by the public forum doctrine. Since the execution chamber is a publicly-owned space, and since the question here involves speech access to that space, the instant policies implicate the public forum doctrine by restricting the expressive use of that space. Under any of the three prongs of public forum analysis—governing traditional, designated, or nonpublic fora—these policies violate the First Amendment. Through centuries of history and public custom, the gallows has served as a traditional—or, at the very least, a designated—public forum. To the extent that these policies are aimed at suppressing last words that are "offensive" or unpleasant, they should be struck down under the strict scrutiny that governs content-based restrictions in traditional or designated public fora. Even if the gallows is deemed a nonpublic forum, these policies violate the First Amendment by imposing viewpoint-based restrictions on such a forum. Finally, even if they are

227. Rosenberger, 515 U.S. at 829.
228. Id.
229. Id.
230. See supra notes 72–74 and accompanying text.
232. See supra Section IV.C (establishing that these restrictive policies are, at the very least, content-based—and, given their preoccupation with silencing offensive last words, are more appropriately regarded as viewpoint-based).
deemed content-neutral, these policies flunk the narrow tailoring and ample alternative channels requirements by blocking access to a unique and precious forum: the irreplaceable opportunity to communicate the thoughts and feelings that surface in the final moments of one's life.

Before elaborating these arguments, we should begin with the black-letter principles of the public forum doctrine. The Supreme Court has adopted a "forum-based" approach to assessing speech restrictions that the government seeks to place on the use of its property. 233 Government-owned property has been divided into three categories for purposes of forum analysis: (1) "traditional" public fora; (2) "designated" public fora; and (3) "nonpublic" fora, the last category comprising all of the government property not embraced within the first two. 234

Traditional public fora are places that "by long tradition or by government fiat have been devoted to assembly and debate" 235—including, for example, such areas as public streets, parks, and sidewalks. 236 Designated public fora are places that the government "has opened for expressive activity by part or all of the public" 237—including, for example, university meeting facilities 238 and municipal theaters. 239 Nonpublic fora are places that, by tradition, nature, or design, "are not appropriate platforms for unrestrained communication" 234—including, for example, military installations 240 and federal office buildings. 241

In forum analysis, the government's power to impose speech restrictions depends on how the affected property is categorized; the level of judicial scrutiny hinges on whether the property is deemed a traditional, designated, or nonpublic forum. 242 Traditional public fora "may be regulated only via content-neutral time, place, and manner restrictions." 243 Governmental restrictions on the content of public forum speech are presumptively unconstitutional; 244 they will be struck down unless shown to be "necessary, and narrowly drawn, to serve a compelling state interest." 245

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234. Krishna Consciousness, 505 U.S. at 678–79.
237. Krishna Consciousness, 505 U.S. at 678.
242. See United States v. Sachs, 679 F.2d 1015 (1st Cir. 1982).
243. Krishna Consciousness, 505 U.S. at 678–79.
244. Paulsen, 925 F.2d at 69.
246. Pinette, 515 U.S. at 761.
standards govern the second category: restrictions on speech in designated public fora.\textsuperscript{247} Though the government may limit access to certain speakers (for example, student groups)\textsuperscript{248} or certain subjects (for example, school board business),\textsuperscript{249} and though it need not keep such a forum open indefinitely,\textsuperscript{250} its restrictions must be applied evenhandedly to all similarly situated parties.\textsuperscript{251} Judicial scrutiny is substantially relaxed vis-a-vis the third category: restrictions on speech in nonpublic fora.\textsuperscript{252} A reasonableness standard generally prevails here, but the government may not impose viewpoint-based restrictions.\textsuperscript{253}

1. The Death Chamber as a Traditional Public Forum

This Article has painstakingly demonstrated that the gallows has served for centuries as a singular forum for expression.\textsuperscript{254} Throughout the sixteenth century—at a time when speech and press were subject to ferocious restrictions—prisoners were consistently afforded the freedom to deliver a scaffold speech.\textsuperscript{256} That freedom, visible in England as early as 1388,\textsuperscript{257} was being honored here in America more than a century before the First Amendment’s adoption.\textsuperscript{258} The freedom afforded Guy Fawkes and the Gunpowder Plot conspirators in 1606\textsuperscript{259} is the same freedom consistently honored today at executions in Texas,\textsuperscript{260} Florida,\textsuperscript{261} and Louisiana.\textsuperscript{262} This

\begin{itemize}
  \item 247. Krishna Consciousness, 505 U.S. at 678; Cornelius, 473 U.S. at 800; Perry, 460 U.S. at 46.
  \item 250. Perry, 460 U.S. at 46.
  \item 251. Id. at 45–46, 48.
  \item 253. See id.
  \item 254. See supra Section III.A.
  \item 255. For example, in 1579, the right hand of an author was chopped off as punishment for his written attack on the proposed marriage between Queen Elizabeth and the Duke of Anjou. Fredrick Seaton Siebert, Freedom of the Press in England 91–92 (1965). In 1603, at the end of Elizabeth’s reign, a printer was hanged, drawn, and quartered for publishing a book that opposed the ascension of James I to the throne. Nat Hentoff, The First Freedom 57 (1980).
  \item 256. See supra notes 77–89 and accompanying text.
  \item 257. See supra note 2 and accompanying text.
  \item 258. One sees the privilege being honored at a hanging on Boston Common in 1659—more than 100 years before the First Amendment’s ratification in 1791. Drimmer, supra note 1, at 138–39.
  \item 259. Fraser, supra note 3, at 229–34, 265.
  \item 260. See supra notes 46–49 and accompanying text.
  \item 261. See supra note 50.
  \item 262. See supra note 51.
\end{itemize}
expressive tradition is so deeply ingrained in our history and culture that we may safely deem the gallows a traditional public forum. Indeed, the gallows qualifies as a traditional public forum even under the restrictive standard enunciated by Chief Justice Rehnquist in *International Society for Krishna Consciousness, Inc. v. Lee*.

In *Krishna Consciousness*, the Chief Justice held that airport terminals are nonpublic fora because they are modern and therefore cannot fit the classic description of streets, parks, and sidewalks announced in *Hague v. CIO* as “immemorially . . . time out of mind” devoted to public discourse. Moreover, he concluded, airports cannot be deemed traditional public fora because their principal purpose is not to promote the free exchange of ideas. Thus, the Chief Justice substantially narrowed the concept of the public forum by transforming *Hague’s descriptions* of streets, parks, and sidewalks into prerequisites that must be satisfied in order to qualify for traditional public forum status. Writing separately, Justice Kennedy complained that this heavy emphasis on historical tradition “leaves almost no scope for the development of new public forums.”

But even the restrictive analysis employed by the Chief Justice cannot deprive the gallows of its rightful status as a traditional public forum. No less than streets, parks, and sidewalks, the gallows has served “immemorially . . . time out of mind” as a platform for free expression. This Article has demonstrated that the expressive traditions surrounding the gallows are as old as they are rich, stretching back at least 500 years and embracing even seditious speech long before comparable expression was afforded any meaningful protection by the Supreme Court. Indeed, given the great age of the gallows as a rostrum for individual expression, and given its consistent use as a medium for communicating with the

265. Id. at 515.
267. Id. at 680–81.
268. Id. at 683.
269. Id. at 695 (Kennedy, J., concurring in the judgment).
271. See supra Section III.A.
272. Traceable to 1388, the privilege was consistently honored at English executions throughout the 1500s. See supra notes 2–3 and accompanying text.
273. See supra note 104 and accompanying text.
274. It was not until the mid-20th century that the Supreme Court developed significant protections for speech. E.g., *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) (inaugurating the development of the hostile audience precedents and affording meaningful protection for provocative speech). By contrast, the tradition of seditious scaffold speeches is traceable, conservatively, back to the 1700s. See supra note 104 and accompanying text.
public, it qualifies even more readily than streets and sidewalks as a traditional public forum under the Rehnquist standard. As Justice Kennedy observed, the "principal purpose of streets and sidewalks . . . is to facilitate transportation, not public discourse."\(^{275}\) By contrast, the gallows really has served—literally—as a platform for speech making. Though it functions, certainly, as a killing apparatus, it is used just as frequently as a stage for oratory—and this sets it apart from streets and sidewalks, which are used only occasionally for expressive activities. Historically, the scaffold speech was as much a part of the spectacle as the killing that followed it.\(^{276}\) The spectators who attended an execution came with a keen interest in hearing what the condemned would say.\(^{277}\) Thus, given its historical function as a platform for speech making, the gallows readily qualifies as a traditional public forum.

Since the gallows is a traditional public forum; since, within such a forum, content-based restrictions are presumptively unconstitutional;\(^{278}\) and since, as we have already shown, last words policies are content-restrictive (indeed, viewpoint-restrictive),\(^{279}\) such policies are void as a matter of law.

2. The Death Chamber as a Designated Public Forum

Even if our courts reject the notion that the gallows is a traditional public forum, it certainly satisfies the definition of a designated public forum as one that the government "has opened for expressive activity."\(^{280}\) Five hundred years of scaffold speeches did not happen by accident; such a tradition could never have developed without the affirmative dedication of the state. That type of purposeful cooperation, transcending many governments and many eras, is more than enough to create a designated public forum.

In divining the requisite intent to create a designated public forum, the Court will look to the government’s “policy and practice” vis-a-vis the property;\(^{281}\) it will likewise inquire whether the property is by nature “compatib[le] with expressive activity.”\(^{282}\) As the Court observed in *Cornelius*, “We will not find that a public forum has been created in the


\(^{276}\) See supra notes 107–09 and accompanying text.

\(^{277}\) Id.


\(^{279}\) See supra Section IV.C.

\(^{280}\) Krishna Consciousness, 505 U.S. at 678.


\(^{282}\) Id.
face of clear evidence of a contrary intent, nor will we infer that the
government intended to create a public forum when the nature of the
property is inconsistent with expressive activity."^{283}

Both of these factors—the government’s policy and practice vis-a-vis the
property, and the property’s free-speech compatibility—must be analyzed in
light of the centuries of tradition that this Article has charted. Over the
course of 500 years, Anglo-American governments have consistently
allowed condemned prisoners to make expressive use of the gallows. That
use, over and over again through the centuries, shows that the gallows are
perfectly compatible with expressive activity. As Justice Kennedy observed
in *Krishna Consciousness*, "[G]overnment property of a type which by
history and tradition has been available for speech activity must *continue*
to be recognized as a public forum."^{284} Thus, our courts should not hesitate to
treat the gallows as a designated public forum.

In designated (as in traditional) public fora, regulations that single out
particular messages for suppression are subject to strict scrutiny.^{285} Since,
as we have already shown,^{286} the regulatory *purpose* here is to silence
certain messages, these policies are equally vulnerable to First Amendment
challenge if the gallows is deemed a designated public forum.

3. The Death Chamber as a Nonpublic Forum

Even if our courts conclude that the gallows should be deemed a
**nonpublic** forum, these policies are constitutionally suspect. Although a
reasonableness test normally governs nonpublic fora, the government may
not impose *viewpoint*-based restrictions there.^{287} Since (as prison officials
have publicly acknowledged^{288}) the very purpose of these policies is to
suppress particular messages, they constitute a viewpoint-based restriction
that is impermissible even in a nonpublic forum.

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283. *Id.* at 803.
284. 505 U.S. at 698 (Kennedy, J., concurring in the judgment) (emphasis added).
285. 505 U.S. at 678–79.
286. *See supra* Section IV.C.
4. Even if a Ban on Dying Speeches Were Somehow Deemed Content-Neutral, It Would Flunk the Narrow Tailoring and Ample Alternative Channels Requirements.

Finally, even if such a policy were to be deemed a content-neutral time, place, and manner regulation, it would flunk the narrow tailoring and ample alternative channels requirements by blocking access to a unique and precious forum: the irreplaceable opportunity to communicate the thoughts and feelings that surface in the final moments of one’s life.

Time, place, and manner regulations are governed by a form of intermediate scrutiny that has three distinct prongs. To survive judicial review, such a regulation: (1) must be content-neutral (that is, it must be justified by the government without reference to the content of the regulated speech); (2) must be narrowly tailored to serve a significant governmental interest; and (3) must leave open ample alternative channels for communicating the information.\(^{289}\) Merely for purposes of argument, we are assuming here that the first prong—content-neutrality—has been satisfied. An examination of the second and third prongs will reveal that an outright ban on dying speeches cannot satisfy the narrow tailoring and ample alternative channels requirements.

It must be admitted that the second prong—narrow tailoring—is by no means stringently enforced. Indeed, the Supreme Court watered down this requirement in *Ward v. Rock Against Racism*,\(^ {290}\) stressing that time, place, and manner regulations need not be the least restrictive or least intrusive means of achieving the government’s end; rather, “the requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’”\(^ {291}\) But regulations will fail this test if they choke off particular forms of expressive activity—imposing, for example, sweeping prohibitions on parades,\(^ {292}\) demonstrations,\(^ {293}\) residential


\(^{290}\) 491 U.S. 781 (1989).


\(^{292}\) E.g., Sixteenth of Sept. Planning Comm., Inc. v. City of Denver, 474 F. Supp. 1333 (D. Colo. 1979) (striking down, as impermissibly broad, a time, place, and manner restriction on parades in downtown Denver; the regulation banned parades anywhere within the seven-square-block central business district on all workdays from 7:00 a.m. to 6:00 p.m.).

\(^{293}\) E.g., United Food & Commercial Workers Union Local 442 v. City of Valdosta, 861 F. Supp. 1570, 1580–81 (M.D. Ga. 1994) (striking down outright ban on public assemblies in all
picketing,\textsuperscript{294} door-to-door leafleting,\textsuperscript{295} or public handbilling.\textsuperscript{296} A good example is \textit{Bery v. City of New York},\textsuperscript{297} where the Second Circuit enjoined enforcement of an ordinance that prohibited visual artists from exhibiting or selling their work in public places without a general vendor’s license. The court held that the ordinance was not narrowly tailored, but served instead as “a \textit{de facto} bar preventing visual artists from exhibiting and selling their art in public areas of New York,” because it placed an exceedingly low ceiling on the number of available permits, creating a waiting list so long that even the City conceded that plaintiffs’ prospects of securing a license were nonexistent.\textsuperscript{298}

In each of these cases, the regulation was struck down because it foreclosed an entire avenue of communication. And that is exactly the effect of any prohibition on dying speeches—except that, in our context, the injury is all the more irreparable because the speaker is silenced on the very brink of death. He is deprived of the one and only chance to communicate the unique thoughts and feelings that surge inside him at the culmination of his life. An outright ban on parading or leafleting, while certainly unconstitutional, can only pale in comparison. After all, the thwarted speakers in those successful challenges remain alive, able to march or picket or protest another day.

Prong three requires that the regulation must “‘leave open ample alternative channels for communicat[ing]’ the speaker’s message.”\textsuperscript{299} In applying this requirement, it must be borne in mind that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”\textsuperscript{300} Though a speech restriction may run afoul of this requirement if it precludes “forms of
expression that are much less expensive than feasible alternatives," the basic test for gauging the sufficiency of alternative channels is whether the speaker is afforded "a forum that is accessible and where the intended audience is expected to pass." A speech restriction does not leave open ample alternative channels if the speaker is left unable to reach the intended audience. Thus, a restriction may be invalid if it deprives speakers of "a uniquely valuable or important mode of communication," or if it "threaten[s]" their "ability to communicate effectively." These principles are illustrated by Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago. In that case, a civil rights organization sought to march through a white neighborhood, its previous foray there having been curtailed when bystanders pelted the procession with rocks, bricks, and explosive devices. City officials denied plaintiffs a permit for a second march through the same neighborhood, proposing instead an alternate route through an all-black neighborhood. Since the whole point of plaintiffs' march was to publicize and protest a pattern of violence against blacks attempting to reside in or travel through the specified neighborhood, the court held that the city's proposal for an alternate route—taking plaintiffs away from that neighborhood and away from their intended audience—was constitutionally inadequate as an alternative channel of communication.

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301. Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 812 n.30 (1984); accord Bay Area Peace Navy v. United States, 914 F.2d 1224, 1229 n.3 (9th Cir. 1990); City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547, 1558 (7th Cir. 1986), aff'd mem., 479 U.S. 1048 (1987); see, e.g., Martin v. City of Struthers, 319 U.S. 141, 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people."). But the Supreme Court has stressed that its "special solicitude" for inexpensive forms of communication "has practical boundaries." Taxpayers for Vincent, 466 U.S. at 812 n.30 (citing Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949) ("That more people may be more easily and cheaply reached by sound trucks . . . is not enough to [insulate that method of communication from regulatory restrictions] when easy means of publicity are open.") and Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 549-50 (1981) (Stevens, J., dissenting in part) (ban on graffiti constitutionally permissible even though some creators of graffiti may have no equally effective alternative means of public expression)).


303. Bay Area Peace Navy, 914 F.2d at 1229; accord Taxpayers for Vincent, 466 U.S. at 812 ("While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate.") (citations omitted).

304. Taxpayers for Vincent, 466 U.S. at 812.

305. Id.


307. Id. at 672.

308. Id. at 672, 674.

309. Id. at 673-74.
Application of this prong is likewise fatal to any prohibition on dying speeches. While prison officials will insist that they can satisfy this requirement by allowing the prisoner to write out his “last” words in his cell, a brink-of-death utterance is qualitatively different from any other. To block it is certainly to deprive the speaker of “a uniquely valuable or important mode of communication,” and thus to offend the ample alternative channels requirement. There is simply no substitute for speaking at the very moment of one’s demise; there is simply no existential equivalent. Because that moment is so unique, it is all too likely that the content of one’s remarks will be different in the heart-pounding atmosphere of the death chamber than they would be in the comparative calm of one’s cell. Accordingly, prohibitions on dying speeches flunk the ample alternative channels requirement because there can never be a meaningful alternative to one’s last parting words.

E. Overbreadth Analysis

Last words policies run afoul of the overbreadth doctrine because, in their effort to suppress a tiny fraction of dying speeches (the very few that feature spiteful or profane remarks to the victim’s family), they deny to all prisoners the opportunity to speak from the brink of death.

The overbreadth doctrine may be invoked to strike down restrictions on speech that are worded in such a way that even protected expression is left vulnerable to punishment. An excellent example of the doctrine is Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc., where the Supreme Court struck down, on overbreadth grounds, a regulation prohibiting any person “to engage in First Amendment activities within the Central Terminal Area at Los Angeles International Airport.” The Court held that this regulation was fatally overbroad because “it prohibits even

310. Taxpayers for Vincent, 466 U.S. at 812.
311. E.g., Reno v. ACLU, 521 U.S. 844 (1997) (striking down—as facially overbroad—provisions of the Communications Decency Act, a federal statute that criminalized the Internet transmission of “indecent” materials to persons under the age of eighteen); id. at 874 (“In order to deny minors access to potentially harmful speech, the [Act] effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.”); City of Houston v. Hill, 482 U.S. 451 (1987) (striking down—as facially overbroad—an ordinance prohibiting speech that “in any manner” interrupts a police officer in performing his duties; the ordinance was so broadly worded that it was violated every day and effectively gave police un-fettered discretion to arrest individuals for words or conduct that merely annoyed or offended them). See O’Neill, supra note 206, at 278–82 (offering an expository account of the overbreadth doctrine).
313. Id. at 571.
talking and reading, or the wearing of campaign buttons or symbolic clothing." 314

Though a regulation must be "substantially" overbroad to be invalidated, 315 the total ban on death chamber speeches imposed by these policies satisfies that test. Here the government is targeting those extremely rare instances where prisoners are spiteful or abusive toward the victim’s family 316—a fact pattern so rare that one does not find a single example of it in the hundreds of executions conducted in Texas 317—but the government is regulating the problem by taking away every inmate’s right to utter a death chamber speech. This would seem the very definition of "substantial" overbreadth.

An example of how the Court applies the requirement of substantial overbreadth is seen in New York v. Ferber, 318 where it rejected an overbreadth challenge to a statute that prohibited persons from knowingly promoting a sexual performance by a child under the age of sixteen. While recognizing that this statute might reach some protected expression (like medical textbooks or pictorials in National Geographic), the Court observed: "[W]e seriously doubt . . . that these arguably impermissible applications . . . amount to more than a tiny fraction of the materials within the statute’s reach." 319 Thus, a statute will be deemed unconstitutionally overbroad only when a substantial portion of the utterances within its reach are protected by the First Amendment. 320

Unlike Ferber, the vast majority of utterances barred by last words policies are protected by the First Amendment. The Ferber statute targeted child pornography, an utterly unprotected category of speech. In sharp contrast, dying speeches almost never cross the line into unprotected territory. They often feature protestations of innocence, 321 lamentations of a wasted life, 322 expressions of apology to the victim’s family, 323 or loving good-byes to next of kin. 324 Even if they did feature spiteful or abusive statements, there is no good reason to suppose that such utterances are

314. Id. at 575.
316. See supra note 72 and accompanying text.
317. The author has read the last words of every condemned prisoner executed in Texas since 1982—and he has not found a single instance where the prisoner lashed out at the victim’s family. See Executed Offenders Website, supra note 13.
319. Id. at 773.
321. See supra note 16 and accompanying text.
322. See supra note 18 and accompanying text.
323. See supra note 14 and accompanying text.
324. See supra note 15 and accompanying text.
unprotected.\textsuperscript{325} The unprotected category of “fighting words” requires an immediate and personal invitation to fisticuffs\textsuperscript{326}—which is not something that a condemned prisoner, strapped to a gurney behind thick glass walls, is in any position to do. Likewise, the unprotected category of obscenity\textsuperscript{327} would require a very different \textit{mise en scene}. Ultimately, it is difficult even to imagine a dying speech that would cross the line into unprotected territory. How can the government survive an overbreadth challenge if it cannot point to \textit{any} unprotected speech lying at the center of its regulatory target?

\textbf{F. Restricted Environment Analysis}

Supreme Court decisions upholding restrictions on prisoner speech do not diminish the constitutional infirmity of these policies. Those cases—involving efforts by prisoners to form a union,\textsuperscript{328} to correspond with inmates at other prisons,\textsuperscript{329} or to hold face-to-face media interviews\textsuperscript{330}—cannot save these policies because, in sharp contrast to the issue here, none of them involved a form of expression permitted by Anglo-American governments since the sixteenth century.

In \textit{Jones v. North Carolina Prisoners’ Labor Union, Inc.},\textsuperscript{331} the Supreme Court upheld direct restrictions on efforts by prison inmates to form and operate a union—including a ban on soliciting other inmates to join the union, meetings among union members, and bulk mailings concerning the union from outside sources.\textsuperscript{332} Delivering the opinion of the Court, Justice Rehnquist established an extremely deferential standard for gauging restrictions on inmate speech.\textsuperscript{333} Recognizing “the wide-ranging deference

\begin{itemize}
\item \textsuperscript{325} If \textit{sedition} statements fell within the tradition’s protection as far back as the 1700s (see \textit{Gatrell}, supra note 8, at 36), how can spiteful or unpleasant remarks be deemed unprotected now?
\item \textsuperscript{326} Texas v. Johnson, 491 U.S. 397, 409 (1989) (limiting the fighting words doctrine to “a direct personal insult or an invitation to exchange fisticuffs”); Gooding v. Wilson, 405 U.S. 518, 524 (1972) (holding that, for the fighting words doctrine to apply, a statement must be specifically and individually directed to a particular target); Cohen v. California, 403 U.S. 15, 20 (1971) (finding a provocative epithet insufficient for fighting words to apply and requiring a more direct personal affront).
\item \textsuperscript{327} See \textit{Miller v. California}, 413 U.S. 15, 24 (1973).
\item \textsuperscript{329} Turner v. Safley, 482 U.S. 78 (1987).
\item \textsuperscript{330} Pell v. Procunier, 417 U.S. 817 (1974).
\item \textsuperscript{331} 433 U.S. 119 (1977).
\item \textsuperscript{332} \textit{Id.}
\item \textsuperscript{333} \textit{Id.} at 121–36.
\end{itemize}
to be accorded the decisions of prison administrators,"\textsuperscript{334} Rehnquist asserted that "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to [security] considerations, courts should ordinarily defer to their expert judgment in such matters."\textsuperscript{335} Justice Marshall, in dissent, contended that the Court was effectively applying a test that only inquired whether prison officials had exercised their judgment in a \textit{rational} manner.\textsuperscript{336} In no other context, Marshall asserted, is the Court \textit{this} deferential.\textsuperscript{337}

Ten years later, in \textit{Turner v. Safley},\textsuperscript{338} the Court upheld broad restrictions on inmate-to-inmate correspondence—and, in the process, reaffirmed its commitment to a deferential standard in prisoner speech cases. Announcing a test that prevails to this day,\textsuperscript{339} Justice O'Connor held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."\textsuperscript{340} She identified four factors to be considered in applying this standard: (1) whether there exists a "valid, rational connection" between the regulation and the governmental interest put forward to justify it; (2) whether inmates are left with alternative means of exercising the right that the regulation restricts; (3) whether accommodating the asserted right would have a significant "ripple effect" on fellow inmates or prison staff; and (4) whether there is a ready alternative to the regulation that fully accommodates the asserted right at a de minimis cost to valid penological interests.\textsuperscript{341}

Even applying the deferential standard from \textit{Turner}, these policies are constitutionally suspect. To begin with, the security concerns on which Justice Rehnquist relied so heavily in \textit{Jones} are simply not present here to assist the government in establishing the requisite state interest. What "security" concerns can possibly be present when an inmate is strapped to a gurney, poised to receive a lethal injection? As for \textit{Turner}'s first prong, there is no "valid, rational connection"\textsuperscript{342} between these policies (which deprive condemned prisoners of a 500-year-old privilege) and their underlying justification (to prevent the remote\textsuperscript{343} possibility that a prisoner

\begin{itemize}
  \item \textsuperscript{334} Id. at 126.
  \item \textsuperscript{335} Id. at 128 (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)).
  \item \textsuperscript{336} Id. at 141 (Marshall, J., dissenting).
  \item \textsuperscript{337} Id.
  \item \textsuperscript{338} 482 U.S. 78 (1987).
  \item \textsuperscript{339} See, e.g., Thornburgh v. Abbott, 490 U.S. 401, 404 (1989) (confirming that \textit{Turner} articulates the prevailing test); Altizer v. Deeds, 191 F.3d 540, 547–48 (4th Cir. 1999) (same).
  \item \textsuperscript{340} \textit{Turner}, 482 U.S. at 89.
  \item \textsuperscript{341} Id. at 89–91.
  \item \textsuperscript{342} Id. at 89 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).
  \item \textsuperscript{343} See supra notes 316–17 and accompanying text.
\end{itemize}
Muzzling Death Row Inmates

The opportunity to communicate one’s life-ending thoughts is simply too precious to be sacrificed so easily; it simply is not rational to take so much away when the harm to be avoided is so speculative. The inevitable result, per prong three, is to generate a needlessly punitive ripple effect, silencing prisoners who would never have used their last words to injure anyone. As for Turner’s second and fourth prongs, there is simply no substitute for delivering one’s dying speech. As this Article has already explained, nothing can replace that privilege because the prisoner cannot possibly anticipate what will go through his mind as he stands on the brink—and if he is silenced at that very moment, he will never get the opportunity to express what he’s feeling.

Thus, even when applying Turner’s deferential standard, the instant policies are vulnerable to challenge. On this score, the outcome in Turner is more instructive than its test. Among the challenged regulations in Turner was a provision that barred inmates from marrying other inmates or civilians. Writing for the Court, Justice O’Connor struck it down as failing to satisfy her newly minted test. What is revealing about her analysis is the great respect she shows for the fundamental right to marry, her impatience with corrections officials who argue that the right does not apply to prisoners, and her readiness to brush aside every “security concern,” “rehabilitation goal,” and “penological objective” offered to justify this restriction. Her aggressive approach here stands in sharp contrast to her deference to prison officials on the other challenged provision: a restriction on inmate-to-inmate correspondence that she upholds. This contrast may be explained by the sharp difference between the two underlying rights; in Justice O’Connor’s eyes, the fundamental right to marry is simply deserving of far more judicial respect than the ill-supported inmate correspondence right.

This contrast suggests that Turner should not be applied in a deferential manner to last words policies—because the underlying privilege is of ancient origin, honored for centuries by governments on both sides of the Atlantic. Accordingly, if Turner is to be applied at all to a last words challenge, it should be the more skeptical approach employed by Justice

344. See supra section IV.B.2.
345. Turner, 482 U.S. at 82.
346. Id. at 94–99.
347. See id. at 95 (citing Zablocki v. Redhail, 434 U.S. 374 (1978) and Loving v. Virginia, 388 U.S. 1 (1967) (establishing the right to marry as a fundamental right)); id. at 95–96 (reviewing with considerable care the significance of the marital relationship).
348. See id. at 94–96.
349. See id. at 97–99.
350. See id. at 91–93.
O'Connor in reviewing the marriage restriction. This is because the Court's prison speech cases are factually so remote from our scenario. We are dealing here with an expressive tradition that simply dwarfs the speech rights that were claimed in those cases. How can one compare the privilege to utter a last dying speech with the right to hold face-to-face media interviews? Where in Jones and Turner do we see an expressive privilege traceable back to the 1300s? Where in Jones and Turner do we find a speech tradition that was well established on this side of the Atlantic a century before the First Amendment's adoption?

At the end of the day, Turner may be nominally applicable to last words, but the deferential approach exemplified by the Court's prison speech cases should be seen as a function of the relatively trivial claims that the Court was entertaining. As seen with Justice O'Connor's analysis of the marriage restriction in Turner, judicial scrutiny should be heightened in direct proportion to the age and stature of the affected right. Accordingly, restrictions on last words should be analyzed with great skepticism.

G. Original Intent Analysis

When the First Amendment was ratified in 1791, the privilege to utter a dying speech was more firmly established than most, if not all, of the expressive freedoms recognized today. Indeed, we are talking here about a tradition that existed before the Founding Fathers were born; a tradition that George Washington himself honored; a tradition older than the right to vote, older than freedom of the press, and much, much older than our Constitution. Thus, under an original intent analysis, our courts should not hesitate to recognize a First Amendment right to deliver a last dying speech.

As this Article has already shown, scaffold speeches were consistently honored at English executions throughout the 1500s. By 1606, the privilege to utter a dying speech had become a well-established tradition. At that time, by contrast, the "liberties" of speech and press were subject to ferocious restraint. In 1579, for example, the right hand of an author was chopped off as punishment for his written attack on the proposed marriage

352. See supra note 2 and accompanying text.
353. See supra note 1 and accompanying text.
354. A British prisoner of war, John Andre, was afforded the privilege to deliver a scaffold speech when executed by order of General George Washington in 1780. Lossing, supra note 1, at 105; Drimmer, supra note 1, at 147–50.
355. See supra notes 78–88 and accompanying text.
356. Fraser, supra note 3, at 229–34, 265.
between Queen Elizabeth and the Duke of Anjou. In 1603, at the end of Elizabeth's reign, a printer was hanged, drawn, and quartered for publishing a book that opposed the ascension of James I to the throne. And in 1683, Algernon Sidney was beheaded for suggesting—in an unpublished treatise discovered in his study—that the king was accountable to the people.

Thus, at a point in history when liberty of expression was negligible at best, the privilege to deliver a dying speech free from state censorship had already become a tradition. During this time period—spanning the sixteenth, seventeenth, and eighteenth centuries—the English crown and Parliament employed three principal devices in suppressing speech and press: the doctrine of constructive treason, the licensing of the press, and the law of seditious libel.

Starting with the reign of Henry VIII and continuing late into the seventeenth century, the definition of treason was extended (both by statute and judicial decree) to embrace mere utterances critical of the government. This innovation, authorizing conviction and death for a

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358. Haight & Grannis, supra note 357, at 15; Hentoff, supra note 357, at 57.

359. 9 Cobbett's, supra note 7, at 817, 902, 906–07 (discussing the trial of Sidney (K.B. 1683)). Since this crime was deemed treason, Sidney was originally sentenced to the traditional punishment: "[Y]ou shall be hanged from the neck, and, being alive, cut down, your privy-members shall be cut off, and burned before your face, your head severed from your body, and your body divided into four quarters, and they to be disposed at the pleasure of the king." Id. at 902. Charles II, in a gesture of indulgence, reduced the sentence to a simple beheading. Id. at 902, 906–07.

360. Id. at 860, 898. Sidney testified that he had shown the treatise to no one. Id. at 898.


363. Stone Seidman, supra note 165, at 993; William T. Mayton, Seditious Libel and the Lost Guarantee of a Freedom of Expression, 84 Colum. L. Rev. 91, 97–98 (1984). See Hamburger, supra note 357, at 666–73 (observing that, in addition to licensing, treason, and seditious libel, the crown and Parliament also employed statutes governing heresy, felony, and "Scandalum Magnatum").

purely verbal crime, became known as "constructive" treason. A notorious example is the prosecution of John Twyn, who was tried in 1663 for publishing a book that postulated a right of revolution on the ground that the king was accountable to the people. Twyn was sentenced to be hanged, cut down while still alive, and then emasculated, disemboweled, quartered, and beheaded—the standard punishment for treason. After executing a teenager in 1720 for printing a dissident pamphlet, the crown finally abandoned the use of constructive treason.

In addition to constructive treason, the English government employed a second method in controlling the expression of ideas: the licensing of the press. Spurred by the invention of printing in the late fifteenth century, the English crown asserted the power to impose editorial control over all printed matter. Established initially as a right of royal prerogative and

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365. LEVY, supra note 361, at 122–23; SIEBERT, supra note 357, at 266; 8 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 307–17 (Methuen 1937); Mayton, supra note 363, at 99–100.

366. 6 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 513 (London, R. Bagshaw 1810) [hereinafter 6 COBBETT'S] (discussing the trial of Twyn (K.B. 1663)). A sharply truncated account of the case is set forth at 84 Eng. Rep. 1064 (K.B. 1663).

367. 6 COBBETT'S, supra note 366, at 513. For discussions of the case, see BRANT, supra note 364, at 124–25; HENTOFF, supra note 357, at 60; LEVY, supra note 361, at 9; Mayton, supra note 363, at 101; SIEBERT, supra note 357, at 267; THOMAS L. TEDFORD, FREEDOM OF SPEECH IN THE UNITED STATES 16 (1985).

368. 6 COBBETT'S, supra note 366, at 536.

369. LEVY, supra note 361, at 9.

370. John Matthews, a 19-year-old printer, was found in possession of a single-sheet pamphlet advocating the claim of James Francis Edward Stuart to the throne of England. When a search of his rooms turned up several more copies of the pamphlet, Matthews was charged with treason. Though he professed to be unaware of the pamphlet's contents and significance, Matthews was convicted and hanged. The King v. Matthews, 15 Howell's State Trials 1323 (K.B. 1719). See DONALD THOMAS, A LONG TIME BURNING 41–42 (1969); HENTOFF, supra note 357, at 60–61.

371. LEVY, supra note 361, at 9.


373. Even before the invention of printing, church officials in England were engaged in licensing any writings that touched upon matters of religion. SIEBERT, supra note 357, at 42; Hamburger, supra note 357, at 671–72. As early as 1414, Parliament had confirmed the legal right of ecclesiastical officers to proceed in open court against the makers and writers of "heretical" books. 1414, 2 Henry V, stat. 1, cap. 7. But the invention of printing, coupled with the Reformation, brought forth from continental presses a stream of heretical books that began to reach London in 1520. SIEBERT, supra note 357, at 42. Church officials, finding it impossible to control the press, by 1529 surrendered their licensing powers to King Henry VIII. Id. at 42–45.

374. SIEBERT, supra note 357, at 47–63; Hamburger, supra note 357, at 672; Mayton, supra note 363, at 106.
later perpetuated by statute, this licensing system criminalized the publication of any work that had not received advance approval by agents of the crown. From the mid-sixteenth to the late seventeenth century, the system served as a powerful clamp on dissent: It afforded the crown prepublication censorship and easy prosecution of offenders, since a defendant’s guilt turned solely on whether he had published without a license. The penalties for unlicensed printing included confiscation of all goods and chattels, fine and imprisonment at the will of the crown, and the posting of bonds to be forfeited upon further misbehavior. These penalties were designed in part to exert so much pressure upon printers that they could be tempted to assist the crown, disclosing the whereabouts of

375. The Proclamation of 1538, issued by Henry VIII, was the first attempt to establish a licensing system for all printed materials in England. SIEBERT, supra note 357, at 48–49; Mayton, supra note 363, at 106 n.84. It was designed to suppress not just heretical writings but “seditious opinions” as well. SIEBERT, supra note 357, at 48. Following Henry’s death in 1547, his successors (Edward VI and Mary) each employed the royal prerogative to keep the licensing system in place. Id. at 51–56. The long reign of Queen Elizabeth (1558–1603) featured lasting and comprehensive changes to the licensing system that imposed even tighter controls on the press. Id. at 56–57, 61–62; HENTOFF, supra note 357, at 59. Under her Star Chamber Decree of 23 June 1586, printing could only take place at London, Oxford, and Cambridge; the number of presses was limited; all presses had to be registered with the Stationers Company, a crown-controlled printers guild; the right to print could be exercised only by Company members or those having special license from the queen; to ferret out unlicensed publications, the Company was vested with broad powers of search and seizure; no book could be published without prior editorial review and approval by agents of the crown. SIEBERT, supra note 357, at 61–62, 68–70, 82–87; Mayton, supra note 363, at 106 n.84. These provisions remained in effect until even tighter controls were effected by the Star Chamber Decree of 1637. This Decree required more exacting prepublication review, imposed more onerous registration requirements (including a sizable bond that the printer would forfeit for printing anything unlicensed), and extended the sweep of the licensing laws to imported publications. SIEBERT, supra note 357, at 61–62, 142–43; 8 HOLDSWORTH, supra note 365, at 367–69; Mayton, supra note 363, at 106 n.84. In 1643, licensing power shifted from the crown to Parliament. SIEBERT, supra note 357, at 186–87. Thereafter, licensing authority was based principally upon statute rather than royal prerogative. Hamburger, supra note 357, at 679–91.

376. STONE SEIDMAN, supra note 165, at 993–94.

377. Hamburger, supra note 357, at 674–75, 678–79.

378. Id. at 673, 690.

379. SIEBERT, supra note 357, at 49. Under the Star Chamber Decree of 23 June 1586, offending book publishers were to be punished with six months imprisonment and banned from printing, their equipment to be destroyed. Wardens were authorized to search wherever “they shall have reasonable cause of suspicion,” and to seize all materials printed contrary to the ordinances. BRANT, supra note 364, at 100. All printing equipment so taken was to be destroyed and the printing presses “melted, sawed in pieces, broken or battered at the smith’s forge,” and returned in that shape to their owners. Id. On 6 June 1558, a royal proclamation warned that those caught with books proclaimed to be “wicked and seditious . . . shall without delay be executed.” HENTOFF, supra note 357, at 59; SIEBERT, supra note 357, at 55.
dissident authors. Licensing finally ceased in 1694, but not from any nascent commitment to free speech. Instead, as the number of printers and presses grew, the system became unwieldy, ineffective, and conducive to bribery.

By 1769, with licensing a thing of the past, Sir William Blackstone observed: "The liberty of the press is indeed essential to the nature of a free state [——] but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." Freedom from prior restraint was cold comfort to authors and printers, because post-publication punishment (even with the demise of constructive treason) could be so easily effected through yet another device: the doctrine of seditious libel.

380. HENTOFF, supra note 357, at 59. Before being put to death for publishing a book maintaining that the king was accountable to the people, see supra notes 366-69 and accompanying text, John Twyn was offered a reprieve if he would name the author of the work he had printed. Twyn refused, asserting: "[B]etter . . . one suffer, than many." 6 COBBETT'S, supra note 366, at 513, 536 (discussing the trial of Twyn (K.B. 1663)). See HENTOFF, supra note 357, at 60; Mayton, supra note 363, at 101 n.59.

381. LEVY, supra note 361, at 6, 12; SIEBERT, supra note 357, at 260–63.

382. STONE SEIDMAN, supra note 165, at 994.

383. Id.; SIEBERT, supra note 357, at 263; Hamburger, supra note 357, at 714–17.

384. 4 BLACKSTONE, supra note 143, at 151. “[W]here blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law,” Blackstone asserted, “the liberty of the press, properly understood, is by no means infringed or violated.” Id. In elaboration, he observed:

Every freeman has an undoubted right to lay what sentiments he pleases before the public [——] to forbid this, is to destroy the freedom of the press [——] but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall . . . be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment.

Id. at 151–52.

385. Hamburger, supra note 357, at 663, 665.

386. LEVY, supra note 361, at 12–13. Though Blackstone identified seditious libel as a common law doctrine (4 BLACKSTONE, supra note 143, at 150–51), it appears instead to have been an ad hoc creation of the Star Chamber (Mayton, supra note 363, at 102–03). See Irving Brant, Seditious Libel: Myth and Reality, 39 N.Y.U. L. REV. 1, 3–14 (1964) [hereinafter Seditious Libel] (arguing that seditious libel was entirely a Star Chamber creation and not a product of the common law); A.T. CARTER, A HISTORY OF ENGLISH LEGAL INSTITUTIONS 148 (Fred B. Rothman & Co. ed. 1986) (1902) (identifying seditious libel as among the crimes that 
Closely akin to constructive treason, and featuring penalties nearly as severe, the doctrine of seditious libel was broad enough to criminalize any comment critical of the government. Born in the Star Chamber in 1606, the doctrine was declared in 1680 a common law offense, and thus within the jurisdiction of the King's Bench. After 1689, concomitant prosecutions were carried out by Parliament itself, as both the Lords and the Commons vigorously pursued any publication critical of their actions.

were punished in the Star Chamber, and observing that those crimes “were for the most part unknown to the common law”).

387. 2 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 302 (London, MacMillan 1883); LEVY, supra note 361, at 9; Mayton, supra note 363, at 103–04.

388. Though not a capital offense, seditious libel brought severe punishments, including whipping, the pillory, indefinite imprisonment, heavy fines, and large bonds (to be forfeited upon further misbehavior). SIEBERT, supra note 357, at 269–70; LEVY, supra note 361, at 9. An early Star Chamber decision mentions “loss of ears” as another potential punishment for seditious libel. De Libellis Famosis, 77 Eng. Rep. 250, 250 (Star Chamber 1606). The ferocity of these punishments is vividly exemplified by the seditious libel prosecution of William Prynn, the author of a treatise that attacked the English theater and characterized “[w]omen actors” as “notorious whores.” 3 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS 561, 561–62 (London, R. Bagshaw 1809) (discussing the trial of Prynn (Star Chamber 1632)). Given the Queen’s love of the stage and her own participation in theatrical performances at court, the attorney general “suspected [Prynn’s treatise] to be leveled against the practice of the court, and the example of the [Q]ueen.” Id. at 561–62. For this offense, Prynn was sentenced to “perpetual imprisonment” and fined 10,000 pounds (a sum that far exceeded his worth). Moreover, his forehead was branded, his nose was slit, and both of his ears were cut off. Id. at 584–85. See CARTER, supra note 386, at 146 (describing Prynn’s case and the general severity of Star Chamber punishments for seditious libel).

389. LEVY, supra note 361, at 9. In the late seventeenth and early eighteenth centuries, the English common law courts gave so wide a meaning to the term “seditious” that any reflection on the government in written or printed form was deemed a seditious libel. SIEBERT, supra note 357, at 271. Since it was illegal to publish anything about the government, it was all the more reprehensible to publish something damaging to the government. Id. at 271–72.


391. 7 COBBETT’S, supra note 7, at 925, 929–30 (discussing the trial of Harris (K.B. 1680)) (Scroggs, L.C.J.) (declaring that “all the judges of England,” meeting “by the king’s command,” decided “unanimously” that writing, printing, or selling any publication “scandalous to the government” is an offense punishable “at the common-law”). See 2 STEPHEN, supra note 387, at 311–12; Hamburger, supra note 357, at 685–86; Seditious Libel, supra note 386, at 12–14; Mayton, supra note 363, at 106–07, nn.90–94. Scroggs’s reference in Harris to “all the judges of England” meant the twelve high judges, drawn equally from the courts of King’s Bench, Common Pleas, and Exchequer, who were called upon by the crown for advisory opinions and occasionally acted together in rendering final decisions after trials. Seditious Libel, supra note 386, at 12 n.33.

392. The English Bill of Rights of 1689 expanded freedom of speech to include members of Parliament in their official capacity during a legislative session. TEDFORD, supra note 367, at 13; LEVY, supra note 361, at 14. “Jealous of their new freedom, both houses of Parliament declared that although they needed freedom of speech, the average citizen did not, and that
Hundreds of seditious libel trials were conducted in England during the seventeenth and eighteenth centuries. At these trials, the jury was permitted to decide only one issue: whether the defendant had actually published the remark. The judges reserved to themselves, as a question of law, whether the remark constituted seditious libel. Truth was no defense, and malicious intent to cause sedition need not be proved. In unwarranted criticism of the lawmakers would be punished.” TEDFORD, supra note 367, at 13. A number of newspaper publishers were tried and convicted of publishing stories critical of Parliament. TEDFORD, supra note 367, at 14. These prosecutions were conducted on the floor of either house. “The guilty parties were summoned, examined, and tried in summary fashion; their criminal publications were burned by the hangman at the order of the house, the party humiliated, usually on his knees, and forced to pay costs.” LEVY, supra note 361, at 14. A speaker critical of Parliament could be imprisoned for the life of the session by the Commons and indefinitely by the Lords. LEVY, supra note 361, at 14. After 1730, when English juries began to rebel in seditious libel cases, “the two houses of Parliament were the principal deterrents to free and open discussion of political questions through their power to punish a printer for what today would be considered harmless discussion of public issues.” SIEBERT, supra note 357, at 368. Not until the last quarter of the 18th century did Parliament “quietly abdicate[ ] its functions as a prosecutor and judge of seditious libels in favor of the attorney general and common-law courts.” SIEBERT, supra note 357, at 374.

393. LEVY, supra note 361, at 17. Siebert notes the great frequency with which printers and publishers were prosecuted for seditious libel in the later part of the seventeenth century: “Hardly a year passed without one or two major prosecutions,” with sixteen of them during a seven-month span in 1684. SIEBERT, supra note 357, at 269. Moreover, a chilling effect could be achieved even without a full-blown prosecution and conviction: “Being arrested, called into court, and forced to pay costs on the dismissal of the information could have an intimidating effect even if the prosecution proceeded no further.” Convictions, in other words, “were not necessary for the law of seditious libel to operate oppressively.” LEVY, supra note 361, at 10.

394. 7 COBBETT’S, supra note 7, at 925, 929–30 (discussing the trial of Harris (K.B. 1680)) (Scroggs, L.C.J.). See Mayton, supra note 363, at 107; Seditious Libel, supra note 386, at 12–14. These procedural innovations were imposed by Chief Justice Scroggs at the crown’s behest. 2 STEPHEN, supra note 387, at 311–13; 2 JOHN LORD CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 267 (New York, Cockcroft 1874); Hamburger, supra note 357, at 685–86. To achieve this result, Scroggs found it necessary to bully the Harris jury, whose members initially balked at following his instructions and agreed to an unqualified guilty verdict only after the recorder commenced polling them individually. 7 COBBETT’S, supra note 7, at 931; see Seditious Libel, supra note 386, at 13. After getting the verdict he wanted, the Chief Justice menaced the jury with an angry lecture before letting them go. 7 COBBETT’S, supra note 7, at 931–32; see Seditious Libel, supra note 386, at 13–14.

395. LEVY, supra note 361, at 11–12; 8 HOLDSWORTH, supra note 365, at 342–45; Mayton, supra note 363, at 107; Seditious Libel, supra note 386, at 13.

396. LEVY, supra note 361, at 12; 8 HOLDSWORTH, supra note 365, at 210; 2 STEPHEN, supra note 387, at 305. In arriving at this rule, the judges “proceeded on the theory that the truth of a libel made it even worse because it was more provocative, thereby increasing the tendency to breach of the peace or exacerbating the scandal against the government.” LEVY, supra note 361, at 12.

397. 2 STEPHEN, supra note 387, at 312; SIEBERT, supra note 357, at 273; Seditious Libel, supra note 386, at 13.
this way, the King’s Bench perpetuated the crown’s prerogative power over seditious libel, much in the tradition of the Star Chamber.398

This historical sketch confirms that in the centuries preceding the First Amendment’s adoption, the “liberties” of speech and press were subject to aggressive control and draconian punishment by the state. But during that same period of history, condemned prisoners were remarkably free to express themselves on the scaffold.399 In contrast to the press licensing that prevailed during much of this era, scaffold speeches were not subject to advance review and approval by the state.400 In contrast to the harsh suppression of anti-government speech that characterized this era, condemned prisoners were free to convey even a seditious message with their last words.401

Thus, when the First Amendment was adopted, the privilege to deliver a dying speech was more firmly established than any other expressive freedom. That privilege was older, and its exercise freer from state interference, than any other facet of speech or press liberty. At a point in history when expressive freedom meant little more than the absence of prior restraint,402 condemned prisoners were at liberty to use their last words for any message they desired.403 From the perspective of original intent, then, last words have a stronger claim to constitutional protection than any other expressive tradition.

V. CONCLUSION

This Article has demonstrated that prison policies offend the First Amendment when they thwart404 or disallow405 a traditional dying speech. The Article began by showing that condemned prisoners in Anglo-American culture have been afforded the privilege to utter their last words, free from state censorship, in an unbroken tradition that stretches back at


399. See supra notes 104, 110–14, 119 and accompanying text.

400. See supra note 119 and accompanying text.

401. See supra note 104 and accompanying text.

402. See supra note 384 and accompanying text.

403. See supra notes 112–13 and accompanying text.

404. Prison policies in Maryland, Virginia, California, and Nevada, for example, allow the prisoner’s last words to be uttered only outside the presence or beyond the hearing of the witnesses. See supra notes 30–33 and accompanying text.

405. Several states, including Pennsylvania, Illinois, North Carolina, South Carolina, and, until just recently, Ohio, do not allow a condemned prisoner to utter his last dying speech inside the execution chamber. See supra notes 25–29 and accompanying text.
least 500 years. Next, the Article identified the striking parallel between the as-yet-unrecognized right to deliver a dying speech and the well-established right of "allocution"—the right to be heard just prior to sentencing. The Article then performed a First Amendment analysis of prison policies that restrict last words.

That analysis began with "first principles," examining the instant policies in terms of the three most prominent rationales for protecting free expression: the search-for-truth rationale, the self-governance rationale, and the self-fulfillment rationale. The Article showed that many condemned prisoners use their last words as a plea for abolishing capital punishment—and that such a plea, coming from a person whose own life is about to be taken, is uniquely capable of grabbing public attention and changing public sentiment. Policies that restrict dying speeches by condemned prisoners offend the search-for-truth and self-governance rationales by eliminating the most riveting form of death penalty criticism. Such policies offend the self-fulfillment rationale by sending the prisoner to a muffled and anonymous end, thereby squelching his humanity and individuality.

Next, this Article examined the instant policies under a succession of First Amendment doctrines—performing, in turn, a prior restraint analysis, a content-neutrality analysis, a public forum analysis, an overbreadth analysis, a restricted environment analysis and, finally, an original intent analysis.

Prior Restraint Analysis. This Article showed that, in two different respects, the instant policies operate as unconstitutional prior restraints. They do so, first, by giving the warden advance review and approval power over the prisoner's statement. Such power is akin to the vesting of unfettered discretion in a licensing official—a power that the First Amendment flatly forbids. Second, these policies operate in advance to silence the prisoner at the very end of his life, foreclosing any spontaneous communication of the unique thoughts and feelings that may occur to him as he stands on the brink of extermination.

406. See supra section III.A.
407. See supra section III.B.
408. See supra section IV.
409. See supra section IV.A.
410. See supra Section IV.B.
411. See supra Section IV.C.
412. See supra Section IV.D.
413. See supra Section IV.E.
414. See supra Section IV.F.
415. See supra Section IV.G.
Content-Neutrality Analysis. Next, this Article demonstrated that the instant policies should not be viewed as content-neutral. To the extent that these policies are designed to shield witnesses from unpleasant remarks by condemned prisoners, they should be struck down under the strict scrutiny reserved for content-based restrictions on speech. Ohio, for example, adopted its policy because of the communicative impact of potential statements by condemned prisoners—\footnote{See supra note 72 and accompanying text.} and that is the very definition of a content-based restriction.

Public Forum Analysis. Since these policies restrict expressive access to publicly owned property, they are governed by the public forum doctrine. This Article showed that under any of the three prongs of public forum analysis—governing traditional, designated, or nonpublic fora—these policies are vulnerable to First Amendment challenge. Through centuries of history and public custom, the gallows has served as a traditional—or, at the very least, a designated—public forum. To the extent that these policies are aimed at suppressing last words that are “offensive” or unpleasant, they should be struck down under the strict scrutiny that governs content-based restrictions in traditional or designated public fora. Even if the gallows is deemed a nonpublic forum, these policies violate the First Amendment by imposing viewpoint-based restrictions on such a forum. Finally, even if they are deemed content-neutral, these policies flunk the narrow tailoring and ample alternative channels requirements by blocking access to a unique and precious forum: the irreplaceable opportunity to communicate the thoughts and feelings that surface in the final moments of one’s life.

Overbreadth Analysis. This Article demonstrated next that the instant policies run afoul of the overbreadth doctrine because, in their effort to suppress a tiny fraction of dying speeches (the very few that feature spiteful or profane remarks to the victim’s family), they deny to all prisoners the opportunity to speak from the brink of death.

Restricted Environment Analysis. This Article next invoked the line of First Amendment cases dealing with speech in certain “restricted” environments: prisons, schools, and the military. The Article showed that Supreme Court decisions employing a deferential standard to uphold restrictions on prisoner speech are inapplicable here because none of them involved a form of expression honored by Anglo-American governments since the sixteenth century.

Original Intent Analysis. Finally, this Article performed an original intent analysis, demonstrating that the privilege to utter a dying speech was
more firmly established by 1791 than most, if not all, of the expressive freedoms recognized today.

It is the author's hope that the historical research and the legal arguments advanced in this Article will prove helpful to condemned prisoners in making their last words heard.