CAN FREE SPEECH BE PROGRESSIVE?

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Free speech cannot be progressive. At least it cannot be progressive if we are talking about free speech in the American context, with all the historical, sociological, and philosophical baggage that comes with the modern American free speech right. That is not to say that the right to free speech does not deserve protection. It might serve as an important side constraint on the pursuit of progressive goals and might even protect progressives against the possibility of catastrophic outcomes. But the notion that our free speech tradition might be weaponized to advance progressive ends is fanciful. The American free speech tradition is too deeply rooted in ideas about fixed property rights and in an equation of freedom with government inaction to be progressive. Instead of wasting energy on futile efforts to upend our First Amendment traditions, progressives should work to achieve their goals directly.

INTRODUCTION

The answer to the question posed by the title of this Essay is "no." At least the answer is "no" if we are talking about free speech in the American context with all the historical, sociological, and philosophical baggage that comes with the modern American free speech right. But explaining why the answer is "no" will require some work.

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To make the claim plausible, it must be sharpened and narrowed. That is the goal of Part I, which defines some terms, specifies the conditions under which the claim holds, and distinguishes between broader positions that this Essay might appear to advance and the narrower position that I in fact defend. With this groundwork in place, Part II provides an abbreviated history of American First Amendment law that is meant to demonstrate that this area of law has furnished less support for progressive positions than is commonly supposed. Part III is the heart of the argument: It claims that the history outlined in Part II is not accidental or contingent. The history results from the fact that, at its core, the American free speech tradition is tilted against progressive outcomes. This is true for four interlocking reasons: (1) The American tradition rests on the kind of protection for existing economic entitlements that progressives oppose; (2) it equates freedom with government inaction in a fashion that is inconsistent with the progressive program; (3) it purports to be neutral as between progressives and their adversaries and therefore cannot systematically aid progressives; and (4) it depends upon authoritarian pronouncements inconsistent with the open discourse that progressives favor.

I. SOME DEFINITIONS, LIMITATIONS, AND GENERAL THROAT CLEARING

In order to evaluate the assertion that "freedom of speech" "cannot be" "progressive," we need to specify a meaning for each of these terms. These definitions are especially important because, without them, it is easy to misinterpret my central claim. This Part introduces definitions for each of these terms and discusses the ways in which these definitions limit the scope of my argument.

As used here, "freedom of speech" refers to the American free speech tradition and its accompanying ideology, marked by an assumption that the right is rooted in market allocations, a preference for a passive state, and an obsession with government malfunction.

The claim that free speech "cannot be" progressive is certainly false if "cannot be" is defined to include in any conceivable world. Instead, as used here, the term means that free speech law cannot systematically and significantly advance the progressive program unless there is first a fundamental transformation of American political culture.

Finally, by "progressive," I mean the modern political stance favoring an activist government that strives to achieve the public good, including the correction of unjust distributions produced by the market and the dismantling of power hierarchies based on traits like race, nationality, gender, class, and sexual orientation.[1]

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1. For representative defenses, see generally Paul Krugman, The Conscience of a Liberal (2007) (offering a historical defense of liberalism and calling for a "new New Deal"); Robert B. Reich, Saving Capitalism: For the Many, Not the Few (2016) (discussing

This definition immediately suggests one way in which my argument is limited. "Progressivism" is not a synonym for all that is or might be good and right in the world. It follows that even if the free speech right is not itself "progressive," believers in progressivism might embrace the speech right as a side constraint on the realization of their goals. I know of no progressives who favor violence, authoritarianism, or deception, even if these techniques might be used to advance progressive ends. Similarly, for all their problems, free speech theories that are premised on search for truth,[2] development of moral community,[3] dignity,[4] popular sovereignty,[5] intellectual humility,[6] or tolerance[7] might be convincing on their own terms. I am agnostic about the value of free speech as so conceived, but nothing prevents progressives from endorsing the speech right on these or other grounds. That endorsement is fully consistent with the proposition that the answer to the question that this Essay addresses is "no."

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the shortcomings of a free market approach and advocating for a reorganized market aimed at broad-based prosperity). Although this stance has important points of contact with the progressive movement at the beginning of the twentieth century, there are also important differences. Modern progressives have jettisoned some of the faith in expertise as a means of transcending social conflict and have similarly rejected the racism and sexism that marred progressivism's earlier manifestation. It is nonetheless true that many of the criticisms of the speech right that I advance here have antecedents or roots in earlier versions of progressivism. See David M. Rabban, Free Speech in Progressive Social Thought, 74 Tex. L. Rev. 951, 955 (1996) (noting that, "[t]hough aimed at the evils of economic rights, the progressive position that individual rights should be recognized only to the extent that they contribute to social interests also confined the right of free speech"). For a less sympathetic version that also has fewer points of contact with the argument advanced here, see Mark A. Graber, Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism 78–86 (1991).

2. See, e.g., Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he 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 . . . ."); John Stuart Mill, On Liberty 88 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) ("All silencing of discussion is an assumption of infallibility.").

3. See, e.g., Seana Valentine Shiffrin, Speech Matters: On Lying, Morality, and the Law 1 (2014) (arguing that free speech protections are "essential for our mutual flourishing, for the apprehension and discharge of our moral obligations to one another as individuals, and to enable us to act well, in concert, and pursue our collective moral ends").

4. See, e.g., David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45, 62 (1974) (associating the speech right with "[t]he value placed on [a] cluster of ideas derive[d] from the notion of self-respect that comes from a mature person's full and untrammelled exercise of capacities central to human rationality").

5. See, e.g., Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 26 (1972).

6. See, e.g., Vincent Blasi, Free Speech and Good Character: From Milton to Brandeis to the Present, *in* Eternally Vigilant: Free Speech in the Modern Era 61, 84 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

7. See generally Lee C. Bollinger, Tolerance and the First Amendment (1986) (discussing tolerance as a First Amendment value).

These definitions are concededly stipulative, and it might be thought that their stipulative character means that I have unfairly built my conclusions into my premises. One might, for example, define "progressivism" to include a commitment to freedom of speech. Similarly, one might define freedom of speech to include a commitment to economic redistribution. And one might define "cannot be" in a way that excluded from the definition possible but fundamental transformations of our culture. Altering any of these definitions would mean that freedom of speech can in fact be progressive.

There may be a kernel of truth to this objection, but the bare fact that we might stipulate different definitions for these phrases does not defeat my argument. Pigs can fly if we define "fly" as walking on four legs or "pigs" as small animals with wings. Still, pigs, as currently defined, just cannot get off the ground. That is a useful fact to know, and it is also useful to know that the speech right, as I have defined it, just cannot be progressive.[8] If we tried to stipulate a definition for free speech that made it progressive, doing so would be no more convincing than a stipulated definition for pigs that made them airborne.

This point, alone, does not completely dispose of the claim made by free speech progressives. To accomplish that, we must focus more attention on the definition of "cannot be." In a certain sense, we have no need to speculate about whether free speech can be progressive. It *has been* progressive. The First Amendment prevented suppression of labor picketing in the 1930s and 1940s[9] and suppression of civil rights demonstrations in the 1960s.[10] It protected the *New York Times* when it published an advertisement defending Martin Luther King, Jr.[11] and when it published a report discrediting the Vietnam War.[12] Constitutional protection for freedom of speech shielded antiwar protesters who wanted to "Fuck the Draft,"[13] artists who challenged conventional morality,[14] and school

8. Of course, so far I have said virtually nothing to substantiate that claim. I make that case infra in Part III. I introduce the Supreme Court's historical views in Part II.

9. See, e.g., Thornhill v. Alabama, 310 U.S. 88, 101 (1940) (holding that a statute prohibiting picketing is facially invalid); Hague v. Comm. for Indus. Org., 307 U.S. 496, 512 (1939) (holding that the right of labor unions to assemble to discuss issues raised by the National Labor Relations Act is a privilege of citizenship).

10. See, e.g., Cox v. Louisiana, 379 U.S. 536, 545 (1965) (holding that the conviction of civil rights demonstrators violated their First Amendment rights); Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (same).

11. See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'").

12. See N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (holding that the government had not met the heavy burden necessary to justify a prior restraint directed at the *New York Times*).

13. See Cohen v. California, 403 U.S. 15, 26 (1971) (reversing a conviction based on the petitioner wearing a jacket stating "Fuck the Draft").

14. See, e.g., A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass., 383 U.S. 413, 417 (1966) (reversing the lower court's judgment that

children who resisted compelled "patriotic" indoctrination.[15] What's not progressive about that?

There is no doubt that the assertion of free speech rights can advance progressive goals in particular times and places. I offer no reasons here why left-wing lawyers should not take advantage of speech rights so long as they exist, and nothing I say here is meant to begrudge them their victories.

It might even be true that progressives who weigh downside risks more strongly than upside gains will think that they are better off with a free speech right than without it. On one hand, without the right, some states might outlaw progressive speech on topics like Islam, abortion, gay rights, and police abuse. On the other, it is doubtful that even without the right, legislatures would enact measures like serious campaign finance reform that are currently blocked by the Supreme Court's interpretation of the First Amendment.

To make my claim plausible, then, I need to make clear that I am not discussing whether the speech right has instrumental utility in isolated cases or whether it is necessary to minimize extreme downside risks. The working class might be slightly better off because of the few crumbs cast its way by the Trump tax law. That does not make the tax law "redistributive." Similarly, the fact that free speech protects the political left from the most extreme threats to it does not make the speech right progressive. The question I address is whether the First Amendment has significant upside potential. Can progressives weaponize free speech by tinkering with constitutional doctrine?[16] Can they convert the First Amendment from a sporadically effective shield against annihilation to a powerful sword that would actually promote progressive goals?[17]

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the book *A Woman of Pleasure* was obscene); Jacobellis v. Ohio, 378 U.S. 184, 187 (1964) (finding that a film shown by petitioner was not obscene).

15. See W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that compelling students to salute the flag violates free speech rights); cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist, 393 US. 503, 514 (1969) (upholding the right of school children to wear arm bands protesting the Vietnam War).

16. Cf. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (accusing the majority of "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy").

17. The question might be understood in two slightly different ways. First, might free speech law be reformulated so as to constitutionally mandate aspects of the positive program favored by progressives? For reasons that I explain below, I think that this outcome is very unlikely. See infra Part III. At its core, free speech law is much more conducive to constitutionally required libertarianism.

A second, less ambitious version of the question asks whether free speech law could be reformulated so as to promote the flourishing of progressivism, even if it did not directly dictate progressive outcomes. If the question is formulated in this way, the possibilities are arrayed along a continuum, from protection against the total annihilation of progressivism at one extreme to establishing the preconditions for a total progressive triumph on the other. I am ready to concede that a speech right might provide some assurance

A free speech progressive might oppose even this narrow claim on the ground that I am guilty of what philosopher Roberto Unger has called "false necessitarianism."[18] One might say that progressives can make free speech into anything they want it to be if only we have the will and skill to do so. Denying that fact, the argument goes, exhibits a loss of nerve, an absence of imagination, or both. Even if it is true that conservatives have been more successful in defining, using, and justifying the right in the past, that is no argument for ceding this ground to them in the future.

For a generation, practitioners of Critical Legal Studies have made careers out of doing just this kind of work in a wide variety of doctrinal domains. Since I have done some of it myself, I am hardly in a position to insist that the work cannot be done.

It does not follow, however, that my pessimism about free speech progressivism entails false necessitarianism. As Professor Mark Tushnet has recently reminded us, the legerdemain for which Critical Legal Studies is justly famous requires work.[19] With sufficient effort and cleverness, one can (always?) show that the underlying materials will yield unexpected outcomes without violating the conventional forms of legal argument. Given current background conditions, however, doing so necessitates a great deal of effort that is unlikely to bear much fruit.

Moreover, even with this effort, outcomes that are logically possible will nonetheless seem "off the wall" to the relevant audience given current background conditions.[20] With much thought and effort, I suppose I could produce a legal argument that the very existence of Fox News violates the First Amendment.[21] But even if the argument were logically

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against catastrophic outcomes at one end of the continuum, although, for reasons I discuss below, I think the risk of those outcomes is often overstated. See infra section III.A. As one moves toward the other end of the continuum, my skepticism about the upside potential for free speech law becomes more intense.

18. Roberto Mangabeira Unger, False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy 1–8 (1987).

19. See Mark Tushnet, The Coverage/Protection Distinction in the Law of Freedom of Speech—An Essay on Meta-Doctrine in Constitutional Law, 25 Wm. & Mary Bill Rts. J. 1073, 1075–77, 1117–20 (2017).

20. Cf. Jack M. Balkin, How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure, 39 Suffolk U. L. Rev. 27, 28 (2005) [hereinafter Balkin, Social Movements] (arguing that social movements succeed if they can turn "off the wall" constitutional arguments into "plausible" ones).

21. In broad outline, the argument might go something like this: As the owner for the public airwaves, the federal government has the power to allocate broadcast licenses so as to advance the public interest. See Red Lion Broad. Co. v. FCC, 395 U.S. 367, 377 (1969). By distributing such licenses, the government has "opened [the airwaves] for use by the public as a place for expressive activity." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). When the state does this, it is bound by the same standards that govern traditional public fora. Id. at 46; Widmar v. Vincent, 454 U.S. 263, 267–68 (1981). In particular, the state is prohibited from engaging in "viewpoint discrimination" even in circumstances where "content discrimination" would be permissible. See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995). The government is jointly

sound and formally consistent with the legal materials, it would nonetheless violate free speech "common sense." For the very reason that free speech doctrine is open textured and contradictory, opponents of the argument will be able to marshal legal doctrine supporting the "common sense" outcome. Moreover, they can do so without much work—indeed, without breaking a sweat.[22]

Of course, the qualification "given current background conditions" is important. If we changed the background conditions, then it would require much less work to get to the "right" result, and outcomes that currently seem "off the wall" would be "on the wall."[23] The question, then, is which projects promise the best results with the least work? Is it really worth it to do legal somersaults to show that the legal material can support progressive ends when, even if we succeed as a matter of pure logic, the outcome will be dismissed as violating common sense? Why not instead work to change the background conditions so that the outcome no longer violates common sense? Instead of fighting an uphill legal battle, why not put our efforts into changing the cultural and political landscape?

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responsible for discrimination of a private actor when it turns over its property to that actor, see Burton v. Wilmington Parking Auth., 365 U.S. 715, 724–25 (1961) (holding that the state is responsible for the racially discriminatory activity of a restaurant to which it had leased space in a public building), or when it grants a license without controlling the licensee's impermissible discrimination, cf. Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 462 (1952) (holding that the federal government was sufficiently involved, for First Amendment purposes, to be held responsible for radio programs played by a private company when a federal regulator had investigated, held hearings on, and dismissed claims that public safety, comfort, and convenience were impaired by such radio programs). Accordingly, the government is responsible for the rampant and blatant viewpoint discrimination engaged in by Fox News, which violates the First Amendment.

22. Again, in broad outline, the argument might go something like this: Technological advances have made the premises of *Red Lion* obsolete. See FCC v. Fox Television Stations, Inc., 556 U.S. 502, 531 (2009) (Thomas, J., concurring) ("[*Red Lion*] relied heavily on the scarcity of available broadcast frequencies. . . . This deep intrusion into the First Amendment rights of broadcasters, which the Court has justified based only on the nature of the medium, is problematic . . . ."). Cable broadcasters are subject to different standards than over-the-air broadcasters. See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994) ("It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media."). In any event, the state is not responsible for the conduct of private actors merely because it supports or licenses the activity. See Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982) (holding that the fact that a school derived virtually all of its income from government funding did not make the school's discharge decisions acts of the state); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 174–75 (1972) (holding that a state's granting of a liquor license to a private club does not make the state jointly responsible for the club's racially discriminatory activity). Rather than being required by the First Amendment, state regulation of these private actors violates the First Amendment. Cf. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 244, 258 (1974) (holding that a statute granting a political candidate a right of access to a newspaper to reply to the newspaper's criticism of his record violated the First Amendment).

23. See, e.g., Balkin, Social Movements, supra note 20, at 28.

A possible response to this objection is that a reformulation of the free speech right might be part of a broader strategy to change the cultural and political landscape. The skill set of lawyers might be better suited to making arguments favoring the doctrinal reformulation than to attempting to change the landscape directly. If the reformulation could be readily accomplished, this approach might make sense. But the argument I make below is that it cannot be readily accomplished. The theory, structure, and tradition of American free speech law make it a particularly unpromising entry point for a progressive transformation. In an environment like this, lawyers who attempt to restructure the First Amendment do not advance the progressive cause. Instead, their "crazy" arguments discredit it.

To summarize: "Free speech" "cannot be" "progressive" in the sense that conventional conceptions of the speech right cannot be made to tilt toward the significant social change that progressives favor—unless the social change is already in place. Without that change, a progressive First Amendment is impossible because it is inconsistent not only with deeply entrenched legal principles but also with First Amendment "common sense." With that change, a progressive First Amendment is unnecessary because progressives will already have achieved their goals.

Of course, so far, these are only assertions. The next two Parts are designed to make them plausible. In Part II, I summarize a history that is consistent with the broad outlines of my argument. In Part III, I describe the structural features of free speech law that stand in the way of a progressive orientation.

II. THE HISTORICAL RECORD

Because this ground has already been well trod by others,[24] I provide no more than a brief discussion here. For roughly the first century and a quarter after the adoption of the First Amendment, a judicially enforced free speech right barely existed.[25] That is not to say that there were no conflicts over freedom of speech, however. For example, the Alien and Sedition Acts at the end of the eighteenth century[26] and the suppression of antislavery petitions to Congress at the middle of the nineteenth century[27] generated robust debates about free speech. There were free speech

24. See generally Michael Kent Curtis, Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History (2000); Graber, supra note 1; David M. Rabban, Free Speech in Its Forgotten Years (1997) [hereinafter Rabban, Forgotten Years]; Geoffrey R. Stone, Perilous Times: Free Speech in Wartime (2004); Laura Weinrib, The Taming of Free Speech: America's Civil Liberties Compromise (2016); Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. 1 (1996); Robert F. Nagel, How Useful Is Judicial Review in Free Speech Cases?, 69 Cornell L. Rev. 302 (1984).

25. See generally Rabban, Forgotten Years, supra note 24 (detailing First Amendment jurisprudence from 1800 to 1920).

26. See Stone, supra note 24, at 29–73.

27. See Curtis, supra note 24, at 155–81.

arguments about the Comstock Act,[28] about the Alien Immigration Act of 1903,[29] and about local laws that restricted access to streets and parks for public protest.[30] In all of these instances, free speech arguments advanced causes that we might today identify as "progressive."

But these arguments mostly fell on deaf ears.[31] Of course, the historical record is complicated,[32] and, here as elsewhere, it is a mistake to confuse judicial enforcement of constitutional rights with the rights themselves. We cannot know how many statutes were not enacted and executive actions not undertaken because political actors had internalized free speech norms. But, as Professor Mark Graber has demonstrated, the support for free speech was premised on conservative, libertarian ideology at war with progressive ideals.[33] Moreover, as the preceding paragraph details, there were plenty of instances in which political actors impinged on what we think of as free speech rights, and, for the most part, no court was available to check these invasions.[34]

For most of the period in question, judges thought that the First Amendment was inapplicable on the state and local level, at which many of the quotidian infringements on speech occurred.[35] And even when the First Amendment did apply, the prevailing view was that it prohibited only prior restraints and permitted criminal punishment for speech that had already occurred. As Professor David M. Rabban summarizes the evidence:

> Throughout the period from the Civil War to World War I, the overwhelming majority of decisions in all jurisdictions rejected free speech claims, often by ignoring their existence. . . . No court was more unsympathetic to freedom of expression than the Supreme Court, which rarely produced even a dissenting opinion in a First Amendment case. Most decisions by lower federal courts and state courts were also restrictive. Radicals fared

28. The Comstock Act regulated obscene material. See Rabban, Forgotten Years, supra note 24, at 130.

29. The Act excluded aliens who advocated anarchism. See id.

30. See id. at 110–16.

31. See id. at 131 ("Throughout the period from the Civil War to World War I, the overwhelming majority of decisions in all jurisdictions rejected free speech claims, often by ignoring their existence.").

32. For example, state courts occasionally vindicated free speech claims, see id. at 119–20, 175–76, or reversed convictions without relying on the First Amendment in situations in which it seemed clear that free speech concerns nonetheless influenced the decision, see, e.g., Weinrib, supra note 24, at 111 (describing how a court sidestepped constitutional free speech issues by deciding a case as a matter of common law interpretation and statutory construction).

33. See Graber, supra note 1, at 17–49.

34. See supra notes 25–31 and accompanying text.

35. There were large-scale free speech controversies on the federal level, see supra notes 26–29, but for ordinary Americans, regulation of streets and parks—which were outside of federal jurisdiction—had a more immediate impact, see supra note 30.

> particularly poorly, but the widespread judicial hostility to free speech claims transcended any individual issue or litigant.[36]

According to the conventional account, all this changed with the Espionage Act prosecutions during World War I, the eloquent opinions by Justices Holmes and Brandeis, and the birth of modern free speech doctrine.[37] These changes on the Court were accompanied by changes in the underlying rationale for speech protection from a libertarian theory, in obvious tension with progressive ends, to a theory based on democratic engagement that was much friendlier to progressivism.[38]

But revisionist accounts, which by now are themselves conventional, suggest that there is much less here than meets the eye.[39] Despite Holmes and Brandeis, and sometimes in opinions that they authored or joined, the Court affirmed the convictions and lengthy sentences of World War I dissenters.[40] It was only after the war fever subsided, at a moment when speech rights were much less important to radicals, that the Court began reversing convictions of individuals jailed because of their speech.[41] Decisions during this period were of some aid to labor unions[42] and to

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36. Rabban, Forgotten Years, supra note 24, at 131.

37. See, e.g., Whitney v. California, 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring); Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting); Weinrib, supra note 24, at 4–5 (noting that conventional accounts attribute the awakening of American expressive freedom to unprecedented wartime repression during World War I).

38. See Graber, supra note 1, at 122–64 (describing how law professor Zachariah Chafee, Jr.'s writings assessed free speech rights from the perspective of debate on matters of public importance instead of individual liberty).

39. See, e.g., Stone, supra note 24, at 192–98; Klarman, supra note 24, at 11–12.

40. See *Abrams*, 250 U.S. at 623–24 (holding that a leaflet attacking American involvement in World War I was not protected by the First Amendment); Debs v. United States, 249 U.S. 211, 214–16 (1919) (holding that speech attacking American involvement in World War I was not protected by the First Amendment); Frohwerk v. United States, 249 U.S. 204, 209 (1919) (holding that circulation of a newspaper attacking American involvement in World War I was not protected by the First Amendment); Schenck v. United States, 249 U.S. 47, 51–52 (1919) (holding that a document attacking the military draft was not protected by the First Amendment).

41. See Herndon v. Lowry, 301 U.S. 242, 261 (1937) (reversing a conviction because evidence failed to show that the defendant incited violence or insurrection); De Jonge v. Oregon, 299 U.S. 353, 365 (1937) (reversing a conviction for participating in a meeting sponsored by the Communist Party); Fiske v. Kansas, 274 U.S. 380, 387 (1927) (reversing a conviction under the state's Criminal Syndicalism Act for lack of evidence).

42. See, e.g., Carlson v. California, 310 U.S. 106, 112 (1940) (holding that a statute that prohibited picketing was facially invalid); Thornhill v. Alabama, 310 U.S. 88, 101 (1940) (same).

political radicals,[43] but many of the cases involved groups like the Jehovah's Witnesses,[44] which were in no sense progressive.

The same pattern repeated itself during the post–World War II Red Scare. When free speech protection was most needed, it was least available. The Court acceded to criminal convictions and firings of scores of people because of their political affiliations.[45] Just as an earlier Court had ignored the dissents of Holmes and Brandeis, so too the post–World War II Court ignored powerful dissents by Justices Black and Douglas.[46] It was only after the panic abated that the Court reinvigorated free speech law.[47]

During the brief Warren Court interregnum, free speech doctrine provided some real protection for progressive causes. Most notably, Warren Court decisions aided civil rights protestors[48] and opponents of the Vietnam War.[49] Yet even at high tide, the Warren Court provided only intermittent and uncertain protection.[50] For example, the Court upheld

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43. See, e.g., *Herndon*, 301 U.S. at 259 (reversing the conviction of a political radical because evidence failed to show that the defendant incited violence or insurrection); Stromberg v. California, 283 U.S. 359, 369 (1931) (reversing a conviction for the display of a red flag).

44. See, e.g., Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (invalidating a licensing statute as applied to a Jehovah's Witness engaged in solicitation); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (reversing the conviction of a Jehovah's Witness for distributing books and pamphlets). For an account of the role that Jehovah's Witnesses played in the development of free speech law and of the way in which conservatives used cases involving the Witnesses to attack progressive constitutionalism, see Jeremy K. Kessler, The Early Years of First Amendment Lochnerism, 116 Colum. L. Rev. 1915, 1956–76 (2016).

45. See, e.g., Adler v. Bd. of Educ., 342 U.S. 485, 495 (1952) (upholding a statute prohibiting the employment of teachers who belonged to listed organizations); Garner v. Bd. of Pub. Works, 341 U.S. 716, 723–24 (1951) (upholding an oath required of government employees, as a condition of employment, swearing that they did not belong to an organization advocating forceful overthrow of the government); Dennis v. United States, 341 U.S. 494, 516–17 (1951) (upholding the convictions of leaders of the American Communist Party).

46. See, e.g., *Dennis*, 341 U.S. at 579 (Black, J., dissenting); id. at 581 (Douglas, J., dissenting).

47. See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that punishment for advocacy is unconstitutional unless "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); Yates v. United States, 354 U.S. 298, 303 (1957) (reversing convictions after narrowly construing the Smith Act).

48. See, e.g., Cox v. Louisiana, 379 U.S. 536, 545 (1965) (holding that the conviction of civil rights demonstrators violated First Amendment rights); Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (same).

49. See Cohen v. California, 403 U.S. 15, 26 (1971) (reversing the conviction of a defendant for wearing a jacket stating "Fuck the Draft"); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (upholding the right of schoolchildren to wear an armband protesting the Vietnam War).

50. See, e.g., Justin Hansford, The First Amendment Freedom of Assembly as a Racial Project, 127 Yale L.J. Forum 685, 694–700 (2018), https://www.yalelawjournal.org/pdf/Hansford_qqek3ose.pdf [https://perma.cc/72PV-WXYD] (detailing the limits of the Warren Court's First Amendment protection for demonstrations advocating racial justice).

the criminal convictions of draft-card burners,[51] some civil rights demonstrators,[52] and publishers of otherwise constitutionally protected speech who engaged in what the Court called "pandering."[53]

With the receding of Warren Court liberalism, free speech law took a sharp right turn. Instead of providing a shield for the powerless, the First Amendment became a sword used by people at the apex of the American power hierarchy. Among its victims: proponents of campaign finance reform,[54] opponents of cigarette addiction,[55] the LBGTQ community,[56] labor unions,[57] animal-rights advocates,[58] environmentalists,[59] targets of hate speech,[60] and abortion providers.[61] While striking down laws that protected all of these groups, the Court upheld a statute that cut off all funding to colleges and universities that refused to allow the military to recruit on campus[62] and a statute that criminalized purely political speech that constituted neither incitement nor a clear and present danger when

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51. United States v. O'Brien, 391 U.S. 367, 377 (1968).

52. See, e.g., Walker v. City of Birmingham, 388 U.S. 307, 320–21 (1967) (upholding a conviction for criminal contempt premised on disobeying an injunction against demonstration); Adderley v. Florida, 385 U.S. 39, 46–47 (1966) (upholding a conviction for demonstrating on jailhouse grounds).

53. Ginzburg v. United States, 383 U.S. 463, 474–75 (1966) (holding that "pandering" is relevant to an obscenity judgment).

54. See, e.g., Citizens United v. FEC, 558 U.S. 310, 342–43 (2010) (holding that corporations have a constitutional right to expend money in conjunction with political campaigns); Buckley v. Valeo, 424 U.S. 1, 45 (1976) (per curiam) (invalidating expenditure limits for political campaigns).

55. See, e.g., Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 565–66 (2001) (invalidating a regulation of outdoor cigarette advertisements).

56. See, e.g., Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000) (holding that requiring the Boy Scouts to accept a gay scoutmaster violated the organization's right to expressive association).

57. See Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2471 (2018) (holding that compelled contributions to unions by government employees violate freedom of speech).

58. See United States v. Stevens, 559 U.S. 460, 482 (2010) (holding that a statute prohibiting the creation, sale, or possession of depictions of animal cruelty is facially unconstitutional).

59. See Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 571 (1980) (holding that a prohibition on promotional advertising by an electric utility violates the First Amendment).

60. See R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (holding that an ordinance that prohibits "fighting words" that insult, or provoke violence, on the basis of race, color, creed, religion, or gender violates the First Amendment).

61. See McCullen v. Coakley, 134 S. Ct. 2518, 2541 (2014) (holding that a statute establishing a "buffer zone" around abortion clinics violates the First Amendment).

62. See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 69–70 (2006) (rejecting a First Amendment challenge to a statute that conditions federal funding of universities on those universities providing equal access to military recruiters). In the interest of full disclosure, I note that I served on the Board of Directors of the Forum for Academic and Institutional Rights.

the speech "material[ly] support[ed]" a group that the State Department labeled as a "foreign terrorist organization."[63]

No one should confuse this quick-and-dirty summary with a serious analysis of the history of free expression in the United States. I have elided many details and complications. But the summary is sufficient to demonstrate that over the course of our history, free speech law has only occasionally been of much help to progressive causes and that during the modern period, it has often been an important impediment.

Despite this, advocates of free speech progressivism want to claim that the modern period is aberrational and that it is possible to return to or create a new golden age during which the speech right, properly understood, would mandate progressive outcomes.[64] They are at least partially right. Modern free speech doctrine breaks from the recent past because it has gone beyond authorizing political suppression of political radicals; courts have affirmatively intervened to reverse the occasional political victories of progressives.[65]

In a deeper sense, though, the modern period is far from aberrational. At its core, free speech law entrenches a social view at war with key progressive objectives. For that reason, it is not surprising that throughout American history, the speech right has, at best, provided uncertain protection for progressives. The modern, antiprogressive First Amendment amounts to the delayed presentation of traits built into the genetic material of the speech right.[66] The next Part explores that genetic material in further detail.

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63. See Holder v. Humanitarian Law Project, 561 U.S. 1, 8, 31 (2010) (holding that a statute that prohibits material support to listed "terrorist" organizations is constitutional even as applied to some peaceful and lawful activities).

64. See, e.g., Catherine L. Fisk, A Progressive Labor Vision of the First Amendment, 118 Colum. L. Rev. 2057, 2065 (2018) ("[R]estoring the First Amendment protection that labor protest enjoyed in the 1940s will not jeopardize antitrust or other regulation of expressive conduct that lies close to the line between the economic and political."); Jedediah Purdy, Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment, 118 Colum. L. Rev. 2161, 2175–81 (2018) (arguing for neutrality as an aim of a progressive First Amendment jurisprudence and recognizing that neutrality "might require the doctrines of *Buckley* and *Citizens United*").

65. See, e.g., Amanda Shanor, The New *Lochner*, 2016 Wis. L. Rev. 133, 136–37 (warning that subjecting all restrictions on speech to intense constitutional scrutiny would "render democratic self-government impossible"). But cf. Kessler, supra note 44, at 1924 (cautioning against "treating First Amendment Lochnerism as a recent corruption of an otherwise progressive project of judicial civil libertarianism").

66. See Shanor, supra note 65, at 136 ("Speech protection possesses broader deregulatory capacity . . . ."). Many of the arguments I offer below might be extended to attack liberal constitutional rights more generally. There is an extensive literature, some of it with roots in the progressive tradition, that is skeptical of rights rhetoric. See generally Duncan Kennedy, The Critique of Rights in Critical Legal Studies, *in* Left Legalism/Left Critique 178 (Wendy Brown & Janet Halley eds., 2002); Roscoe Pound, Liberty of Contract, 18 Yale L.J. 454, 457–62 (1909) (arguing that the American conception of rights privileges individualism and "exaggerate[s] private right[s] at the expense of public interest"); Mark Tushnet, An Essay on Rights, 62 Tex. L. Rev. 1363 (1984). But the argument

III. FOUR REASONS WHY FREE SPEECH CANNOT BE PROGRESSIVE

This Part details four interlocking reasons why the speech right cannot be used to systematically and significantly advance progressive ends. The first two, discussed in sections III.A and III.B, relate to property entitlements and the feasance–nonfeasance distinction, respectively. They demonstrate that First Amendment theory rests on libertarian assumptions at war with progressivism. The third and fourth reasons, discussed in sections III.C and III.D, assume arguendo that there is no such libertarian tilt. Even on that assumption, the free speech right cannot be progressive because the supposed neutrality between ideas that advocates of free speech prize is inconsistent with the systematic advancement of progressive ideas (section III.C) and because a constitutional command regarding free speech is inconsistent with the unfettered dialogue that progressives value (section III.D).

A. *Free Speech and Property Entitlements*

Years ago, the great press critic, A.J. Liebling, wrote that "[f]reedom of the press is guaranteed only to those who own one."[67] He was on to an important point: There is an intrinsic relationship between the right to speak and the ownership of places and things. Speech must occur somewhere and, under modern conditions, must use some things for purposes of amplification. In any capitalist economy, most of these places and things are privately owned,[68] and in our capitalist economy, they are distributed in dramatically inegalitarian fashion.[69]

Even before the recent, radical right turn in free speech law, the connection between property and speech posed a problem for a progressive version of the speech right. Because speech opportunities reflect current property distributions, free speech tends to favor people at the top of the power hierarchy.[70]

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against rights plays out in different ways and with different force in different settings. In this Essay, I confine my discussion to the speech right.

67. A.J. Liebling, The Wayward Press: Do You Belong in Journalism?, New Yorker, May 14, 1960, at 105, 109 (on file with the *Columbia Law Review*).

68. Most, but not all. The right to a public forum provides a partial corrective, but, under modern conditions, marches and demonstrations in public streets and parks matter little unless privately owned media publish information about them. Moreover, access to public property is sharply limited by a variety of legal rules, which have become much more restrictive in recent years. See Ronald J. Krotoszynski, Jr., Our Shrinking First Amendment: On the Growing Problem of Reduced Access to Public Property for Speech Activity and Some Suggestions for a Better Way Forward, 78 Ohio St. L.J. 779, 804, 817 (2017).

69. For statistics on inequality in labor income and capital in the United States as compared with other countries, see Thomas Piketty, Capital in the Twenty-First Century 247–49 tbls.7.1, 7.2 & 7.3 (Arthur Goldhammer trans., 2014).

70. Of course, there are isolated strands of free speech law that are redistributive. But for reasons explained below, the fundamental structure of the doctrine rests on fixed property rights. See infra notes 79–81 and accompanying text.

Consider, for example, *Citizens United v. FEC*, in which the Court invalidated restrictions on independent corporate campaign speech.[71] The case is the bête noire of free speech progressives, and for obvious reasons. The holding and closely related holdings that restrict regulation of independent political action committees (PACs)[72] and of aggregate contribution limits[73] more or less doom the effort, already made difficult by *Buckley v. Valeo*, to break the chain between money and politics.[74] That link, in turn, makes progressive political victories much more difficult.

These grim facts should not distract us from the reality that the holding of *Citizens United* was also more or less inevitable. The case was effectively lost when, at oral argument, the Justices began asking questions about media corporations.[75] No one thinks that the government can prohibit the *Washington Post* from endorsing Hillary Clinton for president or Penguin Books from publishing a book during election season criticizing Donald Trump.[76] The government struggled to distinguish media corporations from other corporations wishing to spend money on political speech,[77] but the Court proved unwilling to accept the distinction,[78] and it is hard to see how the distinction could have been operationalized.

Suppose, though, that the Court had somehow fashioned a carve-out for media companies. Such an exception hardly solves the problem from a progressive point of view. No progressive should be surprised by the

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71. 558 U.S. 310, 337–40 (2010).

72. See, e.g., SpeechNow.org v. FEC, 599 F.3d 686, 695 (D.C. Cir. 2010) (holding that limitations on contributions to PACs making independent expenditures are unconstitutional).

73. See McCutcheon v. FEC, 134 S. Ct. 1434, 1442 (2014) (holding aggregate contribution limits unconstitutional).

74. See 424 U.S. 1, 143 (1976) (per curiam) (invalidating a number of campaign finance reforms while leaving in effect only the individual contribution limit to individual candidates, due to concerns of "quid pro quo" corruption).

75. See Transcript of Oral Argument at 26–40, *Citizens United*, 558 U.S. 310 (No. 08-205), 2009 WL 760811; id. at 64–68, 2009 WL 6325467.

76. At one time, it was thought that the First Amendment permitted the government to regulate the "fairness" of broadcast media. See Red Lion Broad. Co. v. FCC, 395 U.S. 367, 377 (1969). But technological changes have raised doubts about that holding. See FCC v. Fox Television Stations, Inc., 556 U.S. 502, 533 (2009) (Thomas, J., concurring) ("Even if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified at the time of *Red Lion* and *Pacifica*, dramatic technological advances have eviscerated the factual assumptions underlying those decisions."). Moreover, the Court has made clear that the holding does not apply to print media or cable. See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1984) (cable); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (print media). The status of speech platforms like Twitter and Facebook is more fluid. We may come to see them as analogous to public utilities subject to government regulation. In another possible world, one could imagine the analogy being extended to traditional media companies like newspapers and book publishers, but that is not our world. Making it into our world would require a close-to-unimaginable revision of fundamental free speech principles.

77. See supra note 75 and accompanying text.

78. See *Citizens United*, 558 U.S. at 352–53 (rejecting the distinction between media and ordinary corporations).

fact that media companies are disproportionately owned by very wealthy people. In every other sphere, progressives reject the idea that markets and willingness to pay necessarily produce just distributions of assets.[79] Why should distribution of media assets be any different? So long as there is a link between wealth and the means of speech amplification, the First Amendment cannot be progressive.[80]

It bears emphasis that this outcome is not a result of conservative distortion of free speech theory that might easily be remedied if progressives controlled the Supreme Court. In a completely different world, one could imagine that we would treat media companies as common carriers subject to regulation or even as state actors constitutionally required to provide others with speech opportunities. But that is nothing like our world. As things stand now, the immunity of newspapers and book publishers from government control is a bedrock free speech principle.[81] That immunity favors people who are wealthy enough to acquire these assets.

Understanding the connection between property and speech unmasks progressive support for the speech right for what it is: a kind of "trickle down" theory of civil liberties. Yes, the big victors are the rich and powerful, but the rather pathetic hope is that just enough protection will trickle down to prevent the government from entirely annihilating unpopular leftists.

There is, of course, something to this argument. The First Amendment might protect progressives from the most serious sorts of attack even if it stands in the way of affirmatively advancing the progressive agenda.[82] The defense nonetheless understates the extent to which the speech game is competitive and the extent to which doctrinal manipulation can support politically discriminatory application of legal rules. More importantly, though, it misunderstands the most serious danger to effective progressive speech.

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79. See, e.g., supra note 1 and accompanying text.

80. Of course, there is always the possibility that government regulation of media would make things worse rather than better. Both thoroughgoing Marxists and thoroughgoing libertarians believe that this result is inevitable, at least under current conditions. But progressives occupy the uncomfortable space between Marxists and libertarians. They think that government offers the best hope of regulating market outcomes to make them more just. Giving up that hope is giving up on progressivism itself, and, so long as the hope remains alive, no progressive should favor media immunity from government regulation designed to redistribute speech opportunities. For further discussion, see infra section III.B.

81. See, e.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 123 (1991) (holding unconstitutional a statute that required an accused or convicted criminal's income from works describing his crime be deposited in an escrow account from which funds were then made available to the victims of the crime and the criminal's other creditors); N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (upholding newspapers' general right to be free from prior restraint even when they publish classified material).

82. See supra note 17 and accompanying text.

In the modern era, the danger is not mass imprisonment of political radicals. It is not even milder forms of intimidation, like blacklists or exclusion from government jobs.[83] Ironically, what works much better is the proliferation and splintering of speech opportunities. These trends are greatly enhanced by technological changes in the means of speech production. As Professor Tim Wu has forcefully argued, the modern free speech problem is not government suppression but speech clutter, trolling, and speech siloing.[84] "Fake news" is everywhere, and because views are constantly reinforced by exposure to ideologically driven media, there is too little prospect of correction.

One might suppose that this democratization of speech breaks the link between wealth and speech opportunities. In fact, though, the change exacerbates, rather than diminishes, the difficulty for progressives.[85] In a world where there is too much speech, the old notion that a free speech regime creates an unfettered marketplace of ideas breaks down. Anyone can use Twitter, but that very fact means that Twitter produces an undifferentiated and useless swamp of information and opinion. The result is that people need a filter. Real control is therefore exercised not by speech producers but by speech aggregators and amplifiers, who themselves enjoy some protection under the First Amendment.[86] While it may be cheap to produce speech, aggregation and amplification—speech management—still require capital. Moreover, the managers regularly shield speech consumers from ideas that are unfamiliar, upsetting, or inconsistent with a preconceived narrative. To the extent that progressive views are all of these things, they are regularly filtered out by technological devices that allow people to receive only the ideas that they want to hear.[87]

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83. Of course, this state of affairs might itself be the result of our free speech culture. If that culture were destroyed, there is some risk that these tactics would reappear. But the risk is relatively small because conservatives have come to understand that heavy-handed repression often backfires and is unnecessary. See supra Part II.

84. Tim Wu, Knight First Amendment Inst., Is the First Amendment Obsolete? 2–3 (2017), https://knightcolumbia.org/sites/default/files/content/Emerging%20Threats%20Tim%20Wu%20Is%20the%20First%20Amendment%20Obsolete.pdf [https://perma.cc/SM27-BZ9H].

85. Indeed, some commentators have argued that the "crowding out" effects of unfiltered speech are deleterious to both the Right and the Left, considering, for example, the ability of foreign states to interfere with traditional progressive and conservative narratives. See id. at 11–14.

86. See Jack M. Balkin, Free Speech Is a Triangle, 118 Colum. L. Rev. 2011, 2021–25 (2018) [hereinafter Balkin, Triangle] ("[W]e should think of private-infrastructure owners—and especially social media companies—as governing online speakers, communities, and populations, rather than thinking of them as merely facilitating or hindering digital communication. . . . [W]e should recognize [digital infrastructure companies] as the governors of social spaces.").

87. Cf. Cass Sunstein, Republic.com 8–9 (2001) (arguing that a well-functioning system of free expression requires that "people should be exposed to materials that they would not have chosen in advance" and that the specialization of websites and discussion groups obstructs this disclosure).

Deeply engrained First Amendment doctrine makes it very difficult to deal with this state of affairs. The doctrine is dominated by obsession with government restrictions on speech and with government interference with listener autonomy. It is ill-equipped to deal with a world where there is too much speech and where listener autonomy makes real conversation impossible.

The problem of too much speech also provides reason for skepticism about some of progressivism's favorite solutions to the free speech problem. Many progressives favor leveling the playing field without running afoul of First Amendment principles by government subvention of speech.[88] Why not give every citizen a campaign contribution voucher to use to support the candidate of her choice? Why not have government-sponsored newspapers, websites, and publishers open to all? Why not greatly expand government funding for investigative reporting or the National Endowment for the Arts, the National Endowment for the Humanities, and the Corporation for Public Broadcasting?

Enacting some of these proposals might in fact make things marginally better. Still, even apart from speech clutter, the proposals have obvious problems and limitations. Providing campaign contribution vouchers adds to the total volume of campaign speech, but it does relatively little to remedy the disproportion.[89] Government sponsorship of the means by which speech is produced introduces inevitable problems about government choices regarding which speech to subsidize.[90] But the more fundamental difficulty is that in a world where there is already too much speech, and where people are shielded from speech they disagree with, government programs to encourage more speech are unlikely to make things better and might actually make them worse.

In theory, many of these problems might be solved by wealth redistribution that makes our society more egalitarian. In a world with more economic equality, control of speech production and management would be more economically diverse. Put differently, if the progressive program were already enacted, free speech might be more progressive. And that, of course, is the problem. The impact of money on politics makes it much

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88. For a representative example, see generally Bruce Ackerman & Ian Ayres, Voting with Dollars: A New Paradigm for Campaign Finance (2002).

89. The problem is made worse by the Supreme Court's insistence that the government may not peg subsidies to the amounts spent by a candidate's opponent. See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 737–39 (2011) (holding that public subsidies for candidates keyed to the amount spent by self-financing opponents are unconstitutional); Davis v. FEC, 554 U.S. 724, 740–41 (2008) (holding that a statute that raised contribution limits for non-self-financing candidates when expenditures by self-financing candidates exceeded a certain amount was unconstitutional).

90. Although First Amendment requirements are inapplicable when the government itself speaks, discriminatory government funding of private speakers is conventionally treated as raising serious First Amendment concerns. Compare Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015) (government speech), with Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834–35 (1995) (government-subsidized private speech).

harder to assemble legislative majorities to enact the progressive program. Worse yet, the modern right turn in First Amendment law demonstrates that the speech right has the potential to make redistribution unconstitutional.

To understand this last point, we need to examine the contradiction at the heart of the New Deal constitutional settlement. Beginning with the famous Footnote Four in *United States v. Carolene Products Co.*,[91] the Court sought to distinguish between the protection of economic and political rights. On this view, property entitlements are discretionary and subject to redistribution if political majorities can be assembled to support redistributive programs. In contrast, civil liberties, like freedom of speech, were fixed and immune from majoritarian erosion. The contradiction is obvious: Because speech rights depend upon property entitlements, free speech cannot remain fixed while property entitlements are redistributed.

The tension might be resolved in one of two ways. First, the discretionary character of property rights might bleed over into speech law, thereby making speech opportunities discretionary rather than mandatory. Some examples illustrate how this might be accomplished. In *Janus v. AFSCME*, the Supreme Court held that "agency fees" charged to nonunion members working for public employers violate the First Amendment.[92] In the Court's view, public-employee unions engage in inherently political activity. Forced payment of fees that support that activity therefore constitutes unconstitutional compelled speech.[93]

As Professor Benjamin Sachs has pointed out, the argument depends on the money in question being the property of the employees.[94] One might instead think of the money as being the property of the state employer. Suppose that instead of deducting the agency fee from the workers' paychecks, the government simply paid its workers lower wages and donated the surplus to the union. No employee would be forced to endorse a cause she opposed, so the compelled speech claim would evaporate. Because property rights are discretionary, it would seem that there is no constitutional obstacle to this recharacterization of the property right.

A similar argument was available in another compelled speech case, *Boy Scouts of America v. Dale*.[95] State antidiscrimination law prohibited the Boy Scouts from excluding individuals from the organization because of their sexual orientation. The Boy Scouts claimed that the law violated their right to "expressive association" by requiring them to endorse a lifestyle they opposed.[96] But this argument depended on the unstated assumption

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91. 304 U.S. 144, 152 n.4 (1938).

92. See Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2471 (2018).

93. Id. at 2464.

94. Benjamin I. Sachs, Agency Fees and the First Amendment, 131 Harv. L. Rev. 1046, 1047–48 (2018).

95. 530 U.S. 640 (2000).

96. See id. at 644.

that the Boy Scouts themselves were owned by an organization called the Boy Scouts of America. Suppose, though, that one treated the antidiscrimination statute as adjusting this property claim. Although the Boy Scouts of America retained most of the sticks in the bundle, the statute created a kind of nondiscrimination "easement" and vested that property right in people like Dale. If Dale had the entitlement in the first place, then the free speech right cuts the other way. The Boy Scouts would be violating Dale's speech rights by utilizing his property to advance their ideological objectives.

Of course, both Dale and the public-employee unions lost their cases.[97] These results entail resolving the tension between property and speech entitlements in a second way: allowing speech law to bleed over into property law, thereby making property entitlements fixed rather than discretionary. Because speech is immune from government redistribution, the property rights necessary to support speech must be fixed as well. If this resolution is chosen, then the state *may not* treat the agency fees as state property, and the state *must* treat Boy Scout membership decisions as belonging to the Boy Scouts of America.

In principle, the Court might use this technique to constitutionally entrench a libertarian utopia. Because all property has the potential to fund speech, any property redistribution affects speech opportunities and, therefore, in some sense gives government control over speech. The Justices have not yet gone that far and are unlikely to do so.

Still, when confronted with direct conflict between a fixed First Amendment and a fluid property regime, the modern Court has often resolved the contradiction by fixing property rights, thereby producing what commentators have called "the new Lochnerism."[98] For example, the political branches must simply accept the fact that consumer tastes for harmful products are formed by commercial advertising.[99] If publishers sell books or newspapers that harm those they attack, the state is often precluded from redistributing the economic loss.[100] The government is sharply constrained if it tries to intervene in the economic market for political candidates,[101] regulate a pharmacy's decision to sell confidential information

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97. See *Janus*, 138 S. Ct. at 2471; *Dale*, 530 U.S. at 656 .

98. See, e.g., Shanor, supra note 65, at 135 ("[A] growing number of scholars, commentators, and judges have likened aspects of recent First Amendment jurisprudence to *Lochner v. New York*'s anticanonical liberty of contract.").

99. See, e.g., Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 565–66 (2001) (invalidating a regulation of outdoor cigarette advertisements).

100. See, e.g., Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (holding that the First and Fourteenth Amendments prohibited a public figure from recovering damages for the tort of intentional infliction of emotional distress—caused by a magazine's publication of advertisement parody—without also showing that the publication contained a false statement of fact made with actual malice).

101. See, e.g., McCutcheon v. FEC, 134 S. Ct. 1434, 1441–42 (2014) (holding aggregate contribution limits unconstitutional).

about drug prescriptions,[102] or regulate the manner in which merchants state the prices for the goods they sell.[103]

Once again, these outcomes do not result from a deformation of the free speech right. They are the consequence of shielding the speech power from political redistribution. For a period, it may have seemed that speech rights could be protected from the political branches while subjecting economic entitlements to political adjustment. But because speech opportunity depends upon property distributions, this compromise was always unstable. Of course, a more liberal Court might occasionally resolve the contradiction by insisting on redistributed property rights in order to protect speech rights,[104] but no Court was or is likely to undertake the kind of broadscale, constitutionally mandated property redistribution that would make free speech *truly* progressive. In recent years, a conservative Court has chosen instead to invigorate the speech right by imposing *Lochner*-like restrictions on the reallocation of the property entitlements that make speech possible. The results have been disastrous for progressives, but the disaster is completely consistent with the internal logic of most free speech doctrine.

B. *Free Speech and the Feasance–Nonfeasance Distinction*

Speech causes harm. It can coerce, humiliate, mislead, embarrass, and destroy. Of course, the suppression of speech also causes harm. So, as a first cut, the public policy question is how to balance the two potential harms against each other.

Actually, though, the question is more complicated because the speech game is often zero sum. Granting speech opportunities to some often denies speech opportunities to others. For that reason, the speech right harms speech, as well as nonspeech, interests. Solving the policy question therefore requires balancing along two different dimensions: We need to balance between competing speech so as to maximize overall speech opportunities, and then we need to balance those speech opportunities against nonspeech costs so as to produce the most speech at the least cost.

Needless to say, operationalizing all of this poses a complicated problem. Conservatives have a simple solution to it. Much of the work is done by presumptively favoring government nonfeasance over government feasance. Government intervention is appropriate when private individuals

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102. See Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011) (holding that a statute restricting "the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors" violates the First Amendment).

103. See Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1151 (2017) (holding that a statute that prohibits merchants from offering a discount in exchange for paying with cash regulates speech).

104. I therefore do not mean to claim that free speech doctrine cannot yield occasional, small-scale progressive victories. See supra notes 48–53 and accompanying text.

harm others, but the harm must be clearly and narrowly defined. Absent such harm, the private sphere will magically produce better outcomes than the government can generate.

American free speech law adheres to this approach. Like the rest of the Constitution, First Amendment doctrine links freedom to government nonfeasance and oppression to government action. It assumes that speech is "free[]" when government "make[s] no laws," and that it is laws that have the potential to "abridg[e]" the freedom of speech. If homophobic religious fanatics add to the pain of grieving friends and relatives at a military funeral, the mourners have no legal recourse. But if the government tries to prevent infliction of this harm, the fanatics can invoke judicial process to enforce their speech rights.[105]

The dichotomy is starker still when speech rights are on both sides of the ledger. If Facebook takes down posts expressing political views it dislikes, that action is a manifestation of freedom, and the government's decision to do nothing about it raises no free speech concerns.[106] But if the government intervenes to force Facebook to provide fair speech opportunities to all, that action is coercive and there is at least a First Amendment problem and maybe a First Amendment violation.[107]

This general orientation violates core progressive commitments. Progressives think that the government has a duty to act affirmatively to counterbalance private power and correct for the unfairness of market allocations. When the government "does nothing"—when it acts like a "night-watchman state" or endorses laissez faire economics—it is failing to meet its responsibilities.

Progressives are not unaware of the risk of government capture, and there is always the possibility that government intervention will make things worse rather than better. Progressives have two responses to this risk. First, they emphasize the "compared to what" problem. Governments

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105. See Snyder v. Phelps, 562 U.S. 443, 455–58 (2011) (holding that the speech of church members who picketed near the funeral of a military service member was of public concern and therefore was entitled to special protection under the First Amendment). It is worth noting that only Justice Alito dissented from the holding. See id. at 463 (Alito, J., dissenting). Even the Court's liberals acceded to this robust conception of the harm that the First Amendment requires.

106. See, e.g., Reno v. ACLU, 521 U.S. 844, 878–79 (1997) (invalidating a statute that prohibited the posting of "indecent" material on the internet). But cf. Balkin, Triangle, supra note 86, at 2045 ("Legislation that requires digital curators to provide due process would not necessarily violate the First Amendment. . . . [O]ne can avoid constitutional problems by making due process obligations part of a safe harbor from intermediary liability.").

107. Cf. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1984) (holding that the less rigorous First Amendment protection against broadcast regulation does not apply to cable regulation); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (invalidating a "right of reply" statute applicable to print media).

can be arbitrary and autocratic, but markets also have problems.[108] Most progressives favor a mixed system that leaves many matters in the private sphere but also provides for more or less government intervention to enforce public values.[109]

Second, many progressives point out that nonintervention is not a real possibility.[110] Background property and contract rules, as well as our tax and spending regime, regulation of the money supply, and countless other government interventions, give particular people the power to control resources. If the rules were different, other people would be in control. One way or the other, the government is implicated in supposedly private decisions. Given the inevitability of government involvement, the state should be obligated to promote, rather than retard, the broad distribution of power and opportunity.

How might this general stance toward market allocations be reconciled with free speech law? Progressives might treat speech as different from other sorts of entitlements. They might, in other words, argue that a laissez faire state with respect to speech serves progressive interests even as laissez faire economics endanger progressive goals with respect to everything else. Alternatively, they might try to refashion free speech law so as to mandate government action rather than inaction.

It is hard to see what sort of argument would support the first resolution. One might think that speech is especially valuable[111] or especially vulnerable to state suppression.[112] But how does a laissez faire speech regime promote *progressive* ends? If progressives think that government intervention is sometimes necessary to give people fair market opportunities, then why do they think that government intervention is never necessary to give people fair speech opportunities? If they think that government is

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108. Cf. Neil K. Komisar, Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis, 51 U. Chi. L. Rev. 366, 376 (1983) ("A court that normally harbors a strong presumption in favor of legislative supremacy may be willing to reconsider that presumption in the face of severe political malfunction, but it would not and should not abandon the presumption unless . . . it can offer an alternative superior to the defective legislative process.").

109. See, e.g., Reich, supra note 1, at xiii (arguing that the debate over the merits of a "free market" versus an activist government has diverted attention from how markets should be organized).

110. For early progressive arguments along these lines, see generally Morris R. Cohen, Property and Sovereignty, 13 Cornell L.Q. 8 (1927); Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 Pol. Sci. Q. 470 (1923).

111. See, e.g., Leslie Kendrick, Use Your Words: On the "Speech" in "Freedom of Speech," 116 Mich. L. Rev. 667, 689–93 (2018) (arguing for the special value of speech). As noted above, one can be a progressive and still favor freedom of speech on nonprogressive grounds. See supra notes 2–7 and accompanying text.

112. See, e.g., NAACP v. Button, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

inevitably implicated in market decisions, then how do they think the government can avoid implication in speech decisions?

Despite these difficulties, some progressives might support free speech if they thought that the political branches would most often be controlled by the enemies of progressivism and that the maintenance of a constitutionally protected private sphere was necessary to protect progressives from these enemies.

There is something to this argument. As noted above, it is at least possible that the speech right has protected progressives from truly catastrophic outcomes.[113] But there is a big gap between acknowledging this possibility and believing that the speech right could be refashioned so as to actually mandate progressive outcomes.

Moreover, if we take seriously the argument that the political branches are likely to be controlled by the enemies of progressives, we risk impeaching the progressive position more generally. If the enemies of progressivism are more likely to win elections, then progressives should also want to shield property entitlements from political interference. A reactionary state that suppresses progressive speech will also redistribute property in the wrong direction. As flawed as markets are, they are better than this alternative. To be clear, the worry about reactionary government may be justified, but if it is, then progressivism itself should be rejected. Free speech would then be reconciled with the progressive ideal, but only because the ideal has been transformed beyond recognition.

The other alternative is to reconceive speech law so as to break the link between freedom and government nonfeasance. There is nothing in principle that stands in the way of accomplishing this goal, and there are fragile and neglected strands of First Amendment doctrine that support it. For example, long ago, the Supreme Court held that the government had an affirmative obligation to regulate privately owned "company towns" that were restricting speech.[114] In limited circumstances, it has required the government to open "traditional public fora" to speech activities.[115] It has permitted, but not required, "fairness" regulation of broadcast media.[116] However, these examples are isolated and aberrational. Of course, a Court that was so inclined could expand this doctrine at the margin. But there are deep structural problems, not to mention decades of precedent, that stand in the way of an expansion that would really make a difference.

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113. See supra note 17 and accompanying text.

114. Marsh v. Alabama, 326 U.S. 501, 508–09 (1946).

115. See, e.g., Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939). For indications of just how limited these circumstances are, see, e.g., Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 680 (1992) (holding that an airport is not a public forum); United States v. Kokinda, 497 U.S. 720, 727 (1990) (holding that a sidewalk near the entrance of a post office is not a public forum); Adderley v. Florida, 385 U.S. 39, 46–47 (1966) (holding that a grassy area near a jail is not a public forum).

116. See Red Lion Broad. Co. v. FCC, 395 U.S. 367, 377 (1960).

The problem becomes apparent as soon as one sees that opening speech opportunities for some means limiting speech opportunities for others. A statute that requires best-selling books to publish "balanced" accounts of controversial issues impinges on the speech right of authors. A law that requires TV stations to offer "equal time" discourages stations from editorializing. Equalizing campaign expenditures entails reducing the power of the wealthy to communicate their messages.

All of this would have to be in service of creating some target "fair" distribution of speech opportunities. But what distribution is "fair"? As currently distributed, flat-earthers and advocates for burning witches have very limited speech opportunities. Is that really a bad state of affairs? If overt racists are currently underrepresented in our speech marketplace, should progressives really favor government subsidies so they can more effectively get their message out? The alternative is for the government to decide that some distributions are appropriate because the underrepresented speech is just "wrong." But once the government is given that power, there is no guarantee that it will not put progressive speech in the "just wrong" category.

In any event, a systematic effort by the government to determine which speech to promote and which to suppress based on official determinations of the correctness of contested positions is the antithesis of the speech right rather than its apotheosis. Even if it would promote progressive values, it would be unrecognizable as a realization of First Amendment ideals.

C. *Free Speech and Government Neutrality*

The problem posed by government determinations about the appropriate distribution of speech opportunities points toward a third obstacle to a progressive speech right. American speech law is dominated by a concern about equality and neutrality. Free speech law's core commitment is to the proposition that the government may never suppress speech simply because of disagreement with the message that it expresses.[117] Although the government itself can express controversial opinions,[118] the government may not restrict the content of others' speech unless it can justify the regulation based on the secondary effects of speech.[119]

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117. See, e.g., Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

118. See, e.g., Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.").

119. See, e.g., City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (upholding a local ordinance that limited the possible locations for "adult motion picture theatres" because the regulation was "aimed not at the *content* of the films . . . but rather at the *secondary effects* of such theaters on the surrounding community").

Much of the First Amendment's doctrinal apparatus concerning matters like content,[120] viewpoint,[121] and speaker neutrality[122] reinforce this basic idea.[123] Because free speech is the means by which our political disputes are resolved, our free speech regime must, itself, be neutral as between those disputes. That is why content and viewpoint restrictions are especially suspect, and why even regulation that only indirectly affects speech must be justified on grounds other than disagreement with the views being expressed.[124]

This stance, in turn, reflects a broader theoretical view about the overall purpose of constitutional law. On standard liberal premises, the Constitution is supposed to provide the mechanism by which people with opposing views can settle their disagreements through law rather than power. To accomplish this goal, the Constitution must be acceptable to people of differing political beliefs. It is designed to enforce a regime of fair political competition, and the competition can be fair only if the Constitution is neutral regarding the outcome.[125]

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120. See, e.g., Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015) (holding that the town sign code's "differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs" was not content neutral and failed to withstand the requisite strict scrutiny review).

121. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (striking down a "Bias-Motivated Crime Ordinance" on the ground that it embodied viewpoint discrimination).

122. See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 50–55 (1983) (upholding a speaker-based restriction in the context of a nonpublic forum).

123. The Supreme Court has enforced the ban on content-based distinctions even in the context of expression that is not protected by the First Amendment. See *R.A.V.*, 505 U.S. at 386. However, it has excepted from this ban instances in which the reason for the content discrimination is also the reason the speech is prohibited. Id. at 388.

Recent Supreme Court opinions applying these requirements have been extraordinarily rigid and formalistic. See, e.g., *Reed*, 135 S. Ct. at 2228; cf. Genevieve Lakier, *Reed v. Town of Gilbert, Arizona*, and the Rise of the Anticlassificatory First Amendment, 2016 Sup. Ct. Rev. 233, 259–86 (criticizing *Reed* on these grounds). But although the Court could conceivably loosen its prohibition on content neutrality, it is hardly conceivable that it would give up on its First Amendment commitment to the equality of ideas. Cf. *Reed*, 135 S. Ct. at 2237 (Kagan, J., concurring in the judgment) (criticizing the Court's rigid application of the ban on content neutrality but endorsing the prohibition on government regulation based on hostility toward the underlying message).

124. See, e.g., *Reed*, 135 S. Ct. at 2229 ("Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech."); Texas v. Johnson, 491 U.S. 397, 406 (1989) ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements." (citations omitted)).

125. Anything like a full defense of this position would far exceed the scope of this Essay. For present purposes, it is enough to say that rational individuals are unlikely to commit themselves to a government structure that systematically and deliberately biases outcomes against their values, norms, and life choices. For further elaborations of this point, see Louis Michael Seidman, Seven Problems for Classical Liberals, *in* The Cambridge Handbook of Classical Liberal Thought 270, 275–76 (M. Todd Henderson ed., 2018). For a discussion of the problems with achieving constitutional neutrality, see Louis Michael

But progressivism is not neutral. It is a fighting faith committed to a particular and controversial outcome. It follows that a progressive First Amendment necessarily violates the ground-level premises of American constitutionalism. Reasonable conservatives would be no more bound in conscience to accept a progressive First Amendment than reasonable progressives would be bound to accept a conservative version. So long as we imagine that the Constitution is the common ground that people of all political persuasions can adhere to, it cannot be progressive.

A fair response to this argument is that constitutional neutrality is a sham. As any serious student of constitutional history knows, the Framers were interested in producing some outcomes and avoiding others. Living constitutionalists do not think that we should be bound by the Framers' views, but it is deeply implausible that they are indifferent to the outcomes their interpretations produce.[126] More particularly, for reasons I have already detailed, free speech law is hardly neutral. It systematically favors status quo distributions and, so, the rich and powerful.[127] Indeed, the claim that free speech law is "just there" or is fair to everyone is an important part of the mystification that stymies progressive programs. If speech law is inevitably going to be biased one way or the other, then why not bias it toward progressives?

The underlying observation is fair enough, but the conclusion does not follow. If the Constitution is not, and cannot be, a fair and neutral framework that everyone is bound to accept, that is a reason to oppose constitutional obligation. If progressives are harmed by First Amendment mystification, they should favor demystifying the Amendment rather than embracing it.

There are, again, two escape routes from this conclusion. First, one might claim that progressivism itself is neutral. On the highest level of generality, progressives not only can, but must, make this claim. What it means to be a progressive is to believe that the progressive platform best advances human flourishing. For the very reason that progressives, like everyone else, are not neutral with regard to their own beliefs, they are likely to believe that their own beliefs are neutral. They are bound to think that adoption of their program will promote human flourishing and, therefore, that all sensible and humane people should favor that program.

But this sort of neutrality provides no basis for political union. Even though proponents of particular points of view think of them as neutral, that claim alone does not provide ground to share with proponents of

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Seidman, The Secret History of American Constitutional Skepticism: A Recovery and Preliminary Evaluation, 17 U. Pa. J. Const. L. 1, 104–09 (2014).

126. See, e.g., David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 881–82 (1996) (arguing that constitutional interpretation sometimes requires overriding the Framers' intentions and that it is "hard to see how anyone could interpret the Constitution without relying on [moral] judgments at least sometimes").

127. See supra notes 79–80 and accompanying text.

conflicting points of view. Of course, progressives are convinced of the merits of their own arguments—otherwise they would not be progressives—but they must also acknowledge the brute fact that many reasonable people reject those arguments and that they do so on reasonable grounds. To serve its unifying function, the Constitution must abstract from this reasonable disagreement.

One might think that this point is obvious but for the fact that many conservatives do not seem to understand it. They regularly defend the Constitution and a particular method of interpreting the Constitution as transcending political differences because, as they read it, the Constitution embodies the libertarian, free-market principles that all reasonable people are bound to accept.[128] That claim is plausible only if we are prepared to treat conflicting political and economic theories as illegitimate. But they are not, and because they are not, the conservative argument is inconsistent with claims of constitutional neutrality. And just as conservatives must come to grips with the unfortunate fact that there are progressives in the world, so too, progressives must recognize the existence of conservatives. The Constitution cannot settle our political arguments if it is read to take one side of them.

If that is so, then all we are left with is the possibility of mystification—that is, with unjustified claims to neutrality that trick people into thinking that their own positions are illegitimate. That possibility, in turn, leads to the second escape hatch: Perhaps progressives should be left-Straussians. Perhaps the realization of progressive ends is sufficiently important to justify mystification as to the means of achieving them.

There are many grounds for skepticism about this conclusion, and I will only briefly rehearse them here. There is little reason to think that the mystification will work or that progressives will be better at this game than their opponents. Under some versions of progressivism, mystification might, itself, be inconsistent with the progressive program. Even if it is not, a prohibition on deliberately misleading our fellow citizens might be an important side constraint.

Suppose, though, that one is unpersuaded by any of these arguments. Even if progressives decide to engage in mystification, that decision does not entail an embrace of free speech. On the contrary, mystification is the negation of speech freedom. Fooling people into believing that they must accept a regime under which speech that they favor is systematically disadvantaged is fundamentally inconsistent with virtually any version of the speech right. It subverts rather than promotes speaker autonomy, undermines rather than encourages a free and fair exchange of views,

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128. For representative examples, see Randy E. Barnett, Our Republican Constitution: Securing the Liberty and Sovereignty of We the People 22–26 (2016) (tying the originalist method to an individualist ideology); Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 3 (rev. ed. 2014) (tying constitutional legitimacy to whether the Constitution's procedural assurances protect against legal commands that are unjust).

and denies rather than affirms the obligation to allow the expression of views that we hate. In short, if progressives end up endorsing a mystification strategy, that will be because they have given up on freedom of speech.

D. *Free Speech and Free Thought*

The mystification dilemma is closely related to the final argument against free speech progressivism: At its root, the assertion of a constitutional right to freedom of speech is dictatorial. This claim will seem paradoxical to many, if not completely implausible. On widely accepted accounts, free speech provides protection against dictatorship, and limitations on the speech right are often the first measures that dictators take when they assume control.[129]

Despite all of this, however, *constitutionalizing* the right to freedom of speech leads to an antiliberal mindset. An assertion that the Constitution requires a certain state of affairs is a way of avoiding the necessity for producing actual reasons for why that state of affairs is desirable and just.[130] If the Constitution requires something, then that is the end of the argument, at least in American constitutional culture. Short of constitutional amendment, a constitutional requirement that a thing must be done just means that it must be done.[131] Once the requirement is established, there is nothing left to talk about.

Of course, it remains open to argue that the Constitution, properly understood, *does not* require a particular state of affairs. But making that move merely diverts discussion from the desirability and justice of particular outcomes to an often arcane, irrelevant, and result-oriented dispute about constitutional interpretation. We can talk until we are blue in the face about what kind of free speech regime the Constitution establishes. We can disagree about the intent of the Framers, the meaning of the words they wrote, or the extent to which the words should be read in light of our traditions and modern conditions. But once constitutional meaning is established, the argument ends. There can be no truly free speech about the desirability of free speech.

This fact about contemporary constitutional culture produces another and deeper paradox: The constitutional right to free speech is actually at war with free thought. Here, as elsewhere, the assertion of constitutional rights shuts down and sidetracks serious conversation, rather than facilitating

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129. See, e.g., John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 106–07 (1980) ("Courts must police inhibitions on expression . . . because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out.").

130. For my elaboration on this point, see Louis Michael Seidman, On Constitutional Disobedience 131–38 (2012).

131. The U.S. Constitution is among the most difficult to amend in the world. See Donald S. Lutz, Toward a Theory of Constitutional Amendment, *in* Responding to Imperfection: The Theory and Practice of Constitutional Amendment 237, 256–67 (Sanford Levinson ed., 1995).

it. It provides an excuse for avoiding the first duty that citizens owe to each other: the duty to explain and justify the positions that they take on questions that matter. It provides an excuse for not speaking, not listening, and not thinking.

Of course, none of this, by itself, demonstrates that this state of affairs harms progressives. There are nonetheless good reasons why the dictatorial character of constitutional argument should trouble them. First, for the reasons I have already given, the free speech right tends to obstruct the realization of progressive objectives. Progressives might respond to this state of affairs by attacking the free speech right. But constitutionalizing the right makes the attack pointless and, thereby, further weakens the political position of progressives.

The second reason is more speculative but also more powerful. Many progressives would like to believe that they could convince others if only they had a fair chance to do so. They think that their position would be endorsed by people who participated in a robust, unfettered, and equal dialogue about what is necessary for human flourishing. Thought, reason, and imagination, unlocked by unconstrained discussion and unpolluted by prejudice and preconception, just leads to progressive views.

A belief of this sort may underestimate differences in culture, perception, values, and experience. It may result from arrogance about the rightness of one's own position. For reasons I have already given, it almost certainly reflects a naïve view about the likely effects of a speech right in our current circumstances.[132]

Still, something like this belief provides an explanation for why many progressives cling to a belief in freedom of speech. And suppose that, despite all the reasons for skepticism, progressives are right to be optimistic about the outcome of unfettered speech. That optimism should make progressives hesitate to invoke constitutional free speech claims that, themselves, obstruct the unconstrained dialogue that progressives favor.

CONCLUSION

"Civil liberties once were radical." That is how Professor Laura Weinrib begins her magnificent book about the dramatic transformation of free speech ideology during the interwar period.[133] But they were radical in the days when free speech advocates embraced rights "'prior to and independent of constitutions,' secured without recourse to law."[134] Translating a nonlegal right of agitation into a constitutional free speech right entails all the problems that I have identified above. It means tying the right to current property distributions, associating it with government passivity, asserting its political neutrality, and using it to end, rather than

132. See supra notes 54–66 and accompanying text.

133. Weinrib, supra note 24, at 1.

134. Id. (quoting ACLU, The Fight for Free Speech 5 (1921)).

begin, good-faith argument. It means, in other words, that the right can no longer be progressive.

It should come as no surprise, then, that when groups like the ACLU managed to express the right of agitation in the language of law, free speech radicalism got lost in the translation. As Weinrib explains:

> By the early 1940s, civil liberties were no longer radical. . . . The ACLU had naively hoped, in an era when revolution seemed possible, that a mere right to agitate would pave the way to substantive change. Implicit in their position was the confidence that radicalism would prevail in the marketplace of ideas. By the 1940s, employers understood that no free exchange in ideas existed. They understood that a right to free speech would ordinarily favor those with superior resources.[135]

These were lessons learned long ago. And yet, many modern progressives seem to have forgotten them. They just can't shake their mindless attraction to the bright flame of our free speech tradition. Progressives need to turn away before they are burned again.

135. Id. at 326–27.