COLUMBIA LAW REVIEW

SYMPOSIUM
A First Amendment for All?
Free Expression in an Age of Inequality

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INTRODUCTION

Over the past decade, the Roberts Court has handed down a series of rulings that demonstrate the degree to which the First Amendment can be used to thwart economic and social welfare regulation—generating widespread accusations that the Court has created a "new Lochner." *This introduction to the* Columbia Law Review*'s Symposium on Free Expression in an Age of Inequality takes up three questions raised by these developments: Why has First Amendment law become such a prominent site for struggles over socioeconomic inequality? Does the First Amendment tradition contain egalitarian elements that could be recovered? And what might a more egalitarian First Amendment look like today?*

After describing the phenomenon of First Amendment Lochnerism, we trace its origins to the collapse of the early twentieth-century "progressive" model of civil libertarianism, which offered a relatively statist, collectivist, and labor-oriented vision of civil liberties law. The recent eruption of First Amendment Lochnerism is also bound up with transformations in the economic and regulatory environment associated with the advent of "informational capitalism" and the "information state." First Amendment Lochnerism may reflect contemporary judicial politics, but it has deep roots.

To figure out how to respond to the egalitarian anxieties besetting the First Amendment, it is natural to consult normative theories of free speech. Yet on account of their depoliticization and abstraction, the canonical theories prove indeterminate when confronted by these anxieties. Instead, it is a series of midlevel conceptual and jurisprudential moves that most often do the work of resisting First Amendment Lochnerism. This grammar of free speech egalitarianism, we suggest, enables the creative elaboration of a few basic motifs concerning the scope and severity of judicial enforcement, the identification and reconciliation of competing speech interests, and the quality and accessibility of the overall expressive system. If First Amendment Lochnerism is to be countered in any concerted fashion, the roadmap for reform will be found within this grammar; where it gives out, a new language may become necessary.

ESSAYS

doctrine in Gill v. Whitford. *The First Amendment stood at the center of this latest gerrymandering challenge. Democratic voters claimed that the legislative districting scheme infringed on their associational rights by denying their party an opportunity for fair representation in the state legislature. For the* Gill *majority, the voters' alleged representational harm was the sort of generalized grievance that failed to satisfy standing's particularized injury requirement.*

Gill *was the latest in a series of First Amendment freedom of association fights between partisan insiders—members or supporters of one of the two major political parties—that dates back to the 1970s. In these fights, the interests and needs of political outsiders—both nonvoters and those unaffiliated with the major political parties—have gone unheard and unaddressed. Political outsiders were not always marginalized in legal controversies involving the freedom of association. In fact, the Supreme Court originally constructed its First Amendment freedom of association doctrine in the 1950s to protect the political activity of dissident minority groups excluded from democratic politics.*

In this Essay, I argue that advocates should return to the Court's initial freedom of association concern with ensuring the inclusion of political outsiders' voices in the democratic space. Gerrymandering can inflict multiple harms, on both insiders and outsiders. While partisan gerrymandering may deprive one political party of holding power in a way that corresponds to its electoral support in the jurisdiction (a "representational harm"), it can also prevent individuals who do not belong to the majority party in the gerrymandered districts from being able to effectively participate in elections (a "participatory harm"). Both political outsiders and members of the minority party experience this latter harm. I argue that the participatory harm should drive future gerrymandering challenges. Such claims could empower political outsiders, advance minority parties' interest in fair representation, and overcome the standing obstacles laid out by the Court in Gill.

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.

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A FIRST AMENDMENT FOR ALL? FREE EXPRESSION IN AN AGE OF INEQUALITY

Co-sponsored by the Knight First Amendment Institute and the Center for Constitutional Governance

A growing chorus of judges, lawyers, and journalists have called attention to a "Lochnerian" turn in First Amendment doctrine, as the federal courts have increasingly invalidated or narrowed regulations of socioeconomic power in the name of free speech or the free exercise of religion. While many legal scholars have offered criticisms of First Amendment Lochnerism—the use of the First Amendment to entrench social and economic hierarchy—there have been few efforts to describe or defend the alternative: a First Amendment that would advance, rather than obstruct or remain indifferent to, the pursuit of social and economic equality. There has likewise been very little commentary connecting First Amendment Lochnerism to broader changes in the institutional landscape of free expression, including the proliferation of private platforms that facilitate and filter public debate.

In response, the *Columbia Law Review* convened a day of debate, discussion, and reflection by leading legal scholars. In asking where the First Amendment goes from here, this Symposium aims to break down barriers between different scholarly subfields—connecting high-level questions about the First Amendment's meaning and function with emerging problems in areas such as internet law, media law, labor law, antidiscrimination law, campaign finance law, and commercial speech. More fundamentally, it aims to move First Amendment theory and practice away from critiques of past judicial rulings and toward the more affirmative project of redesigning the law of free expression for a present and future of mounting economic inequality and authoritarian challenges to democratic norms. Versions of the following essays were presented at the Symposium on March 23, 2018.

The *Review* thanks all those who worked to make this issue a reality, including the Knight First Amendment Institute and the Center for Constitutional Governance. In addition, the *Review* especially thanks Professor David Pozen, Professor Jeremy Kessler, Professor Gillian Metzger, Jameel Jaffer, Ujala Sehgal, Kitty Ahmed, Natalia Luz Chavez, Kelsey Ruescher-Enkeboll, Eve Levin, Samantha Hall Diaz, Joseph Margolies, Patricio Martínez Llompart, and Bruce Pettig, without whose tireless efforts this Symposium would not have occurred.

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INTRODUCTION

THE SEARCH FOR AN EGALITARIAN FIRST AMENDMENT

Jeremy K. Kessler & David E. Pozen***

Over the past decade, the Roberts Court has handed down a series of rulings that demonstrate the degree to which the First Amendment can be used to thwart economic and social welfare regulation—generating widespread accusations that the Court has created a "new Lochner." *This introduction to the* Columbia Law Review*'s Symposium on Free Expression in an Age of Inequality takes up three questions raised by these developments: Why has First Amendment law become such a prominent site for struggles over socioeconomic inequality? Does the First Amendment tradition contain egalitarian elements that could be recovered? And what might a more egalitarian First Amendment look like today?*

After describing the phenomenon of First Amendment Lochnerism, we trace its origins to the collapse of the early twentieth-century "progressive" model of civil libertarianism, which offered a relatively statist, collectivist, and labor-oriented vision of civil liberties law. The recent eruption of First Amendment Lochnerism is also bound up with transformations in the economic and regulatory environment associated with the advent of "informational capitalism" and the "information state." First Amendment Lochnerism may reflect contemporary judicial politics, but it has deep roots.

To figure out how to respond to the egalitarian anxieties besetting the First Amendment, it is natural to consult normative theories of free speech. Yet on account of their depoliticization and abstraction, the canonical theories prove indeterminate when confronted by these anxieties. Instead, it is a series of midlevel conceptual and jurisprudential moves that most often do the work of resisting First Amendment Lochnerism. This grammar of free speech egalitarianism, we suggest,

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> *enables the creative elaboration of a few basic motifs concerning the scope and severity of judicial enforcement, the identification and reconciliation of competing speech interests, and the quality and accessibility of the overall expressive system. If First Amendment Lochnerism is to be countered in any concerted fashion, the roadmap for reform will be found within this grammar; where it gives out, a new language may become necessary.*

INTRODUCTION: THE EGALITARIAN ANXIETY

The specter of inequality haunts the American legal imagination. For an ideologically diverse range of scholars, policymakers, and activists, growing inequality names both the deep cause and the dangerous effect of a set of overlapping conflicts—economic, racial, cultural, constitutional—that threaten the stability of contemporary U.S. society. Of course, the problem of inequality is nothing new. The nation's constitutive ideals of economic independence and democratic self-rule have long achieved realization through practices of mastery: in particular, through the power wielded by white male property owners over the nonwhite, the nonmale, and the poor.[1]

Given the role that material disparities have played in American political development, it is no surprise that the legal meaning of equality has proved especially contentious, or that this meaning has changed dramatically over time. Likewise, the relative priority of equality within the inventory of American constitutional values has tended to ebb and

1. See generally Laura Edwards, The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South (2009); Aziz Rana, The Two Faces of American Freedom (2010).

flow. In the 1860s and 1960s, for instance, the dominance of equality talk heralded the collapse of preexisting racial and (in the 1960s) sexual settlements, as well as the transformation of federalism, the separation of powers, and a host of individual constitutional rights. Today, equality talk is once again at the center of the legal conversation, challenging foundational assumptions about how numerous fields of law are organized and studied and about the social functions they are meant to serve. Why?

One proximate cause is the financial crisis of 2008 and the economic disruption that followed in its wake. Congress's and the executive branch's "seemingly plutocratic response to the crisis" inspired "angry attacks by protesters on both left and right,"[2] from Occupy Wall Street to the Tea Party. The Supreme Court's 2010 decision in *Citizens United v. FEC*,[3] striking down statutory limits on corporate electioneering, compounded these concerns. By 2014, Americans had become alarmed enough to make a bestseller of economist Thomas Piketty's 700-page empirical study of capitalism and inequality, *Capital in the Twenty-First Century*.[4] Two years later, the antiplutocratic politics of the early 2010s found a still broader outlet in the 2016 presidential election. For a decade now, the "anxiety that the 'Great Recession' . . . defines a new economic normal,"[5] in which the wealthiest individuals take an ever larger piece of an ever shrinking pie, has shaped American public culture.

The conditions and aftermath of President Donald Trump's ascendancy make clear that the resurgence of antiplutocratic politics was about far more than elite mismanagement of the macroeconomy.[6] On the campaign trail, Trump framed his critique of postcrisis financial regulation as part of a larger and darker narrative of Wall Street capture

2. David Singh Grewal, The Laws of Capitalism, 128 Harv. L. Rev. 626, 626 (2014) [hereinafter Grewal, Laws of Capitalism].

3. 558 U.S. 310 (2010). We discuss *Citizens United* infra section III.B.

4. Thomas Piketty, Capital in the Twenty-First Century (Arthur Goldhammer trans., 2014); see also David Singh Grewal & Jedediah Purdy, Inequality Rediscovered, 18 Theoretical Inquiries L. 61, 61 (2017) [hereinafter Grewal & Purdy, Inequality Rediscovered] ("Thomas Piketty's *Capital in the Twenty-First Century* . . . at once produced and symbolized a new public awareness of economic inequality.").

5. Grewal, Laws of Capitalism, supra note 2, at 626.

6. For a well-sourced, if contested, history of the financial crisis's management by U.S. officials, see generally Ron Suskind, Confidence Men: Wall Street, Washington, and the Education of a President (2011). For a more comprehensive analysis of the relationship between U.S. politics and international political economy during the crisis years, see generally Adam Tooze, Crashed: How a Decade of Financial Crises Changed the World (2018).

and American decline.[7] "Pikettymania"[8] revolved around the stark neo-Marxist claim that "capitalism automatically generates arbitrary and unsustainable inequalities that radically undermine the meritocratic values on which democratic societies are based."[9] And from Black Lives Matter to No More Deaths to #MeToo to Medicare for All to transgender liberation to the Fight for Fifteen to the Dreamers to the Campaign to End the New Jim Crow, a wave of social movements have mobilized to reveal and redress the myriad structures of oppression confronting particular groups. It is out of this decade of struggle that what we call the "egalitarian anxiety" has emerged. This anxiety joins the unexpected traumas of national economic failure and widening economic insecurity to the all-too-predictable persistence of racial, ethnic, and gender subordination.

New evidence on the extent of American inequality comes out constantly. In 1978, the wealthiest 0.1% of American households held 7% of the nation's wealth.[10] By 2012, that number had more than tripled.[11] Today, the richest 160,000 or so families in the United States possess as much wealth as the 144 million poorest families combined.[12] Between the top 0.1% and the bottom 90%, there stands what the *Atlantic* recently dubbed "The New American Aristocracy": "a well-behaved, flannel-suited crowd of lawyers, doctors, dentists, mid-level investment bankers, M.B.A.s with opaque job titles, and assorted other professionals."[13] These aristocrats-by-degree account for the majority of American wealth, more than the top 0.1% and the bottom 90% put together.[14] And while the institutions and communities that rear the new aristocracy often define themselves in terms of merit and cultural pluralism, the class they are reproducing is in fact a bastion of white power. "African Americans represent 1.9 percent of the top 10th of households in wealth; Hispanics, 2.4 percent; and all other minorities, including Asian and multiracial individuals, 8.8 percent—even

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7. See Rebecca Berg, Trump's Wall Street Picks Clash with Populist Campaign, RealClearPolitics (Dec. 1, 2016), http://www.realclearpolitics.com/articles/2016/12/01/trumps_wall_street_picks_clash_with_populist_campaign_132473.html [https://perma.cc/FFF8-7C97]; Adam Thorp, As Warren Says, Trump Is No Fan of Post-Crisis Wall Street Regulations, PolitiFact (July 5, 2016), http://www.politifact.com/truth-o-meter/statements/2016/jul/05/elizabeth-warren/warren-says-trump-no-fan-post-crisis-wall-street-r [https://perma.cc/A594-SKEG].

8. Alan S. Blinder, 'Pikettymania' and Inequality in the U.S., Wall St. J. (June 22, 2014), http://www.wsj.com/articles/alan-blinder-pikettymania-and-inequality-in-the-u-s-1403477052 (on file with the *Columbia Law Review*).

9. Piketty, supra note 4, at 1.

10. Emmanuel Saez & Gabriel Zucman, Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data, 131 Q.J. Econ. 519, 520 (2016).

11. Id.

12. Id. at 520–21, 551–52.

13. Matthew Stewart, The 9.9 Percent Is the New American Aristocracy, Atlantic (June 2018), http://www.theatlantic.com/magazine/archive/2018/06/the-birth-of-a-new-american-aristocracy/559130 [https://perma.cc/D3FV-Y9GB].

14. Id.

though those groups together account for 35 percent of the total population."[15] The median net worth of a white family in the United States is $134,000, versus $11,000 for the median black family.[16] In Boston, home to the greatest density of higher education institutions in the country,[17] the median net worth of a nonimmigrant black household is $8.[18]

There is a certain irony to this profusion of data on inequality, in that it is mainly manufactured and read by the new aristocracy itself. Yet this privileged group has ample reason to worry as well. Competition within the 9.9% is fierce, and only the highest ranks can comfortably absorb the rising costs of education, healthcare, housing, and environmental security that intraclass competition helps to produce.[19] Meanwhile, every elite has something to fear from the social breakdown that such costs may precipitate when populations simply cannot pay, or are forced to pay in more gruesome currencies.

Accordingly, a solidarity of fear—however partial or impermanent—has taken hold. It is under these conditions that the egalitarian anxiety becomes an almost inescapable motivation for conscious and conscientious legal thought. To dub our moment *the* age of inequality would require the fabrication of too many golden ages to count. But it is indeed an age of profound positional and distributional anxiety, an age when enduring, escalating, and intersectional forms of inequality have become a central object of legal study and reform.

* * *

In less than ten years, the egalitarian anxiety has made inroads across the legal academy. One of the most dramatic manifestations is the economic turn in constitutional theory and history, as the Great Recession stirred a number of scholars to diagnose these fields' persistent neglect of considerations of economic justice,[20] and to begin to rectify that neglect. Today,

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15. Id.

16. Dedrick Asante-Muhammad et al., Inst. for Policy Studies & Prosperity Now, The Road to Zero Wealth: How the Racial Wealth Divide Is Hollowing Out America's Middle Class 6 (2017), http://ips-dc.org/wp-content/uploads/2017/09/The-Road-to-Zero-Wealth_FINAL.pdf [https://perma.cc/YKH6-794L].

17. Denis M. McSweeney & Walter J. Marshall, The Prominence of Boston Area Colleges and Universities, Monthly Lab. Rev., June 2009, at 64, 67.

18. Ana Patricia Muñoz et al., Fed. Reserve Bank of Bos., The Color of Wealth in Boston 20 tbl.9 (2016), http://www.bostonfed.org/-/media/Documents/color-of-wealth/color-of-wealth.pdf [https://perma.cc/C5Q2-JLR5].

19. See, e.g., Steven Brill, Tailspin: The People and Forces Behind America's Fifty-Year Fall—and Those Fighting to Reverse It 17–46 (2018); Daniel Markovits, Yale Law School Commencement Address: A New Aristocracy (May 2015), http://law.yale.edu/system/files/area/department/studentaffairs/document/markovitscommencementrev.pdf [https://perma.cc/HCY3-64V6].

20. See Ganesh Sitaraman, The Puzzling Absence of Economic Power in Constitutional Theory, 101 Cornell L. Rev. 1445, 1466–94 (2016).

the relationship between constitutional law and economic inequality—or "constitutional political economy" more broadly[21]—represents one of the most generative subjects of constitutional scholarship, supplanting to some extent the legal-liberal preoccupation with describing and defending variants of living constitutionalism.[22] While the economic turn in constitutional scholarship is particularly stark, considerations of social and material inequality have also galvanized research in fields more accustomed to thinking about the economic side of power. These include administrative law,[23] antidiscrimination law,[24] antitrust law,[25] banking law,[26] consumer law,[27] corporate law,[28] criminal law,[29] employment law,[30] environmental law,[31] family law,[32]

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21. See Joseph Fishkin & William E. Forbath, Wealth, Commonwealth, and the Constitution of Opportunity, *in* Wealth: NOMOS LVIII 45, 46 (Jack Knight & Melissa Schwartzberg eds., 2017) (emphasis omitted); Jeremy K. Kessler, The Political Economy of "Constitutional Political Economy," 94 Tex. L. Rev. 1527 *passim* (2016) [hereinafter Kessler, Political Economy].

22. In the past four years alone, important works on constitutional political economy have proliferated. E.g., Christine Desan, Making Money: Coin, Currency, and the Coming of Capitalism (2014); Risa Goluboff, Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s (2016); Sophia Z. Lee, The Workplace Constitution: From the New Deal to the New Right (2015); Reuel Schiller, Forging Rivals: Race, Class, Law, and the Collapse of Postwar Liberalism (2015); Ganesh Sitaraman, The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic (2017); Karen M. Tani, States of Dependency: Welfare, Rights, and American Governance, 1935–1972 (2016); Kate Andrias, Separations of Wealth: Inequality and the Erosion of Checks and Balances, 18 U. Pa. J. Const. L. 419 (2015); Joseph Fishkin & William E. Forbath, The Anti-Oligarchy Constitution, 94 B.U. L. Rev. 669 (2014); Bertrall L. Ross II & Su Li, Measuring Political Power: Suspect Class Determinations and the Poor, 104 Calif. L. Rev. 323 (2016); Symposium, The Constitution and Economic Equality, 94 Tex. L. Rev. 1287 (2016); Jedediah Purdy, Neoliberal Constitutionalism: Lochnerism for a New Economy, 77 Law & Contemp. Probs., no. 4, 2014, at 195 [hereinafter Purdy, Neoliberal Constitutionalism].

23. E.g., K. Sabeel Rahman, Democracy Against Domination (2016); David E. Pozen, Freedom of Information Beyond the Freedom of Information Act, 165 U. Pa. L. Rev. 1097 (2017).

24. E.g., Cary Franklin, The New Class Blindness, 128 Yale L.J. 2 (2018).

25. E.g., Lina Khan, Note, Amazon's Antitrust Paradox, 126 Yale. L.J. 710 (2017).

26. E.g., Mehrsa Baradaran, How the Other Half Banks: Exclusion, Exploitation, and the Threat to Democracy (2015).

27. E.g., Anne Fleming, City of Debtors: A Century of Fringe Finance (2018).

28. E.g., Corporations and American Democracy (Naomi R. Lamoreaux & William J. Novak eds., 2017).

29. E.g., Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (rev. ed. 2012); James Forman Jr., Locking Up Our Own: Crime and Punishment in Black America (2018).

30. E.g., Deborah Dinner, Beyond "Best Practices": Employment-Discrimination Law in the Neoliberal Era, 92 Ind. L.J. 1059 (2017); Brishen Rogers, Employment Rights in the Platform Economy: Getting Back to Basics, 10 Harv. L. & Pol'y Rev. 479 (2016).

31. E.g., Jedediah Purdy, After Nature: A Politics for the Anthropocene 45–50 (2015).

32. E.g., Katherine Franke, Wedlocked: The Perils of Marriage Equality (2015); Emily J. Stolzenberg, The New Family Freedom, 59 B.C. L. Rev. 1983 (2018).

human rights law,[33] intellectual property law,[34] labor law,[35] and law and technology.[36]

And then there is the First Amendment. Following the 2008 financial crisis, the Roberts Court handed down a series of rulings that demonstrated the degree to which the First Amendment can be used to thwart economic and social welfare regulation—generating widespread accusations that the Court had created a "new *Lochner*."[37] The freedoms of speech, association, and religion have long been touted as the last nonviolent weapons by which the downtrodden can contest their subordination.[38] But in cases such as *Citizens United*,[39] *Sorrell v. IMS Health Inc.*,[40] *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,[41] *McCutcheon v. FEC*,[42] *Harris v. Quinn*,[43] and *Burwell v. Hobby Lobby Stores, Inc.*[44] (the latter three all decided in early to mid-2014, at the height of

33. E.g., Samuel Moyn, Not Enough: Human Rights in an Unequal World (2018).

34. E.g., Amy Kapczynski, The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism, 59 UCLA L. Rev. 970 (2012).

35. E.g., Kate Andrias, The New Labor Law, 126 Yale L.J. 2 (2016).

36. E.g., Julie E. Cohen, Between Truth and Power: The Legal Construction of Informational Capitalism (forthcoming 2019) (on file with the *Columbia Law Review*); Frank Pasquale, The Black Box Society: The Secret Algorithms that Control Money and Information (2015).

37. Amanda Shanor, The New *Lochner*, 2016 Wis. L. Rev. 133 [hereinafter Shanor, New *Lochner*]; see also Jeremy K. Kessler, The Early Years of First Amendment Lochnerism, 116 Colum. L. Rev. 1915, 1917–18 nn.5–8 (2016) [hereinafter Kessler, Early Years] (collecting sources published from 2011 to 2016 that suggest the First Amendment has been "hijacked" by antistatist, economically libertarian interests).

38. See, e.g., Thomas I. Emerson, The System of Freedom of Expression 7 (1970) (discussing the "safety valve" function of the First Amendment); Steven H. Shiffrin, Dissent, Injustice, and the Meanings of America 128 (1999) (arguing that dissenters ought to be put "at the center of the First Amendment tradition" and that the "dissent model" of the First Amendment "has a strong political tilt against the unjust exercise of power").

39. Citizens United v. FEC, 558 U.S. 310 (2010) (striking down on First Amendment grounds federal restrictions on corporate "electioneering communications").

40. 564 U.S. 552 (2011) (striking down on First Amendment grounds a Vermont law restricting the sale and disclosure of physicians' prescription records).

41. 564 U.S. 721 (2011) (striking down on First Amendment grounds an Arizona law awarding "matching funds" to publicly funded candidates for state office whose privately funded opponents spend over a certain amount).

42. 134 S. Ct. 1434 (2014) (striking down on First Amendment grounds aggregate limits on federal campaign contributions).

43. 134 S. Ct. 2618 (2014) (striking down on First Amendment grounds the agency-fee provision of Illinois's Public Labor Relations Act).

44. 134 S. Ct. 2751 (2014) (striking down under the Religious Freedom Restoration Act of 1993 (RFRA) federal regulations requiring closely held for-profit corporations to provide contraceptive coverage for their employees); see also Beckwith Elec. Co. v. Sebelius, 960 F. Supp. 2d 1328, 1351 (M.D. Fla. 2013) (describing RFRA as the First Amendment's "statutory corollary"); Cynthia Estlund, Are Unions a Constitutional Anomaly?, 114 Mich. L. Rev. 169, 172 n.11 (2015) ("*Hobby Lobby* was decided under [RFRA] but was quasi-constitutional in its reasoning and closely allied with the Court's free exercise jurisprudence." (footnote omitted)).

Pikettymania), the Court seemed to transform those weapons of the weak into one more resource that wealthy interests could deploy to preserve their advantages. From this point of view, the Roberts Court not only got the relevant civil liberties law wrong; it also displayed a reactionary commitment to using that law to entrench inequality in the face of a bruising recession.

Four years later, the Roberts Court's "Lochnerian" application of civil liberties law continues unchecked,[45] leaving students of the First Amendment with more questions than answers. This introductory Essay to the *Columbia Law Review*'s 2018 Symposium, "A First Amendment for All? Free Expression in an Age of Inequality," takes up three such questions:[46] Why has First Amendment law become such a prominent site for struggles over socioeconomic inequality? Do First Amendment theory and precedent contain egalitarian elements that can be recovered? And what might a more egalitarian First Amendment look like today? The latter two questions also motivate the Symposium contributions published in the pages that follow. While a flurry of recent scholarship has helped to identify and critique the emergence of a substantively inegalitarian First Amendment, the search for a constitutionally compelling alternative has only just begun. Our aim in this Essay is to take stock of how the First Amendment arrived at this juncture and to sketch a roadmap for the legal journey ahead.

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45. See, e.g., Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (holding that requiring nonmembers of public sector unions to pay fees toward collective bargaining violates the First Amendment); Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (striking down on First Amendment grounds a California law requiring pro-life pregnancy centers to provide certain factual information to patients); Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1151 (2017) (concluding that a New York law prohibiting merchants from imposing a surcharge on credit card purchases is a "speech regulation" and remanding to the court of appeals to determine whether the law violates the First Amendment); see also *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting) (lamenting that, "not [for] the first time," the Roberts Court was "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy"); Adam Liptak, How Conservatives Weaponized the First Amendment, N.Y. Times (June 30, 2018), http://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html (on file with the *Columbia Law Review*) (describing *Janus* and *Becerra* as "the latest in a stunning run of victories for a conservative agenda that has increasingly been built on the foundation of free speech"). There is little cause to believe that the replacement of Justice Anthony Kennedy with Justice Brett Kavanaugh will derail this trend. See Ken White, You'll Hate This Post on Brett Kavanaugh and Free Speech, Popehat (July 10, 2018), http://www.popehat.com/2018/07/10/youll-hate-this-post-on-brett-kavanaugh-and-free-speech [https://perma.cc/4YVK-ECBT] (reviewing Kavanaugh's appellate opinions and concluding that "[p]eople who buy into the 'conservatives are weaponizing the First Amendment' narrative will see him as a strong [weaponizer], in that he has applied the First Amendment to [invalidate] campaign finance laws, telecommunications regulation, and other aspects of the regulatory state").

46. In keeping with the Symposium's theme, we focus on free expression and largely bracket First Amendment jurisprudence relating to the freedoms of religion, press, assembly, and petition.

I. THE LONG ROAD TO THE ROBERTS COURT

Judicial enforcement of First Amendment rights was once thought to be among the greenest pastures in the land of legal liberalism—the ideology that came to dominate the American legal academy in the 1960s and that sought to defend both the postwar welfare state and its reform by the Warren Court.[47] Yet as explained above, a growing number of legal liberals have begun to view this pasture as a battlefield on which the most powerful socioeconomic actors occupy the highest ground.[48] Scholars who share this anxious assessment disagree about the extent to which First Amendment inegalitarianism should be attributed to long-term trends in American political economy and civil liberties law or, instead, to a relatively recent doctrinal and ideological rupture with the past.[49] Those scholars who believe such a rupture has taken place, meanwhile, differ as to its timing. Cases decided by the Roberts Court, the Rehnquist Court, the Burger Court, and even the Stone Court have been singled out as the inflection point when First Amendment doctrine took its inegalitarian turn.[50] Beneath these debates about causation and chronology, however, lies a set of core propositions affirmed by nearly all participants: first, that there exists an inegalitarian tendency within First Amendment jurisprudence; second, that this tendency has become ever more pronounced during the Roberts Court era;[51] and third, that First

47. See generally Mark A. Graber, Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism (1991); Laura Kalman, The Strange Career of Legal Liberalism (1996); Robert C. Post, Constitutional Domains: Democracy, Community, Management (1995).

48. See supra note 37 and accompanying text.

49. Compare, e.g., Kessler, Early Years, supra note 37, at 1922 (arguing that "contemporary critics of First Amendment Lochnerism have overstated the phenomenon's novelty and understated the economically libertarian tendencies that may be intrinsic to judicial enforcement of civil liberties"), with Tim Wu, The Right to Evade Regulation: How Corporations Hijacked the First Amendment, New Republic (June 3, 2013), http://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation [https://perma.cc/CMM6-UPJY] [hereinafter Wu, Right to Evade] (arguing that the "co-opting of the First Amendment" has been enabled by "a new generation of conservative judges, who have repudiated the judicial restraint their forebears prized").

50. Potential candidates include Citizens United v. FEC, 558 U.S. 310 (2010); Bartnicki v. Vopper, 532 U.S. 514 (2001); Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); Lathrop v. Donohue, 367 U.S. 820 (1961); Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961); and Murdock v. Pennsylvania, 319 U.S. 105 (1943). For further discussion of this chronology, see Kessler, Early Years, supra note 37, at 1917–22, 1992–2002.

51. See, e.g., Elizabeth Sepper, Free Exercise Lochnerism, 115 Colum. L. Rev. 1453, 1455–57 (2015); Laura Weinrib, The Right to Work and the Right to Strike, 2017 U. Chi. Legal F. 513, 533–35; Jedediah Purdy, The Roberts Court v. America, Democracy (Winter 2012), http://democracyjournal.org/magazine/23/the-roberts-court-v-america [https://perma.cc/GK6U-5LGM]; Wu, Right to Evade, supra note 49; Joseph Fishkin & William E. Forbath, Constitutional Political Economy When the Court Is to the Right of the Country, Balkinization (June 28, 2018), http://balkin.blogspot.com/2018/06/constitutional-political-

Amendment inegalitarianism is particularly potent in the economic realm.

A. *First Amendment Lochnerism*

It is thanks to this third proposition that egalitarian anxieties about the First Amendment have come to be spelled out in the language of "Lochnerism." By invoking the Supreme Court's 1905 ruling in *Lochner v. New York*,[52] legal theorists and practitioners suggest that today's First Amendment jurisprudence serves a function similar to the early twentieth century's Fourteenth Amendment jurisprudence.[53] In both cases, the argument goes, we see the federal courts using a select set of individual rights to protect the privileges of the economically powerful and to resist legislative and executive efforts to advance the interests of the economically marginal. Lochnerism provides a particularly vivid trope, or heuristic, with which to criticize judicial decisions that entrench economic inequality.[54]

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economy-when.html [https://perma.cc/H85Q-D6J8]; cf. Lee Epstein et al., 6+ Decades of Freedom of Expression in the U.S. Supreme Court 9 (2018), http://epstein.wustl.edu/research/FreedomOfExpression.pdf [https://perma.cc/MS3C-WZ5A] (finding empirically that "[e]ven as the Roberts Court has decided a smaller number of expression cases than its predecessors, it has accepted significantly more petitions in which the government (or some other body) suppressed *conservative* expression").

52. 198 U.S. 45 (1905). Invocations of Lochnerism generally connote not just the *Lochner* ruling but a series of Fourteenth Amendment cases decided during the first Gilded Age, including Hammer v. Dagenhart, 247 U.S. 251 (1918); Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); and Allgeyer v. Louisiana, 165 U.S. 578 (1897).

53. For judicial uses of the *Lochner* analogy, see, e.g., Sorrell v. IMS Health Inc., 564 U.S. 552, 591–92, 602–03 (2011) (Breyer, J., dissenting); Korte v. Sebelius, 735 F.3d 654, 693 (7th Cir. 2013) (Rovner, J., dissenting). For scholarly uses and defenses of the analogy, see, e.g., Charlotte Garden, The Deregulatory First Amendment at Work, 51 Harv. C.R.-C.L. L. Rev. 323, 323–26 (2016) [hereinafter Garden, Deregulatory First Amendment]; Sepper, supra note 51, at 1459–507; Shanor, New *Lochner*, supra note 37, at 183–92; Purdy, Neoliberal Constitutionalism, supra note 22, at 196–203. As Professor Leslie Kendrick describes the contemporary constitutional landscape:

> [L]itigants claim immunity from laws regulating commercial conditions such as employee safety and benefits; the location and organization of businesses; the composition and labeling of foodstuffs, drugs, and commercial products; and the treatment of customers. These claims mirror *Lochner*-era claims in their structure: they posit a constitutional right, held by business interests (be they sole proprietors or corporate entities), which immunizes them from government regulation, often regulation that relies upon state interests in public health, safety, and welfare.
>
> The difference today is that the First Amendment is so often the designated vehicle for these antiregulatory impulses.

Leslie Kendrick, First Amendment Expansionism, 56 Wm. & Mary L. Rev. 1199, 1207–09 (2015) [hereinafter Kendrick, Expansionism] (footnotes omitted).

54. *Lochner* comparisons have long served as a rhetorical strategy for anathematizing disfavored judicial decisions. See Jamal Greene, The Anticanon, 125 Harv. L. Rev. 379,

While shaped by the historical analogy to a previous Gilded Age, the discourse of First Amendment Lochnerism does not focus exclusively on the economy. An aggressive, libertarian First Amendment, it is increasingly recognized, has the potential to crowd out egalitarian norms across the social field, propagating inequalities of sex, gender, race, and religion along with inequalities of fiscal and cultural capital. Proponents of the *Lochner* analogy thus invoke or allude to it when criticizing a wide range of deregulatory First Amendment decisions. For example, the use of civil libertarian arguments to undermine antidiscrimination law has been identified by several scholars as a particularly worrisome form of modern-day Lochnerism.[55]

Nonetheless, the problem of economic power remains central to the discourse, a testament to the trauma of the Great Recession as well as to the growing popularity of the view that economic inequality intersects with and reinforces other forms of inequality. From the black–white wealth gap and residential segregation to the special burdens that socially conservative employers impose on their female employees' access to reproductive health care, debates over economic inequality have become seemingly inextricable from debates over racial and sexual inequality. The use of the First Amendment to affirm or advance any combination of these inequalities is liable to earn the Lochnerian epithet among today's legal liberals.

Some may find this epithet to be excessive. It is probably a stretch to claim that First Amendment law plays as direct a role in entrenching economic inequality today as substantive due process and equal protection law did in the *Lochner* era. On the other hand, there is a good deal of evidence that our conventional picture of the *Lochner* era is itself overdrawn: that the federal judiciary at the turn of the twentieth century was actually quite accommodating of new regulatory schemes aimed at ameliorating economic distress, upholding the vast majority of such schemes as valid uses of the states' police powers or the federal government's Commerce Clause authority.[56] This Essay is not the place to

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417–22 (2011). In many instances, the implied critique is simply that judges have overstepped their proper role, substituting their personal policy preferences for those of democratic majorities. Within the scholarly discourse of First Amendment Lochnerism, however, the comparison tends to be more substantive, criticizing not only imperious judges but also the programmatic use of individual rights to achieve deregulatory outcomes that favor well-capitalized parties. See Kessler, Early Years, supra note 37, at 1917–25, 1992–2004. The use of the term "Lochnerism" more or less as an antonym of "egalitarianism" elides any number of historical and conceptual complexities, see sources cited infra note 56, but it remains a central feature of this discourse.

55. See, e.g., Samuel R. Bagenstos, The Unrelenting Libertarian Challenge to Public Accommodations Law, 66 Stan. L. Rev. 1205 (2014); Sepper, supra note 51; Nelson Tebbe, Religion and Marriage Equality Statutes, 9 Harv. L. & Pol'y Rev. 25 (2015).

56. See generally David E. Bernstein, Rehabilitating *Lochner*: Defending Individual Rights Against Progressive Reform (2011); Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution (1998); Howard Gillman, The

hash out this historical dispute. Suffice it to say here that perception goes a long way in the law. The egalitarian critiques that currently swirl around cases like *Citizens United*, *Hobby Lobby*, and *Janus* may one day be taught together with—and enjoy the same cachet as—the classic legal-realist and progressive critiques leveled against cases like *Allgeyer*, *Adair*, and *Lochner*.

Whatever the future may bring, it is instructive to ask where the language of First Amendment Lochnerism comes from. Why have free expression and free exercise cases come to be linked with these long-buried due process and equal protection cases? Why is First Amendment doctrine increasingly seen as our "*Lochner*," our symbol of law's complicity in plutocracy?

B. *The Rise and Fall of Progressive Civil Libertarianism*

The answer to these questions becomes slightly less mysterious in light of recent revisionist scholarship on early twentieth-century civil liberties law. According to the revisionists, the "traditional" model of civil liberties law as the judicial enforcement of individuals' noneconomic rights against state interference was itself a rightward departure from the progressive civil libertarianism of the initial decades of the twentieth century. Prior to World War II, revisionists maintain, the progressive lawyers, administrators, and activists who first championed federal protection of civil libertarian rights did so in the hope of building a more economically just, culturally pluralistic society.[57] Such a society would be typified by a strong labor movement; by a powerful but porous

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Constitution Besieged: The Rise and Demise of *Lochner* Era Police Powers Jurisprudence (1993); Claudio J. Katz, Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era, 31 Law & Hist. Rev. 275 (2013).

57. Significant works of revisionism include Megan Ming Francis, Civil Rights and the Making of the Modern American State (2014); Risa L. Goluboff, The Lost Promise of Civil Rights (2007) [hereinafter Goluboff, Lost Promise]; Ken I. Kersch, Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law (2004); Sam Lebovic, Free Speech and Unfree News: The Paradox of Press Freedom in America (2016); Victor Pickard, America's Battle for Media Democracy: The Triumph of Corporate Libertarianism and the Future of Media Reform (2014); Laura Weinrib, The Taming of Free Speech: America's Civil Liberties Compromise (2016) [hereinafter Weinrib, Taming of Free Speech]; John Fabian Witt, Patriots and Cosmopolitans: Hidden Histories of American Law (2007); William E. Forbath, Politics, State-Building, and the Courts, 1870–1920, *in* 2 The Cambridge History of Law in America 643 (Michael Grossberg & Christopher Tomlins eds., 2008); Jeremy K. Kessler, The Administrative Origins of Modern Civil Liberties Law, 114 Colum. L. Rev. 1083 (2014) [hereinafter Kessler, Administrative Origins]; Reuel E. Schiller, Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment, 86 Va. L. Rev. 1 (2000); Karen M. Tani, Welfare and Rights Before the Movement: Rights as a Language of the State, 122 Yale L.J. 314 (2012); Laura M. Weinrib, Civil Liberties Outside the Courts, 2014 Sup. Ct. Rev. 297 [hereinafter Weinrib, Outside the Courts]; Emily Zackin, Popular Constitutionalism's Hard when You're Not Very Popular: Why the ACLU Turned to the Courts, 42 Law & Soc'y Rev. 367 (2008); and Carrie DeCell, Note, Deweyan Democracy and the Administrative State, 125 Harv. L. Rev. 580 (2011).

administrative state, continually solicitous of and transformed by public participation; and by the privileging of collective welfare over individual interest. Federal courts—the inveterate guardians of private property and persecutors of organized labor—had little role to play in this vision. Instead, its proponents focused their energies on administrative and legislative enforcement of civil liberties, especially the liberties of workers, political dissenters, and vulnerable minorities.[58] Free expression and federal regulation were seen as complementary tools in the struggle for socioeconomic equality. This vision achieved its fullest embodiment in the design, staffing, and early operation of New Deal agencies such as the National Labor Relations Board (NLRB), the Federal Communications Commission (FCC), and the Civil Liberties Unit of the Department of Justice (DOJ).[59]

By portraying early twentieth-century civil libertarianism as a relatively statist, collectivist, and labor-oriented project, revisionist scholarship helps to clarify the institutional and ideological roots of today's First Amendment Lochnerism. For if the revisionist story is correct, then before the First Amendment could be Lochnerized, it had to be judicialized, individualized, and shorn of its prolabor bias. According to the revisionists, this is exactly what began to happen in the mid-to-late 1930s, as a coalition of conservative lawyers and businessmen took aim at those aspects of the administrative state most indebted to the progressive civil libertarian cause, such as the NLRB.[60] In a conscious

58. Not all of those legal and political activists who considered themselves both "progressive" and "civil libertarian" would have agreed with every aspect of this summary account. In particular, the more radical proponents of sexual freedom and labor self-management tended to be less trusting of the administrative state as a vehicle of reform; they also occasionally scored victories in the courts. See, e.g., Laura M. Weinrib, The Sex Side of Civil Liberties: *United States v. Dennett* and the Changing Face of Free Speech, 30 Law & Hist. Rev. 325, 326–27 (2012) (describing litigation campaigns against the regulation of birth control and "obscene" speech); see also Weinrib, Outside the Courts, supra note 57, at 312–15 (noting that "Communists and other radicals who opposed [the National Labor Relations Act] framed their objections as civil liberties concerns" and that this framing influenced the lobbying of the American Civil Liberties Union (ACLU)). The presence of this dissenting bloc within the progressive civil libertarian coalition highlights the popularity and success that the more statist and court-skeptic fractions enjoyed during the 1930s.

59. See, e.g., Jerold S. Auerbach, Labor and Liberty: The La Follette Committee and the New Deal 8–11, 51–73 (1966) (discussing the NLRB's ideology); Susan L. Brinson, The Red Scare, Politics, and the Federal Communications Commission, 1941–1960, at 5–59 (2004) (discussing the FCC's progressive origins and the influence of "New Deal liberalism" on early FCC policies); Goluboff, Lost Promise, supra note 57, at 111–24 (discussing the formation and leadership of the Civil Liberties Unit); see also Weinrib, Outside the Courts, supra note 57, at 304 (explaining that "New Deal reformers who called for active intervention in the economy also . . . advocated adjustments in the marketplace of ideas to correct distortions stemming from inequality of access or relative power" and generally "sought to implement that vision in spite of, rather than through, the courts").

60. See generally Weinrib, Taming of Free Speech, supra note 57, at 226–310; Kessler, Early Years, supra note 37, at 1925–36; Gillian E. Metzger, The Supreme Court, 2016

attempt to wrest the civil libertarian banner from the New Deal's progressive wing, this coalition argued that the administrative state, both at the national and local level, had become a threat to free expression and association, imposing ideological conformity on everyone from street preachers to corporate lobbyists.[61] The obvious, if hyperbolic, parallels were Nazi Germany and Soviet Russia.[62] To check such "administrative absolutism," the new civil libertarians called for the reassertion of judicial power—in particular, for vigorous judicial protection of every individual's rights to free expression and procedural due process, without regard to his or her relative economic power or substantive political goals.[63]

Despite the anti–New Deal origins of the new civil libertarianism, several factors in the late 1930s conspired to make it attractive to a growing number of moderate lawyers and politicians as well. Particularly troubling to these on-and-off New Dealers was President Franklin Roosevelt's 1937 campaign for judicial reorganization and executive consolidation, a campaign fatefully launched just as the American economy slipped back into recession and the New Deal's left flank championed an unpopular strike wave in the automobile industry.[64] Such domestic upheaval looked even more ominous in light of the brutal programs of fascist and communist social reform then sweeping Europe.[65] To curtail the more "totalitarian" tendencies of administrative governance while affirming the basic legitimacy of the New Deal, the mainstream legal community engineered a sort of Solomonic compromise, in which civil libertarian rights to free expression, political participation, religious liberty, and procedural due process were both hailed as a shield against bureaucratic domination *and* sharply distinguished from rights to economic liberty.[66] The former, noneconomic rights were to be guarded jealously by the federal judiciary. The latter, economic rights were to be

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Term—Foreword: 1930s Redux: The Administrative State Under Siege, 131 Harv. L. Rev. 1, 52–62 (2017).

61. See Weinrib, Taming of Free Speech, supra note 57, at 271.

62. See Daniel R. Ernst, Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940, at 125–27, 137 (2014); see also Jeremy K. Kessler, The Struggle for Administrative Legitimacy, 129 Harv. L. Rev. 718, 750 n.137 (2016) [hereinafter Kessler, Administrative Legitimacy] (collecting sources on the deployment of this analogy).

63. E.g., Report of the Special Committee on Administrative Law, 63 Ann. Rep. A.B.A. 331, 343–68 (1938).

64. See Barry D. Karl, The Uneasy State: The United States from 1915 to 1945, at 139, 154–58 (1983); Richard Polenberg, Reorganizing Roosevelt's Government: The Controversy over Executive Reorganization, 1936–1939, at 55–78 (1966).

65. See Joanna L. Grisinger, The Unwieldy American State: Administrative Politics Since the New Deal 18 (2012); Karl, supra note 64, at 168; Ira Katznelson, Fear Itself: The New Deal and the Origins of Our Time 173–82 (2013).

66. See generally Richard A. Primus, The American Language of Rights 177–233 (1999); Kessler, Administrative Legitimacy, supra note 62, at 757–73; Weinrib, Outside the Courts, supra note 57, at 348–60.

entrusted largely to Congress and the President, who would calibrate and recalibrate them in the interests of national prosperity and security.

Today, we associate this redistribution of individual rights and institutional responsibilities with Footnote Four of *Carolene Products*.[67] And that footnote is indeed a gnomic testament to the "liberal compromise"[68] (as Professor Laura Weinrib has labeled it) that, in 1938, was gradually displacing progressive civil libertarianism. The work of the most moderate Republicans on the Supreme Court, Justice Harlan Fiske Stone and Chief Justice Charles Evans Hughes, the footnote represented their effort to negotiate the extremes of irresponsible conservative antistatism and irresponsible progressive collectivism.[69]

It may seem odd to think of the advent of bifurcated review as the first step toward First Amendment Lochnerism. *Carolene Products*' hallowed distinction between civil liberty and economic liberty is precisely what First Amendment Lochnerism is said to erode.[70] Yet the liberal compromise of the late 1930s and early 1940s established many of the conditions, or preconditions, that would later enable First Amendment Lochnerism to thrive. It rescued the courts from decades of left-wing critique, recasting them as classless custodians of universal values. By the same token, it elevated the judiciary above the administrative state as the ultimate bulwark of republican self-government. The once reactionary framing of the administrative state as an intrinsic threat to personal freedom and private ordering—rather than the only institution capable of securing a competitive economy and fair society—was more or less accepted across the legal profession. Finally, the liberal compromise "neutralized" the theory and practice of civil libertarianism, transforming a field that had been identified, above all, with workers' rights to organize, picket, and strike[71] into a set of formal limitations on what democracy could demand of any individual or group. As the liberal compromise became the new orthodoxy, admitting considerations of economic power into free speech analysis began to feel more like pollution than pragmatism to the champions of bifurcated review.

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67. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

68. See generally Laura M. Weinrib, The Liberal Compromise: Civil Liberties, Labor, and the Limits of State Power, 1917–1940 (May 1, 2011) [hereinafter Weinrib, Liberal Compromise] (unpublished Ph.D. dissertation, Princeton University), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1005&context=other_publications (on file with the *Columbia Law Review*). This felicitous term captures the political *defeats* that produced midcentury "liberalism."

69. Kessler, Early Years, supra note 37, at 1925–56.

70. See, e.g., Suzanna Sherry, Property Is the New Privacy: The Coming Constitutional Revolution, 128 Harv. L. Rev. 1452, 1471–72 (2015) (discussing the ways in which legal liberals contrast bifurcated review with Lochnerism).

71. Weinrib, Outside the Courts, supra note 57, at 297.

The empowerment of the federal courts, the suspicion of administrative governance, and the insistence on formal neutrality in the enforcement of civil libertarian rights all smoothed the way for the co-optation of the First Amendment by the economically powerful. If the liberal compromise did not *more quickly* devolve into First Amendment Lochnerism, historical contingencies account for much of the delay. For instance, the political composition of the midcentury judiciary, dominated by a decade's worth of Roosevelt appointees, limited extensions of the First Amendment in obviously inegalitarian directions.[72] At the same time, a relatively bipartisan embrace of the logic of Cold War kept the most rabid critics of public spending and regulation on the constitutional margins. Antistatism, whether right wing or left wing, was difficult to square with the fiscal and institutional demands of "competing" with the Soviet Union for global hegemony.[73] Just as these factors slowed the drift toward First Amendment Lochnerism, they also help explain the real attractions of the liberal compromise. In a period of rapid economic growth and declining economic inequality,[74] that compromise offered left-leaning lawyers a principled basis for resisting racially discriminatory state and

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72. See Rayman L. Solomon, The Politics of Appointment and the Federal Courts' Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R., 9 Am. B. Found. Res. J. 285, 323–27, 341–43 (1984) (describing the unprecedented role that judicial ideology and policy considerations played in President Roosevelt's Article III nominations following the Senate's rejection of wholesale judicial reorganization in July 1937). More than two-thirds of Roosevelt's Article III appointments—130 out of 193 total, including all nine Supreme Court appointments—occurred during the post-court-packing phase of his presidency. See Biographical Directory of Federal Article III Judges, 1789–Present, Fed. Judicial Ctr., http://www.fjc.gov/history/judges [https://perma.cc/5GWS-LMFM] (last visited Sept. 11, 2018). Nor did New Deal policy preferences cease to influence the bench after Roosevelt's death. Between Harry Truman's elevation to the presidency in 1945 and the election of Richard Nixon in 1968, pro–New Deal Democrats (Truman, John F. Kennedy, and Lyndon B. Johnson) appointed 443 Article III judges, while the sole Republican President during those years (Dwight D. Eisenhower) appointed 182. Id. It was during this period that presidential ideology displaced the traditional politics of party patronage as the dominant influence on the judicial appointment process. See David Alistair Yalof, Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees 1–19 (1999) (describing this new pattern of ideological influence); Jack M. Balkin & Sanford Levinson, Understanding the Constitutional Revolution, 87 Va. L. Rev. 1045, 1064–80 (2001) (identifying presidential selection of federal judges on an ideological basis as the chief vehicle of "partisan entrenchment" in post–New Deal constitutional law).

73. See Aaron L. Friedberg, In the Shadow of the Garrison State: America's Anti-Statism and Its Cold War Grand Strategy 69–75 (2000) (discussing the "stable strategic synthesis" that emerged from ideological tensions between anticommunism and antistatism in the wake of World War II); Julian E. Zelizer, Arsenal of Democracy: The Politics of National Security—From World War II to the War on Terrorism 4–8 (2010) (elaborating on the partisan political aspects of this dynamic).

74. See David Singh Grewal, Closing Remarks: Law and Inequality After the Crisis, 35 Yale L. & Pol'y Rev. 337, 338–39 (2016) (discussing the "exceptional period" of widely shared growth from roughly 1945 to 1975 and listing the "superlatives" by which it is known in various countries).

local laws while moderating two of the most threatening aspects of Cold War political culture: the repression of dissenting voices in the name of national security and the rollback of the welfare state in the name of the free market. The conditions of moderation, however, began to erode in the 1970s, as the New Deal generation dwindled, the postwar economic boom petered out, and inflation made deregulation and austerity increasingly bipartisan commitments.[75] Those commitments, moreover, would no longer be checked to the same degree by arguments from national security, as failure in Vietnam precipitated a leaner and less visible national security state.[76] All three branches of government shifted rightward.[77]

While this shift was underway, the Burger Court's commercial speech,[78] campaign finance,[79] and religious funding[80] decisions elicited a brief flurry of scholarship warning of—or celebrating—the erosion of the distinction between civil and economic liberty.[81] It was at this moment that anxieties about "Lochnerization" of the First Amendment first surfaced in the law reviews.[82] Cases in which "individuals or groups commonly thought of as 'conservative' took up the First Amendment cudgels against regulatory forces supported by individuals or groups commonly thought to be 'liberals'" began to multiply in the late 1970s and 1980s, both in the economic realm and beyond.[83] Yet when all was said and done, the Burger Court's transformative First Amendment jurisprudence did surprisingly little to dislodge scholarly support for the

75. See id. at 339 ("Starting in the 1970s and 1980s—and continuing through to today—inequality reasserted itself, with increasing vigor . . . ."); see also Judith Stein, Pivotal Decade: How the United States Traded Factories for Finance in the Seventies, at ix–xxii (2010) (describing both parties' rejection of midcentury political economy).

76. See Zelizer, supra note 73, at 234–36 (describing the politics of this change in grand strategy).

77. See Michael J. Graetz & Linda Greenhouse, The Burger Court and the Rise of the Judicial Right 1–10 (2016) (describing the rightward shift in the courts); Laura Kalman, Right Star Rising: A New Politics, at xviii–xxi, 353–66 (2010) (describing the rightward shift in the political branches).

78. E.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

79. E.g., Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

80. E.g., Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985); United States v. Lee, 455 U.S. 252 (1982); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981); Lemon v. Kurtzman, 403 U.S. 602 (1971); Waltz v. Tax Comm'n, 397 U.S. 664 (1970).

81. See, e.g., J.M. Balkin, Some Realism About Pluralism: Legal Realist Approaches to the First Amendment, 1990 Duke L.J. 375, 384 [hereinafter Balkin, Some Realism]; Thomas H. Jackson & John Calvin Jeffries, Jr., Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 30–33 (1979); Mark Tushnet, An Essay on Rights, 62 Tex. L. Rev. 1363, 1387–88 (1984).

82. See, e.g., Jackson & Jeffries, supra note 81, at 30–31; Cass R. Sunstein, *Lochner*'s Legacy, 87 Colum. L. Rev. 873, 883–84 (1987).

83. Frederick Schauer, The Political Incidence of the Free Speech Principle, 64 U. Colo. L. Rev. 935, 941 (1993).

liberal compromise. During the Rehnquist Court years, from 1986 to 2005, the legal academy generally continued to treat the distinction between civil and economic liberty as sacrosanct, a precious fragment of the crumbling New Deal constitutional order, and spoke rarely about the dangers of First Amendment Lochnerism.[84] Such faith would be sorely tested by the Great Recession.

II. INFORMATIONAL CAPITALISM, THE INFORMATION STATE, AND THE FIRST AMENDMENT–INDUSTRIAL COMPLEX

If Lochnerian currents were always swirling just beneath the surface of postwar First Amendment law, over the past decade they have flooded the legal landscape. The timing of this flood may seem strange from a strategic perspective. With Americans facing high unemployment, collapsing wages, and mounting household debt in the late 2000s, considerations of institutional legitimacy presumably counseled against bold judicial experiments in deregulation. The contemporaneous "rediscovery"[85] of economic inequality by the mass media and mainstream policymakers cast these experiments in an especially harsh light. One does not need to read Piketty, however, to guess that equating corporations' rights to spend money, sell data, and trim benefits with citizens' First Amendment rights might prove controversial in a world of bank bailouts and mortgage foreclosures. Why did the Court choose such an unpropitious moment to take a wrecking ball to the already-unstable boundary between freedom of expression and freedom from economic regulation?

One answer might be that it was only shortly before the financial crisis that the Court gained the necessary votes to do so. Justice Sandra Day O'Connor and Chief Justice William Rehnquist had long resisted the expansive approach to defining and protecting commercial speech favored by their successors, Justice Samuel Alito and Chief Justice John Roberts.[86] When O'Connor retired in late 2005, the original vision of the liberal compromise went out the door with her. By the end of the George

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84. But cf., e.g., Daniel J.H. Greenwood, First Amendment Imperialism, 1999 Utah L. Rev. 659, 661 ("The First Amendment . . . has become the locus of a new Lochnerism—or rather, a revival of the old Lochnerism under a new doctrinal label."); Morton J. Horwitz, The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism, 107 Harv. L. Rev. 30, 109–16 (1993) (critiquing the "Lochnerization of the First Amendment" since the end of the Warren Court). A 2006 symposium in the *Northern Kentucky Law Review* brought sustained attention to "First Amendment Lochnerism" for the first time in years. See generally Symposium, First Amendment Lochnerism? Emerging Constitutional Limitations on Government Regulation of Non-Speech Economic Activity, 33 N. Ky. L. Rev. 365 (2006).

85. See generally Grewal & Purdy, Inequality Rediscovered, supra note 4.

86. See, e.g., Steven G. Calabresi, The Libertarian-Lite Constitutional Order and the Rehnquist Court, 93 Geo. L.J. 1023, 1049 (2005) (observing that in commercial speech cases in which the Rehnquist Court engaged in "*Lochner*-izing under the guise of the First Amendment," the "more pro-government view [was] taken by Justices Rehnquist, O'Connor and Breyer").

W. Bush Administration, the conservative legal movement had finally produced a Supreme Court majority sufficiently committed to First Amendment Lochnerism—or sufficiently indifferent to its inegalitarian effects—to risk popular backlash in the midst of a recession.

However plausible this electoral explanation may be, fixating on judicial personalities risks obscuring deeper connections between the political economic structure of the First Amendment disputes the Roberts Court has confronted and the deregulatory doctrines it has crafted. Recent scholarship on the political economy of our digital age suggests several factors that may have helped to catalyze First Amendment Lochnerism in the present period.[87]

To begin with, transformations in the capitalist system have imbued more and more economic activity with communicative content. The Roberts Court's tenure has coincided with an "ongoing shift from an industrial mode of development to an informational one,"[88] a shift that has radically reconfigured the processes, products, and personnel through which capital is accumulated and commodities are created and exchanged.[89] Synthesizing the insights of economists, political scientists, social theorists, and technologists, legal scholar Julie Cohen highlights two "fundamental transformations" bound up with our relatively recent passage from a predominantly industrial to a predominantly informational economy:

> First is a movement away from an economy oriented principally toward manufacturing and related activities toward one oriented principally toward the production, accumulation and processing of information. In an information economy, the mass model of production that emerged in the industrial era is itself increasingly redirected toward development of intellectual and informational goods and services, production and distribution of consumer information technologies, and ownership of service-delivery enterprises. Second is a transformation in the conduct of even traditional industrial activity. In an information economy, information technology assumes an increasingly prominent role in

87. As with all bodies of scholarship touched on in this Essay, we cannot remotely do justice here to the breadth or depth of this literature. Prominent book-length examples include Yochai Benkler, The Wealth of Networks: How Social Production Transforms Markets and Freedom (2006); Jodi Dean, Democracy and Other Neoliberal Fantasies: Communicative Capitalism and Left Politics (2009); Jack Goldsmith & Tim Wu, Who Controls the Internet? Illusions of a Borderless World (2006); Bernard E. Harcourt, Exposed: Desire and Disobedience in the Digital Age (2015); Pasquale, supra note 36; Nick Srnicek, Platform Capitalism (2017); and Tim Wu, The Attention Merchants: The Epic Scramble to Get Inside Our Heads (2016).

88. Julie E. Cohen, The Regulatory State in the Information Age, 17 Theoretical Inquiries L. 369, 370 (2016) [hereinafter Cohen, Regulatory State].

89. See generally 1 Manuel Castells, The Rise of the Network Society: The Information Age: Economy, Society, and Culture (2d ed. 2000); Dan Schiller, How to Think About Information (2007).

> the control of industrial production and in the management of all kinds of enterprises.[90]

Following sociologist Manuel Castells,[91] Cohen identifies these developments with the rise of "informational capitalism."[92] Two years into the financial crisis, political theorist Jodi Dean arrived at a similar diagnosis, warning of the rise of "communicative capitalism."[93] Whatever one calls it, this emergent mode of capitalist organization is not restricted to those "new" sectors of the economy focused on the creation and exchange of data. Rather, the creation and exchange of data suffuse the manufacturing and service sectors as well.[94] There, the relative speed and accuracy of communication among managers, producers, and consumers become keys to maximizing return and minimizing risk.

These developments make it increasingly difficult to separate economic activity from expressive activity—and thus to maintain the distinction at the heart of the liberal compromise. A great deal of economic activity has long had some sort of communicative dimension. But as the locus of profit-making migrates from the production, accumulation, and processing of material goods to the production, accumulation, and processing of information (usually in digital form), the creation and circulation of information, as such, assumes a far more prominent role in the economy while the metaphor of information assumes a far more prominent role in the culture. Doing business in the twenty-first century means dealing with data, and because "data is expressed in alphanumeric symbols, it certainly looks a lot more like traditional speech" than, say, making steel or plowing a field.[95] In turn, the standard justification for affording First Amendment protection to commercial speech—that it serves the interests of listeners in making

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90. Cohen, Regulatory State, supra note 88, at 371 (footnote omitted).

91. See 1 Castells, supra note 89, at 18–21 (defining "informational capitalism").

92. Cohen, Regulatory State, supra note 88, at 370–71, 414.

93. See generally Dean, supra note 87. As with other social theorists grounded in historical materialism, Castells, Cohen, and Dean do not assume a sharp break between one "mode of production" and another (whether from feudalism to capitalism, or industrial capitalism to informational capitalism). See, e.g., Cohen, Regulatory State, supra note 88, at 371 (noting that "the relationship between industrialism and informationalism is not sequential, but rather cumulative, and the emergence of informationalism as a mode of economic development is powerfully shaped by its articulation within capitalist modes of production"). The term "informational" or "communicative" capitalism is best understood as marking a change in the activities and technologies *most essential* to profit-making in a given social formation dominated by the capitalist mode of production. Cf. Perry Anderson, Arguments Within English Marxism 59–77 (1980) (discussing how a single, historically delimited social formation may exhibit variety both within and across modes of production).

94. See, e.g., Louis Columbus, Ten Ways Big Data Is Revolutionizing Manufacturing, Forbes (Nov. 28, 2014), http://www.forbes.com/sites/louiscolumbus/2014/11/28/ten-ways-big-data-is-revolutionizing-manufacturing [https://perma.cc/9Z7X-HPRH].

95. Jane Bambauer, Is Data Speech?, 66 Stan. L. Rev. 57, 59 (2014).

informed decisions—expands to include the interests of commercial actors in imparting, or withholding, valuable information.[96]

An additional feature of informational capitalism extends the potential reach of First Amendment Lochnerism: the dominant role played by private owners of the platforms through which information circulates online and within which ever more data is commodified and mined for economic value. Even though they control the infrastructure of digital communication and function as the "new governors" of the digital public sphere, companies like Facebook and Google are generally assumed to not be bound by the First Amendment because they are not state actors.[97] Instead of empowering users to challenge their policies, the First Amendment empowers the companies themselves to challenge statutes and regulations intended to promote antidiscrimination norms or users' speech and privacy, among other values.[98] First Amendment law not only fails to check the internet's new governors and the inequalities that pervade their platforms[99] but also stands in the way of legislative and administrative correctives.

The *old* governors, meanwhile, face an additional set of civil libertarian obstacles as the "neoliberal" turn in public administration has gradually substituted the management of information for the policing of conduct. Neoliberalism, as the term is used here, refers to an ideology

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96. See, e.g., id. at 87 (arguing based on a "right to create knowledge" that "direct regulations of data should draw [First Amendment] scrutiny"); see also Heather Whitney, Knight First Amendment Inst., Search Engines, Social Media, and the Editorial Analogy 3–7 (2018), http://knightcolumbia.org/sites/default/files/content/Heather_Whitney_Search_Engines_Editorial_Analogy.pdf [https://perma.cc/6J36-AGCX] (describing the largely successful efforts of technology companies to analogize the decisions they make about their platforms to the editorial judgments made by publishers, for purposes of claiming First Amendment protection); Jack M. Balkin, Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society, 79 N.Y.U. L. Rev. 1, 19 (2004) [hereinafter Balkin, Digital Speech] ("[B]usinesses argue [that] regulation of the distribution network is a regulation of the freedom of speech of the network owner, because the network owner 'speaks' through its decisions about which content to favor and disfavor.").

97. See Kate Klonick, The New Governors: The People, Rules, and Processes Governing Online Speech, 131 Harv. L. Rev. 1598, 1610–11, 1658–59 (2018).

98. See, e.g., Jack Balkin, The Political Economy of Freedom of Speech in the Second Gilded Age, Law & Pol. Econ. (July 4, 2018), http://lpeblog.org/2018/07/04/the-political-economy-of-freedom-of-speech-in-the-second-gilded-age [https://perma.cc/B9KQ-MR8D] ("The First Amendment . . . may be a potential obstacle to laws that would try to regulate the owners of private infrastructure to protect freedom of speech and privacy. One example would be first amendment attacks on network neutrality. A second would be first amendment defenses against privacy regulations . . . .").

99. See, e.g., Olivier Sylvain, Knight First Amendment Inst., Discriminatory Designs on User Data 3, 8–16 (2018), http://knightcolumbia.org/sites/default/files/content/Sylvain_Emerging_Threats.pdf [https://perma.cc/VU5V-WBRC] (describing numerous ways in which "online engagement [is] more difficult for children, women, racial minorities, and other predictable targets of harassment and discriminatory expressive conduct").

and mode of governance that favors "the imperatives of market economies . . . deployed to further capital accumulation" over "nonmarket values grounded in the requirements of democratic legitimacy."[100] The neoliberal preference is not necessarily for "free markets" in any strict sense, but for a regulatory environment that prioritizes "familiar protections of property and contract" along with "a favorable return on investment and managerial authority."[101] In our digital age, the facilitation of these preferences has fallen to the "information state," the set of national (or international) bureaucracies that oversee the operations of informational capitalism.[102] Within these bureaucracies, "mandates or bans on conduct"—such as traditional labor laws, wage and price controls, or licensing regimes—are apt to be rejected as overly market-disruptive and replaced whenever possible with "'lighter-touch' forms of governance . . . such as disclosure requirements" and other regulatory techniques that further the production and circulation of commercially salient information.[103] As Professor Amanda Shanor has detailed, one effect of this trend is to make today's regulations "more prone to appear speech-regulating" and, hence, more vulnerable to First Amendment challenge.[104] Whereas banning or taxing most commercial practices (for instance, the use of "conflict minerals") is unlikely to raise any First Amendment issues under existing law, requiring firms to publish information pertaining to these practices (for instance, through

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100. David Singh Grewal & Jedediah Purdy, Introduction: Law and Neoliberalism, 77 Law & Contemp. Probs., no. 4, 2014, at 1, 2–3.

101. Id. at 3. The fusion of Cohen's two "fundamental transformations"—the predominance of information as both (1) a commodity and medium of exchange and (2) a means of managing production and exchange—is most fully achieved in the financial services sector. There, securitization enables the reduction of almost any perceived inefficiency to another piece of saleable information. Scholars from across the academy have identified this primacy of financial services, underwritten by the ease of securitization in the digital marketplace, as a key feature of neoliberalism. See, e.g., David M. Kotz, Financialization and Neoliberalism, *in* Relations of Global Power: Neoliberal Order and Disorder 1, 1 (Gary Teeple & Stephen McBride eds., 2011) ("A common view is that the rise of neoliberalism is explained by the growing role and power of finance in the political economy of capitalism."); Marc Lavoie, Financialization, Neo-Liberalism, and Securitization, 35 J. Post Keynesian Econ. 215, 215, 225–31 (2012) (discussing the "generalization of securitization" and its role in neoliberal economic theory and the 2008 financial crisis).

102. Shanor, New *Lochner*, supra note 37, at 163; cf. Philip Bobbitt, Terror and Consent: The Wars for the Twenty-First Century 85–90 (2008) (describing the ongoing transition from twentieth-century industrial "nation states" to contemporary informational "market states").

103. Shanor, New *Lochner*, supra note 37, at 137, 165; see also David E. Pozen, Transparency's Ideological Drift, 128 Yale L.J. 100, 123–59 (2018) [hereinafter Pozen, Ideological Drift] (discussing, in connection with neoliberalism, the turn toward transparency requirements and away from "substantive" regulation in the United States over the past several decades).

104. Shanor, New *Lochner*, supra note 37, at 164, 171.

regular reports on their mineral sourcing) may give rise to claims of unconstitutionally compelled speech.[105]

At the same time that it makes economic regulation more susceptible to First Amendment scrutiny, the turn toward "lighter-touch" governance saps such regulation of much of its redistributive potential. From the standpoint of individuals lacking in market expertise or capital endowments, these new forms of governance can be perverse. Not only do they fail to produce the levelling effects of traditional regulatory mechanisms aimed at labor–capital parity, but disclosure mandates and the like also often end up "hurting the people [they] purport[] to help" by lulling consumers into complacency, insulating compliant companies from antifraud liability, and undercutting political will for more substantive policy measures.[106] In other words, the same "informational" focus that exposes neoliberal governance to civil libertarian challenges from regulated parties also tends to set internal limits on the equality-enhancing capacities of the administrative state.

Just beyond the formal boundaries of the informational state and the informational marketplace lies a final set of institutions that contributes to contemporary Lochnerism: nonprofit, nongovernmental organizations dedicated to First Amendment advocacy. As the First Amendment's deregulatory potential has become more evident, the economic surplus enjoyed by wealthy firms and executives has increasingly fed back into such organizations. Dissenting Supreme Court Justices[107] and mainstream media outlets[108] called attention this past Term to the "weaponization" of the First Amendment by a well-funded network of advocacy groups, such as the Alliance Defending Freedom, the Becket Fund for Religious Liberty, the Institute for Justice (IJ), the Liberty Justice Center, and the National Right to Work Legal Defense Foundation (NRWLDF). The efforts of these groups follow in the mold of, and build upon, the highly effective campaign to advance commercial speech rights that business

105. See, e.g., Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 370–73 (D.C. Cir. 2014) (partially invalidating under the First Amendment a 2012 Securities and Exchange Commission rule requiring firms using conflict minerals to disclose their origin); see also Garden, Deregulatory First Amendment, supra note 53, at 339–51 (explaining that claims of "compelled speech" have become a key tool for proponents of a deregulatory, antilabor First Amendment).

106. Omri Ben-Shahar & Carl E. Schneider, The Failure of Mandated Disclosure, 159 U. Pa. L. Rev. 647, 651 (2011); see also Pozen, Ideological Drift, supra note 103, at 135–41 (elaborating on these points).

107. See Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting).

108. See, e.g., Liptak, supra note 45; Dahlia Lithwick et al., Kneecapping Unions and Weaponizing the First Amendment, Slate (July 2, 2018), http://slate.com/news-and-politics/2018/07/janus-becerra-masterpiece-cakeshop-the-supreme-court-terms-big-cases.html [https://perma.cc/HRY6-KLLJ].

interests have been leading since the 1970s.[109] Over the past two decades, nonprofits dedicated to religious freedom have joined the fray, sometimes supported by the same donors who fund commercial speech advocacy as well as parallel campaigns against legal protections for organized labor.[110]

Within the broader conservative legal movement that has arisen since the 1970s,[111] there now exists, then, something of a *First Amendment–industrial complex*. Mapping the contours of this complex is well beyond the scope of this Essay. The basic point, for present purposes, is that arguments for a deregulatory First Amendment are now promoted not only (or even primarily) by for-profit companies seeking to minimize their own labor costs or regulatory burdens, but also by a growing set of nominally depoliticized nonprofits with varying degrees of connection to the business community.

In this regard, a critic of First Amendment Lochnerism may have cause to worry about the establishment, within the past year alone, of numerous First Amendment clinics and centers at law schools around the country.[112] Organized as public interest law firms or as 501(c)(3) "public

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109. See Garden, Deregulatory First Amendment, supra note 53, at 325–31; Shanor, New *Lochner*, supra note 37, at 155–63. The 1970s commercial speech campaign itself built upon the midcentury efforts of wealthy conservative activists, such as Cecil B. DeMille, who helped to create a network of nongovernmental organizations committed to the legal expansion of economic, religious, and expressive freedom. See generally Brinson, supra note 59, at 61–140; Kevin M. Kruse, One Nation Under God: How Corporate America Invented Christian America 27–34, 127–61 (2015); Lee, supra note 22, at 56–78, 115–32; Pickard, supra note 57, at 75–96.

110. The Koch brothers, for instance, have supported the Becket Fund for Religious Liberty, IJ, and NRWLDF, among many other groups active in the First Amendment area. See Jane Mayer, Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right 178 (2016) (IJ); Jay Riestenberg & Mary Bottari, Who Is Behind the National Right to Work Committee and Its Anti-Union Crusade?, Huffington Post (Aug. 5, 2014), http://www.huffingtonpost.com/mary-bottari/who-is-behind-the-nationa_b_5451743.html [https://perma.cc/6MK5-25TQ] (NRWLDF); Amelia Thomson-DeVeaux, The Spirit and the Law: How the Becket Fund Became the Leading Advocate for Corporations' Religious Rights, Am. Prospect (June 18, 2014), http://prospect.org/article/little-known-force-behind-hobby-lobby-contraception-case [https://perma.cc/LQN3-5MAK] (Becket Fund).

111. See generally Jefferson Decker, The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government (2016); Steven M. Teles, The Rise of the Conservative Legal Movement: The Battle for Control of the Law (2008); Joseph Fishkin & David E. Pozen, Asymmetric Constitutional Hardball, 118 Colum. L. Rev. 915, 951–59 (2018). Recent scholarship on the history of right-to-work laws, corporate religious liberty, and federal communications regulation suggests that some of the foundations of the conservative legal movement and its First Amendment–industrial complex began to be laid several decades earlier. See supra note 109.

112. See, e.g., Ronald K.L. Collins, First Amendment Clinic Coming to Vanderbilt Law, Concurring Opinions (Jan. 12, 2018), http://concurringopinions.com/archives/2018/01/fan-173-2-first-amendment-news-first-amendment-clinic-coming-to-vanderbilt-law-full-time-director-sought.html [https://perma.cc/Z98X-TTSH]; Cornell Law School Announces Launch of New First Amendment Clinic, Cornell Law Sch. (Dec. 7, 2017), http://www.lawschool.cornell.edu/spotlights/first-amendment-clinic.cfm [https://perma.cc/S79W-8258]; Powell to

charities," these centers and clinics will not engage in electioneering or do any substantial amount of legislative advocacy.[113] Instead, they can be expected to do what such nonprofits usually do: bring lawsuits seeking access to government records or seeking to strike down government policies under the Constitution. Even if some of these centers and clinics are staffed by liberals who aim to defend the downtrodden,[114] the proliferation of First Amendment–focused organizations risks further exacerbation of "First Amendment expansionism"[115] and further degradation of the state's ability to regulate, to better or worse effect, on behalf of the public interest.[116]

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Against this historical and institutional backdrop, any robust response to First Amendment Lochnerism must grapple with the many ways in which the First Amendment tends to entrench socioeconomic inequality. We have called attention to a set of economic, political, technological, and legal developments that, over the past half century, have combined to make First Amendment litigation and ideology a field of struggle that overwhelmingly favors the interests of large employers and well-educated professionals in the private sector (as well as the upper echelons of the national security bureaucracy in the public sector, a topic we lack the space to address[117]). Not only does the contemporary First

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Lead New First Amendment Clinic at Duke Law, Duke Law News (Feb. 7, 2018), http://law.duke.edu/news/powell-lead-new-first-amendment-clinic-duke-law [https://perma.cc/V3B2-6NHJ]; Karen Sung, ASU Law Establishes First Amendment Clinic with Gift from Stanton Foundation, Ariz. State Univ. (Dec. 13, 2017), http://campus.asu.edu/content/asu-law-establishes-first-amendment-clinic-gift-stanton-foundation [https://perma.cc/RXD4-8R9W]. One of us (Pozen) served this past year as the inaugural visiting scholar at Columbia University's Knight First Amendment Institute, which was established in 2016.

113. The Knight First Amendment Institute, for instance, is organized under section 501(c)(3) of the Internal Revenue Code. See Press Release, Knight Found., ACLU's Jameel Jaffer to Direct Knight First Amendment Institute at Columbia University (June 29, 2016), http://www.knightfoundation.org/press/releases/aclus-jameel-jaffer-direct-knight-first-amendment [https://perma.cc/Y5W4-P5PJ]. Accordingly, it may not "participate . . . or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office" or devote a "substantial part of [its] activities" to "attempting[] to influence legislation." I.R.C. § 501(c)(3) (2012).

114. See, e.g., G.S. Hans Joins Vanderbilt's Law Faculty as an Assistant Clinical Professor of Law, Vanderbilt Law Sch. (Aug. 15, 2018), http://law.vanderbilt.edu/news/gautam-hans [https://perma.cc/CR5Q-WW7F] (quoting the incoming director of Vanderbilt's new First Amendment clinic as expressing a "particular[] interest[] in representing vulnerable populations who may need help in asserting their speech and assembly rights").

115. Kendrick, Expansionism, supra note 53, at 1200, 1210–19.

116. Cf. infra section IV.A (elaborating further on the risk that "maximalist" First Amendment arguments advanced for progressive purposes will ultimately fuel First Amendment Lochnerism).

117. See, e.g., Helen Norton, Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression, 59 Duke L.J. 1, 2 (2009) (explaining that courts assessing public employees' First Amendment claims "increasingly

Amendment landscape give the high ground to those already rich in financial and cultural capital, but it also places numerous obstacles in the path of wage laborers and undercapitalized social groups—groups whose free expression and association might otherwise serve as tools of collective self-protection and advancement.

As this grim appraisal makes clear, the search for an egalitarian First Amendment is well and truly a search: an inquiry, both practical and theoretical, into the very possibility of a First Amendment jurisprudence that would advance the expressive and associational interests of the socioeconomically disadvantaged.

III. THE INADEQUACY OF FIRST AMENDMENT THEORY

How might this inquiry proceed? A natural place to begin the search for a more socioeconomically egalitarian First Amendment—a First Amendment that alleviates, or at least does less to aggravate, the "egalitarian anxiety" sketched in this Essay's introduction—is with normative theories of free speech.[118] The Free Speech Clause itself is notoriously unhelpful. Neither its text[119] nor its drafting history[120] sheds much light on contemporary controversies. In the absence of interpretive input from such sources, judges and scholars have produced a vast body of writing that seeks to justify, critique, and shape First Amendment doctrine in light of foundational principles and aspirations—above all, the pursuit of

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permit government to control its employees' expression at work, characterizing this speech as the government's own," and "also increasingly consider government workers to be speaking as employees even when away from work"); David E. Pozen, The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information, 127 Harv. L. Rev. 512, 515 (2013) (explaining that under existing First Amendment doctrine "the government has expansive legal authority to prosecute employees who leak" national security information to the media).

118. Again, this Essay, like the Symposium of which it is a part, focuses on questions of free expression to the neglect of other aspects of First Amendment law. See supra note 46.

119. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Yet hardly anyone reads the Amendment to apply only to Congress, and since the early twentieth century "principles of free expression have taken hold in a way that has become detached from—and may never have been all that securely connected to—the words of the First Amendment." David A. Strauss, The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?, 129 Harv. L. Rev. 1, 34 (2015).

120. See, e.g., Daniel A. Farber, The First Amendment 9 (4th ed. 2014) ("Unfortunately, the incomplete materials concerning the legislative history of the Amendment shed little light about just what was meant by freedom of speech and of the press."); Lori A. Ringhand, Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court, 24 Const. Comment. 43, 53 (2007) (stating that "most scholars agree" that "the original meaning of the First Amendment . . . is—at best—indeterminate or unhelpful"); cf. Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 22 (1971) ("The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject.").

truth, the promotion of individual autonomy, and the facilitation of democratic self-government.[121] The canonical theories of free speech, one might assume, should help us get some purchase on the egalitarian anxiety, whether by suggesting ways in which the inegalitarian aspects of First Amendment law might be challenged and alternative doctrines developed, or by supplying reasons why this body of law's subordination of substantive equality interests to negative liberty interests is defensible or maybe even unavoidable.

A. *Truth, Autonomy, Democracy . . . and Equality?*

In point of fact, however, the leading theories of the First Amendment prove indecisive when confronted by the egalitarian anxiety. Democratic theorizing about free speech may seem at first glance to offer the most hospitable terrain for egalitarian projects and autonomy theorizing the least, insofar as the former prioritizes communal goods while the latter prioritizes individualistic ideals. And indeed, First Amendment theorists who emphasize democratic deliberation and decisionmaking have been more likely, on balance, to take socioeconomic inequalities into account. Yet none of the leading theories of free speech has been able to generate clear or consistent guidance about how such inequalities ought to bear on constitutional analysis, for several reasons.

First, truth-seeking, autonomy-promoting, and democracy-facilitating accounts of free speech (as well as related accounts that focus on tolerance, dissent, and so on) tend to be formulated in highly abstract and depoliticized terms. This allows them to apply to a wide range of situations and to appeal to a wide range of groups—no one is "against" truth, self-actualization, or self-government—but also to be invoked by very different jurists in support of very different outcomes.[122] Alexander Meiklejohn's democratic theory of free speech, for example, has been "embraced all along the political spectrum, from Robert Bork to William Brennan,"[123] and deployed to defend both exceptionally narrow conceptions of First

121. See, e.g., Timothy Zick, First Amendment Cosmopolitanism, Skepticism, and Democracy, 76 Ohio St. L.J. 705, 714 (2015) (describing these as "the principal American First Amendment free speech theories or justifications"); see also Yotam Barkai, Note, The Child Paradox in First Amendment Doctrine, 87 N.Y.U. L. Rev. 1414, 1429 n.90 (2012) ("Because the text is inherently unhelpful and the original understanding of free speech has limited utility, judges and scholars have generally referred to these three theories [advancing truth, facilitating democratic self-government, and promoting autonomy, self-fulfillment, and self-realization] in analyzing First Amendment problems.").

122. Cf. Jeremy K. Kessler & David E. Pozen, Working Themselves Impure: A Life Cycle Theory of Legal Theories, 83 U. Chi. L. Rev. 1819, 1826–41 (2016) (explaining why "depoliticized" legal theories are especially susceptible to co-optation and reformulation over time).

123. Owen M. Fiss, The Irony of Free Speech 2 (1996).

Amendment review[124] and expansive proposals for the redistribution of speech rights.[125] Moreover, it is now widely appreciated that the pursuit of truth, the promotion of individual autonomy, and the facilitation of democratic self-government are best understood as partial and overlapping—rather than comprehensive or mutually exclusive—theories of free speech,[126] which creates additional play in the normative joints.

Second, the indeterminacy of abstract First Amendment theories is compounded by empirical uncertainty about the real-world effects of different speech arrangements. All the leading theories assume a certain causal relationship between speech rules and social outcomes. They posit that expressive practices, when structured appropriately, can generate more knowledge, better debate, greater self-realization, or the like. For the most part, however, these claims are not grounded in any well-worked-out social theory, and good evidence of the validity of the assumed causal relationships is sparse to nonexistent. Although it has long been asserted, for instance, that an "open marketplace of ideas" is more likely to distinguish truth from falsity than a regime based on epistemic paternalism, in which authorities categorize ideas as true or false, the existing empirical research offers little support for this assertion.[127] Empirical results on the impact of various antitrust and media regulations on the diversity of ideas "have been similarly mixed."[128] The relevant

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124. See, e.g., Bork, supra note 120, at 20 (arguing on "democratic" grounds that First Amendment "protection should be accorded only to speech that is explicitly political" and not to "any other form of expression").

125. See, e.g., Owen M. Fiss, Free Speech and Social Structure, 71 Iowa L. Rev. 1405, 1415 (1986) [hereinafter Fiss, Social Structure] (arguing that a "commitment to rich public debate will allow[] and sometimes even require the state" to adopt policies that "make certain all views are heard," however "repressive" such policies "might at first seem").

126. See Farber, supra note 120, at 8–10; Steven Shiffrin, The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment, 78 Nw. U. L. Rev. 1212, 1283 (1983); Lawrence B. Solum, The Value of Dissent, 85 Cornell L. Rev. 859, 859–60 (2000).

127. See Daniel E. Ho & Frederick Schauer, Testing the Marketplace of Ideas, 90 N.Y.U. L. Rev. 1160, 1163 (2015) ("[A] considerable amount of existing empirical research . . . tends . . . to justify skepticism about the causal efficacy of establishing an open marketplace of ideas in identifying true propositions and rejecting false ones."); cf. Frederick Schauer, Facts and the First Amendment, 57 UCLA L. Rev. 897, 910–11 (2010) ("[T]he persistence of the belief that a good remedy for false speech is more speech, or that truth will prevail in the long run, may itself be an example of the resistance of false factual propositions to argument and counterexample."). As Vincent Blasi has explained, Justice Oliver Wendell Holmes, in introducing the market metaphor, did not intend to endorse the pursuit of truth as the overriding aim of free speech or neutral proceduralism as a model of regulation. See Vincent Blasi, Holmes and the Marketplace of Ideas, 2004 Sup. Ct. Rev. 1, 39–40 ("[O]ne must appreciate how far [Holmes] was from a modern procedural liberal concerned more about the right than the good . . . . The cultural/intellectual/political combat facilitated by free speech is, in Holmes's vision, messy, unpredictable, often nasty, and impossible to domesticate.").

128. Ho & Schauer, supra note 127, at 1165 n.16.

dependent variables (truth, democratic discourse, personal autonomy) are hard to specify and to measure, and they may be influenced by countless factors apart from formal speech rules. When it comes to the central prescriptive dilemma raised by the egalitarian anxiety—the degree to which its alleviation requires government planning—the leading theories of free speech therefore have less to offer than one might expect.

Finally, truth-seeking, autonomy-promoting, and democracy-facilitating theories of free speech are ambiguously positioned vis-à-vis the egalitarian anxiety because while none of these theories foregrounds "equality" as a desideratum, none rejects it either. For example, the preeminent autonomy advocate Professor Martin Redish is happy to concede that equality is "an important element of free speech theory," as "[t]he equality principle has a long and venerable tradition in First Amendment theory and doctrine."[129] The equality principle that Redish has in mind, however, is a version of viewpoint neutrality: the proposition that "[a]ll viewpoints must have an equal opportunity to compete in the intellectual marketplace, free from selective governmental regulation."[130] Explicitly rejected are other versions of an equality principle, more in tune with the concerns of this Symposium, that might entail "increasing the pre-speech resources of the economically inferior speakers or limiting the economically superior speakers' ability to employ their resources for expressive purposes."[131] As Redish's discussion reflects, equality claims are made by free speech theorists of all stripes and on both sides of the same questions. Accordingly, debates over whether and how free speech law should respond to present inequalities are prone to take place *within* an already capacious, ill-defined, and internally riven egalitarian tradition of First Amendment theorizing.

B. *The Example of Campaign Finance Regulation*

Perhaps no area better illustrates the inadequacy of high-level First Amendment theory for negotiating the egalitarian anxiety than campaign finance law. Cases such as *Citizens United v. FEC*[132] and *McCutcheon v. FEC*[133] have been at the heart of the emerging critique of First Amendment Lochnerism. They raise the question whether the Free Speech Clause permits a legislature to limit the election-related spending of corporations,

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129. Martin H. Redish & Howard M. Wasserman, What's Good for General Motors: Corporate Speech and the Theory of Free Expression, 66 Geo. Wash. L. Rev. 235, 282 (1998). A generation earlier, Professor Kenneth Karst argued influentially that the "principle of equal liberty of expression underlies" each of the three major theories of the First Amendment. Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 23 (1975).

130. Redish & Wasserman, supra note 129, at 283.

131. Id.

132. 558 U.S. 310 (2010).

133. 134 S. Ct. 1434 (2014).

unions, or wealthy individuals in the service of antiplutocratic goals. To help answer this question in the face of mixed precedent and negligible Founding-era evidence, the Justices have adverted to each of the three major normative theories of the First Amendment.

Writing for the Court in *Citizens United*, Justice Anthony Kennedy contended that the restrictions on corporate "electioneering communications" imposed by the Bipartisan Campaign Reform Act of 2002[134] (BCRA) were simultaneously undermining the pursuit of truth, individual autonomy, and democratic deliberation, as corporate speech contributes importantly to all of these values. According to Kennedy, such restrictions "interfere[] with the 'open marketplace' of ideas protected by the First Amendment";[135] impair "the freedom to think for ourselves";[136] "deprive[] the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice";[137] and distort "an essential mechanism of democracy" and "enlightened self-government."[138] Various amici on the side of Citizens United appealed similarly to truth, autonomy, and democracy.[139] Justice Kennedy further contended that the design of BCRA reflected an impermissible government preference for certain categories of speakers (natural persons) over others (corporations and unions).[140] As Professor Genevieve Lakier observes in her essay for this Symposium, the majority opinion aggressively claimed the mantle of egalitarianism.[141] It just adopted a highly formalistic, anticlassificationist conception of expressive equality,

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134. Pub. L. No. 107-155, § 203, 116 Stat. 81, 91 (codified as amended at 2 U.S.C. § 441b (2012)).

135. *Citizens United*, 558 U.S. at 354 (quoting N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 208 (2008)).

136. Id. at 356.

137. Id. at 340–41.

138. Id. at 339; see also id. at 360 (asserting that any appearance of special political "influence or access" for corporate speakers "will not cause the electorate to lose faith in our democracy").

139. See, e.g., Brief Amicus Curiae of Pacific Legal Foundation in Support of Appellant on Supplemental Question at 11–17, *Citizens United*, 558 U.S. 310 (No. 08-205), 2009 WL 2349017 (citing "the pursuit of truth," "responsive democratic government," and the "values of self-realization, personal and cultural development, autonomy, and autonomous decision-making" as reasons to strike down limitations on corporate electioneering).

140. See, e.g., *Citizens United*, 558 U.S. at 341 ("We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers."); cf. Joel M. Gora, The First Amendment . . . United, 27 Ga. St. U. L. Rev. 935, 940 (2011) (describing the *Citizens United* Court as taking "steps to dismantle the First Amendment 'caste system' whereby whether someone or some group could speak depended on who or what they were").

141. See Genevieve Lakier, Imagining an Antisubordinating First Amendment, 118 Colum. L. Rev. 2117, 2130–31 (2018).

similar to Redish's notion of equality as freedom from "selective governmental regulation."[142]

Justice John Paul Stevens's dissenting opinion in *Citizens United*, meanwhile, argued just as vigorously that BCRA's restrictions on corporate electioneering *enhanced* the pursuit of truth, individual autonomy, and democratic deliberation. These restrictions, in Stevens's telling, did not impinge upon anyone's autonomy or self-expression, and on the contrary they reduced the risk that a "corporation's electoral message" would "conflict with the[] personal convictions" of the individuals associated with the corporation.[143] At the same time, these restrictions reduced the risk that corporations would "distort public debate" and stymie the search for truth by "cow[ing]" politicians "into silence," "drowning out . . . noncorporate voices," and "dimish[ing] citizens' willingness and capacity to participate in the democratic process."[144] These arguments, too, were familiar from the First Amendment literature. Nearly three decades earlier, Judge Skelly Wright sought to show that "all of the leading first amendment rationales may be comfortably reconciled with campaign spending reforms," because regulation that limits spending by wealthy interests "enhances the self-expression of individual citizens who lack wealth," preserves "the truth-producing capacity of the marketplace of ideas," and "prevent[s] mutilation of . . . communal thought processes."[145] Like Judge Wright before him, Justice Stevens connected these claims to a substantive and, in Lakier's terms, antisubordinating vision of expressive and political equality.[146]

Both the majority and the dissent in *Citizens United* thus plausibly invoked each and every one of the three major First Amendment theories, as well as the value of equality itself, in support of their dueling positions. The result is a vivid demonstration of how the abstraction and depoliticization, lack of empirical grounding, and underspecified embrace of equality that characterize these theories sap them of the power to sharpen, let alone resolve, the most controversial questions at the intersection of free speech and political economy. Grand theorizing about truth, autonomy, and democracy fails to supply meaningful direction to those seeking a more egalitarian First Amendment. Instead,

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142. Redish & Wasserman, supra note 129, at 283.

143. *Citizens United*, 558 U.S. at 467 (Stevens, J., concurring in part and dissenting in part) (emphasis omitted).

144. Id. at 469–72.

145. J. Skelly Wright, Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?, 82 Colum. L. Rev. 609, 636–39 (1982).

146. Lakier, supra note 141, at 2123–27. Justice Stevens did not defend this equality value by name, relying instead on the language of "anticorruption" and "antidistortion" from the Court's earlier opinions. See *Citizens United*, 558 U.S. at 447–75 (Stevens, J., concurring in part and dissenting in part); cf. Richard L. Hasen, *Citizens United* and the Orphaned Antidistortion Rationale, 27 Ga. St. U. L. Rev. 989, 992–1000 (2011) (noting doctrinal and case-specific reasons Justice Stevens may not have felt "comfortable embracing the political equality rationale fully" and explicitly in his dissent).

those who wish to reverse or offset First Amendment Lochnerism tend to pursue a set of midlevel conceptual and jurisprudential moves suggested by the contemporary legal landscape. We turn next to these moves and the grammar of free speech egalitarianism they have created.

IV. FIRST AMENDMENT EGALITARIANISM: A CRITICAL ROADMAP

To appreciate more fully the institutional, ideological, and doctrinal challenges that egalitarian reformers face today, it is helpful to imagine the mirror image of First Amendment Lochnerism—that is, the mirror image of judicial enforcement of negative rights against state action in an ostensibly neutral, yet materially inegalitarian, manner. The mirror image of such a regime would look something like early twentieth-century progressive civil libertarianism, updated for the information age. As discussed in section I.B, progressive civil libertarians turned to administrative agencies and sympathetic legislators, rather than courts, to protect workers, political dissenters, and vulnerable minorities from the dominance of private employers, bigoted local governments, and conservative blocs within the national government. Motivating this project was not an apolitical belief in formal equality or fair play but a partisan commitment to the creation of a more inclusive, economically just society. Newly created agencies such as the NLRB, the FCC, and the Civil Liberties Unit of DOJ saw it as an important part of their mission to redistribute expressive and associational rights to undercapitalized groups.

The regulatory approach taken by these New Deal institutions now seems "off the wall,"[147] and not merely because of recent First Amendment Lochnerism. When the liberal compromise displaced progressive civil libertarianism in the second half of the twentieth century,[148] it ruled out precisely the kind of civil libertarian activities in which agencies like the NLRB used to engage. Between its founding in 1935 and 1940, NLRB administrators openly favored the organizing efforts of those unions they thought most politically progressive and ethnically diverse (and most supportive of the New Deal); they scrutinized the speech and assembly of employees opposed to unionization for interference with the goals of federal labor law; and they vigorously investigated and sanctioned employers who expressed anti-union views or issued misleading descriptions of labor law.[149] Such employer speech, the NLRB reasoned, was not

147. See Jack M. Balkin, From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream, Atlantic (June 4, 2012), http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040 [https://perma.cc/T449-4S97] ("Off-the-wall arguments are those most well-trained lawyers think are clearly wrong . . . .").

148. See supra section I.B.

149. See Weinrib, Liberal Compromise, supra note 68, at 468–96 (describing the NLRB's activities in this period and the cleavage its suppression of employer speech produced within the nongovernmental civil libertarian community); see also Peter H.

speech at all within the meaning of the First Amendment.[150] Rather, interpreted in the context of the power that employers wield over employees' wages and work conditions, the expression of opposition to unionization by owners and managers constituted a form of coercion.[151] The NLRB's suppression of employer speech in the name of the civil liberties of workers went so far as to lead the Board to subpoena local newspaper editors to determine whether their publication of anti-union—or anti-NLRB—statements had been sought by employers engaged in nearby labor disputes.[152]

Through the lens of the liberal compromise, the early NLRB's insistent rejection of neutrality when it came to the regulation of expression and association looks shocking, as do the sheer scope and zeal of its investigations into anti-union speech, both inside and outside the workplace. Government viewpoint (and, to a lesser extent, content) neutrality is a "bedrock principle" of modern First Amendment law.[153] The partisan provision of expressive and associational rights by the political branches to make up for disparities in socioeconomic power among private parties *inverts* the contemporary paradigm: judicial enforcement of such rights against state interference, above all when that interference seems motivated by a preference for certain classes of speakers or ideas.

While each feature of this paradigm has been the target of egalitarian critique or qualification, very few commentators have called for its wholesale abandonment. Especially now, in the midst of the Trump presidency, elements of the liberal compromise such as judicial supremacy, content and viewpoint neutrality, and the state action doctrine strike many on the left as salutary limits on the degree to which ascendant political movements can dominate civil society. Unfortunately for egalitarians, these elements also stand in the way of building a progressive civil libertarian state. Such a state would curtail judicial review, reject the ideal of formal neutrality when it comes to the regulation of certain categories of expression and association, and

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Irons, The New Deal Lawyers 226–71 (1982) (providing a detailed account of the NLRB's early administrative practices); Kessler, Administrative Legitimacy, supra note 62, at 751–54 (discussing political and legal critiques of the NLRB's progressive civil libertarianism in the late 1930s).

150. See Joseph K. Pokempner, Employer Free Speech Under the National Labor Relations Act, 25 Md. L. Rev. 111, 112–13 (1965); Kate E. Andrias, Note, A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections, 112 Yale L.J. 2415, 2422–24 (2003) [hereinafter Andrias, Robust Public Debate].

151. See, e.g., 3 NLRB Ann. Rep. 59–62, 125 (1938); 2 NLRB Ann. Rep. 65–66 (1937); 1 NLRB Ann. Rep. 73–74 (1936).

152. See Weinrib, Liberal Compromise, supra note 68, at 441–45.

153. Joseph Blocher, Viewpoint Neutrality and Government Speech, 52 B.C. L. Rev. 695, 695 (2011); see also, e.g., Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

impose speech-redistributive obligations on particularly powerful private entities. To the extent that these modes of governance are seen by mainstream legal and political actors as incompatible with a free democratic society, the strongest historical alternative to First Amendment Lochnerism—progressive civil libertarianism—will remain off the wall and off the table.

As a result, today's progressives generally struggle to achieve a more egalitarian First Amendment within the doctrinal and rhetorical boundaries of the liberal compromise. In this Part, we outline the basic motifs—the transsubstantive themes, tropes, and fault lines—of First Amendment egalitarian argument. Drawing on both the Symposium essays and outside writings, we identify three such motifs that recur again and again in the literature. Together, these motifs constitute something like a grammar of First Amendment egalitarianism.[154] We make no claim to comprehensiveness or taxonomic rigor. There may in fact be two basic motifs, or ten. The grammar will undoubtedly change over time in response to the success or failure of particular ideas; it will also likely feature a host of overlaps and other internal ambiguities, the resolution of which may prove unnecessary, impossible, or, alternatively, transformative.[155] The goal of this Part is not to arbitrate among competing camps but to clarify the structure of contemporary First Amendment debate and to give some sense of the argumentative resources—and the limitations of the resources—available to critics of First Amendment Lochnerism.

A. *Minimalism Versus Maximalism*

Before they can arrive at any particular reform proposal, the threshold question that confronts, and divides, critics of First Amendment Lochnerism is how powerful they want the judicially enforced First Amendment to be. This question itself has several dimensions. Reformers might seek to expand or contract the scope of the First Amendment's "coverage," or the amount of communicative activity that is subject to First Amendment scrutiny.[156] For any given category of

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154. For this metaphorical usage of "grammar," see Grammar, Merriam-Webster, http://www.merriam-webster.com/dictionary/grammar [https://perma.cc/9BVJ-D7EN] (last visited July 21, 2018) (defining "grammar" as, inter alia, "the principles or rules of an art, science, or technique," as in "a *grammar* of the theater"). For the canonical discussion of this usage, see Kenneth Burke, A Grammar of Motives, at xix (Univ. of Cal. Press 1969) (1945) (defining a grammar as the "formal interrelationships [that] prevail" among a given set of "terms . . . by reason of their role as attributes of a common ground or substance"); id. at 441 (defining a grammar as "an attitude embodied in a method").

155. See Burke, supra note 154, at xix (emphasizing the need "to study and clarify the *resources* of ambiguity" within a grammar, as "it is in the areas of ambiguity that transformations take place; in fact, without such areas, transformation would be impossible").

156. See Amanda Shanor, First Amendment Coverage, 93 N.Y.U. L. Rev. 318, 325 (2018) ("Coverage is a sociological concept: It is not the theoretical or philosophical scope of the right of free speech, but what litigants and courts in a given historical moment view as within, or plausibly within, the scope of that right."); see also Frederick Schauer, The

covered speech, they might seek to invigorate or enervate this scrutiny and the First Amendment "protection" that the category receives.[157] And whatever their views on coverage and protection, reformers might seek to allocate more or less of this enforcement work to the courts. The overarching issue is whether and to what extent the project of creating a more socially and economically egalitarian public sphere should be pursued within or outside judicial enforcement of the First Amendment.

As free speech law has drifted rightward in recent years, many progressives have become less concerned to get First Amendment doctrine just right than to get it out of the way. No fewer than four contributions to this Symposium appeal to such *First Amendment minimalism*. After critiquing the neoliberal assumptions that animate the Roberts Court's free speech rulings, Professor Jedediah Purdy calls for a "jurisprudence of permission" that would enable legislatures to pursue social democratic aims without running afoul of the First Amendment.[158] Professor Jack Balkin warns against applying the First Amendment to social media platforms, and he urges courts to reject free speech challenges brought by these platforms to "technical, regulatory, and administrative" measures that would enhance end users' "practical freedom," such as net neutrality rules and media concentration limits.[159] Both Professor Leslie Kendrick and Professor Louis Michael Seidman suggest that First Amendment law is not simply ill equipped to drive progressive change, but incapable of doing so.[160] For all these authors, judicial enforcement of First Amendment rights will not lead to a more egalitarian state or society; the best that can be hoped for is to contain the damage.

Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765, 1769–807 (2004) [hereinafter Schauer, Boundaries] (exploring possible political, cultural, and economic determinants of First Amendment coverage).

157. The distinction between First Amendment coverage and protection is Professor Frederick Schauer's. 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 & n.13 (2017) (discussing the origins of the distinction). For a particularly recent and concise restatement, see Frederick Schauer, Response, Out of Range: On Patently Uncovered Speech, 128 Harv. L. Rev. Forum 346, 347–48 (2015), http://harvardlawreview.org/wp-content/uploads/2015/06/vol128_Schauer.pdf [https://perma.cc/3MNZ-HSAP].

158. Jedediah Purdy, Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment, 118 Colum. L. Rev. 2161, 2175–81 (2018); cf. Tim Wu, Knight First Amendment Inst., Is the First Amendment Obsolete? 19 (2017) [hereinafter Wu, Obsolete], http://knightcolumbia.org/sites/default/files/content/Emerging%20Threats%20Tim%20Wu%20Is%20the%20First%20Amendment%20Obsolete.pdf [https://perma.cc/YWN6-FSYJ] ("[T]he project of realizing a healthier speech environment may depend more on what the First Amendment permits, rather than what it prevents or requires.").

159. Jack M. Balkin, Free Speech Is a Triangle, 118 Colum. L. Rev. 2011, 2032–33 (2018) [hereinafter Balkin, Triangle].

160. See generally Leslie Kendrick, Another First Amendment, 118 Colum. L. Rev. 2095 (2018); Louis Michael Seidman, Can Free Speech Be Progressive?, 118 Colum. L. Rev. 2219 (2018).

The slow but steady growth in judicial coverage and protection of commercial speech, computer algorithms, and campaign spending[161] would seem to support the view that even when First Amendment norms are crafted with the most egalitarian of intentions,[162] they tend to reproduce or intensify the inequalities inherent in a legal system wedded to the production, exchange, and accumulation of commodities.[163] Minimalist responses, accordingly, aim to limit the scope of First Amendment coverage (as with the argument that algorithms should not be considered "speech"[164]), to limit the degree of First Amendment protection (as with the argument that regulations of commercial speech should be subject to less demanding scrutiny[165]), or to avoid legal moves that could inadvertently invigorate the First Amendment in the future.[166] With the First Amendment thus chastened, legislators and administrators could pursue a broader set of egalitarian projects. Of course, this gain in freedom to regulate would

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161. See Kendrick, Expansionism, supra note 53, at 1200 (discussing "First Amendment expansionism, where the First Amendment's territory pushes outward to encompass ever more areas of law"); Frederick Schauer, First Amendment Opportunism, *in* Eternally Vigilant: Free Speech in the Modern Era 174, 176 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (discussing "First Amendment opportunism," whereby free speech doctrine and rhetoric are asked to serve ends external to "the purposes the First Amendment was designed to serve").

162. See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976) (justifying the extension of First Amendment coverage to include commercial advertising on the ground that a pharmacy's generic drug ads would help "the poor, the sick, and particularly the aged" procure medicines at the lowest price).

163. For the commodity-form theory of law, see generally Evgeny B. Pashukanis, Law and Marxism: A General Theory (Barbara Einhorn trans., Ink Links Ltd. 1989) (1924). For a perceptive summary of Pashukanis's thought, see China Miéville, The Commodity-Form Theory of International Law, *in* International Law on the Left: Re-examining Marxist Legacies 92, 105–20 (Susan Marks ed., 2008).

164. See, e.g., Neil M. Richards, Reconciling Data Privacy and the First Amendment, 52 UCLA L. Rev. 1149, 1169 (2005) ("I believe that most privacy regulation that interrupts information flows in the context of an express or implied commercial relationship is neither 'speech' within the current meaning of the First Amendment, nor should it be viewed as such." (footnotes omitted)); Tim Wu, Free Speech for Computers?, N.Y. Times (June 19, 2012), http://www.nytimes.com/2012/06/20/opinion/free-speech-for-computers.html (on file with the *Columbia Law Review*) ("[A]s a general rule, nonhuman or automated choices should not be granted the full protection of the First Amendment, and often should not be considered 'speech' at all.").

165. See, e.g., Tamara R. Piety, Against Freedom of Commercial Expression, 29 Cardozo L. Rev. 2583, 2584 (2008) (critiquing the trend "to offer broader protection to commercial speech and corporate speakers than has been extended in the past"); Robert Post & Amanda Shanor, Adam Smith's First Amendment, 128 Harv. L. Rev. Forum 165, 174 (2015), http://harvardlawreview.org/wp-content/uploads/2015/03/vol128_PostShanor2.pdf [https://perma.cc/3ZJQ-JA55] (criticizing contemporary courts for reviewing regulations of commercial speech in an "aimlessly intrusive" manner).

166. See, e.g., Kate Andrias, Building Labor's Constitution, 94 Tex. L. Rev. 1591, 1593–95 (2016) [hereinafter Andrias, Labor's Constitution] (describing and defending "the choice of worker movements *not* to lay claim to the Constitution" and noting labor lawyers' fear that "even when workers direct their constitutional claims to elected officials, courts often end up reviewing—and rejecting—their validity").

likely come at the expense of some valuable expression. For progressive minimalists, however, that tradeoff might well seem worth it, especially to the extent that judicial enforcement of the First Amendment fails to protect truly transformative or transgressive speech, as opposed to speech that poses little threat to legal elites or the socioeconomic status quo.[167]

This tradeoff will seem especially worthwhile in periods when the legislative and executive branches are led by progressives. The United States is, to put it mildly, not in such a period right now. Yet First Amendment minimalism need not entail a belief that the legislative and executive branches, simply as a matter of constitutional structure, are more likely than courts to produce egalitarian outcomes under all social conditions. Progressive civil libertarians in the first half of the twentieth century not only sought to free the political branches from the negative constraint of judicial supervision; they also sought to impose on the political branches both new institutional forms and a specific ideological mission—oriented around values such as democratic pluralism and individual self-determination—through the operation of a mass political party committed to that mission and capable of sustaining institutional innovation.[168] Similarly, nothing prevents contemporary First Amendment minimalists from seeking to coordinate their civil libertarian vision with the practical pursuit of political power.

Despite the appeals of minimalism, achieving any significant roll-back of First Amendment doctrine looks like an uphill battle given the rise of informational capitalism in the marketplace, the First Amendment–industrial complex in civil society, and First Amendment Lochnerism in the courts.[169] Whether out of conviction or in capitulation, many contemporary

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167. As Professor Michael Klarman has observed:

> A cynical, though nonetheless apparently accurate, interpretation of the Court's free speech jurisprudence is that political dissidents become entitled to significant constitutional protection only when they cease to pose a serious threat to the status quo—that is, communists and Ku Kluxers in the second half of the 1960s, but not, respectively, in the 1950s or 1920s. Further, according to this interpretation, the Court protects the expression rights of pesky but nonthreatening dissidents (Jehovah's Witnesses) and of mainstream speakers (labor union picketers in 1940 but not 1920). Precious little corroboration of the Court's countermajoritarian heroics appears in the free speech context.

Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. 1, 14–15 (1996) (footnote omitted); cf. Andrias, Labor's Constitution, supra note 166, at 1609–11 (observing, with reference to First Amendment doctrine, that "the history of court antagonism toward workers is particularly long and storied").

168. On the relationship between New Deal administration and the mass party, see Kessler, Administrative Legitimacy, supra note 62, at 731–34. On the relationship between progressive civil libertarianism and democracy, see Kessler, Administrative Origins, supra note 57, at 1084–92.

169. See supra Part II; see also Schauer, Boundaries, supra note 156, at 1789–90 (discussing "the First Amendment's *magnetism*," its "rhetorical power and argumentative authority," in contemporary U.S. political culture); Frederick Schauer, The Politics and Incentives of First

progressives have offered more *maximalist* arguments that seek to extend First Amendment coverage to, or enhance First Amendment protection of, equality-promoting expressive and associational activities that are slighted by existing doctrine. In this spirit, Professor Bertrall Ross argues in his contribution to this Symposium that courts should not only embrace First Amendment claims against partisan gerrymandering—claims that have been rapidly gaining traction, especially on the left[170]—but also do so in a manner that prioritizes the associational interests of "political outsiders."[171] Going more against the grain of current case law, Professor Catherine Fisk argues in her Symposium essay for substantially greater First Amendment protection for labor picketing and boycotts.[172]

Not represented in this Symposium are a host of other maximalist arguments put forward in recent years that seek to enhance social or economic equality in parts of the expressive landscape. Examples include proposals for recognizing or strengthening First Amendment rights:

- to register to vote and to cast a ballot;[173]
- to access government information and facilities (a "right to know");[174]

Amendment Coverage, 56 Wm. & Mary L. Rev. 1613, 1614–17 (2015) (cataloguing "accelerating attempt[s]" in recent years "to widen the scope of First Amendment coverage").

170. This development itself reflects a remarkable expansion of First Amendment (and contraction of equal protection) advocacy. Cf. Richard Pildes, What Is the First Amendment Theory of Partisan Gerrymandering?, Election Law Blog (Mar. 25, 2018), http://electionlawblog.org/?p=98319 [https://perma.cc/J9XF-4D7Y] (noting that until very recently, "references to the First Amendment ha[d] sometimes been thrown in" to equal protection challenges to partisan gerrymandering "but never developed in a full way"). For the most recent judicial statement of support, authored by Justice Elena Kagan and joined by all three of her liberal colleagues, see Gill v. Whitford, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) ("[P]artisan gerrymanders may infringe the First Amendment rights of association held by parties, other political organizations, and their members.").

171. Bertrall Ross, Partisan Gerrymandering, the First Amendment, and the Political Outsider, 118 Colum. L. Rev. 2187, 2190–94 (2018).

172. Catherine L. Fisk, A Progressive Labor Vision of the First Amendment: Past as Prologue, 118 Colum. L. Rev. 2057, 2076–91 (2018); see also Andrias, Labor's Constitution, supra note 166, at 1600 & n.46 (collecting recent sources arguing that the Court should "interpret the First Amendment's speech and assembly clauses to give employees greater rights in organizing campaigns, boycotts, and strikes").

173. See, e.g., Armand Derfner & J. Gerald Hebert, Voting Is Speech, 34 Yale L. & Pol'y Rev. 471, 472 (2016) ("This Essay . . . proposes that we find a source of constitutional protection for voting in the First Amendment."); Janai S. Nelson, The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint, 65 Fla. L. Rev. 111, 115–16, 141–59 (2013) (advancing a "First Amendment Equal Protection" framework for strengthening the right to vote and challenging felon disenfranchisement laws); cf. Citizens United v. FEC, 558 U.S. 310, 424–25 (2010) (Stevens, J., concurring in part and dissenting in part) ("Under the majority's view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech.").

174. See, e.g., Heidi Kitrosser, Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State, 39 Harv. C.R.-C.L. L. Rev. 95,

- to record the police and other officials performing public duties (a "right to record"),[175] as well as private parties engaged in matters of public concern;[176]
- to exercise expressive and religious liberties outside the borders of the United States;[177]
- to feed homeless people;[178]
- to engage in panhandling;[179]
- to access, use, reproduce, and exchange copyrighted or otherwise privately owned information;[180]

130–34 (2004) (arguing for First Amendment access rights to administrative proceedings); Barry Sullivan, FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know," 72 Md. L. Rev. 1, 20 (2012) (criticizing courts' "failure to acknowledge that the First Amendment 'right to know' is a foundational value of our form of government . . . and the key to interpreting [the Freedom of Information Act]"); see also Sonja R. West, Awakening the Press Clause, 58 UCLA L. Rev. 1025, 1031 (2011) (urging an "interpretation of the Press Clause . . . that would allow journalists additional and unique protections, primarily with respect to newsgathering"). Outside the context of criminal trials, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), efforts to convince courts to recognize a First Amendment right of access have thus far been "overwhelmingly unsuccessful," Frederick Schauer, Positive Rights, Negative Rights, and the Right to Know, *in* Troubling Transparency: The History and Future of Freedom of Information 34, 37–38 (David E. Pozen & Michael Schudson eds., 2018).

175. See Howard M. Wasserman, Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement, 96 N.C. L. Rev. 1313, 1337–41 (2018) (reviewing "scholarly arguments in support of the First Amendment right to record"). At this writing, a half-dozen federal appellate courts recognize some version of a First Amendment right to record public officials. See id. at 1336.

176. See, e.g., Justin Marceau & Alan K. Chen, Free Speech and Democracy in the Video Age, 116 Colum. L. Rev. 991, 1026–62 (2016) (arguing that the First Amendment should be read to confer a limited privilege to engage in nonconsensual audiovisual recording on private property when the matters recorded are of public concern).

177. See, e.g., Timothy Zick, The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation, 52 B.C. L. Rev. 941, 1020 (2011) (criticizing "First Amendment parochialism" and advocating a "cosmopolitan" approach that would make First Amendment rights "generally portable with regard to citizens, and at least partially portable with regard to aliens").

178. See, e.g., Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, No. 16-16808, 2018 WL 4000057, at *1 (11th Cir. Aug. 22, 2018) (holding that a nonprofit organization's "outdoor food sharing" with homeless individuals "is expressive conduct protected by the First Amendment").

179. See, e.g., Ronald K.L. Collins, ACLU Targets Panhandling Laws Across the Nation, Concurring Opinions (Aug. 29, 2018), http://concurringopinions.com/archives/2018/08/fan-199-7-first-amendment-news-aclu-targets-panhandling-laws-across-the-nation.html [https://perma.cc/L9WA-RM84] (collecting sources on the ACLU's "all out assault on panhandling laws").

180. See, e.g., Yochai Benkler, Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, 74 N.Y.U. L. Rev. 354, 412–46 (1999) (arguing that laws that lead to "enclosure" of the public domain, such as the anticircumvention provision of the Digital Millennium Copyright Act, raise severe First Amendment concerns); Jed Rubenfeld, The Freedom of Imagination: Copyright's Constitutionality, 112 Yale L.J. 1, 5 (2002) (arguing that the "freedom of imagination" guaranteed by the First

- to speak and associate about lawful subjects with organizations designated as terroristic;[181]
- for journalists to withhold confidential information from or about their sources;[182]
- for executive branch employees to "leak" classified information suggesting government error or abuse;[183]
- to assemble peaceably in public spaces;[184] and
- to be free from state surveillance.[185]

This is by no means a complete list. If they were to succeed (or succeed to a greater extent than they already have) in the courts, these sorts of arguments would not dispel the specter of First Amendment Lochnerism; past trends suggest that the First Amendment's deregulatory potential would only grow. But the political valence of First Amendment case law might begin to tack back toward the left.

Conscious of such tradeoffs, progressive maximalists generally advance arguments for careful, and highly selective, expansion of the First Amendment's reach. The risk of libertarian co-optation and ideological drift hangs over these efforts.[186] If a present inequality could

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Amendment "calls into question the enormous and growing set of prohibitions imposed by modern copyright law on so-called 'derivative' works").

181. See, e.g., Holder v. Humanitarian Law Project, 561 U.S. 1, 41 (2010) (Breyer, J., dissenting) (arguing that the First Amendment forbids the application of a federal statute criminalizing the provision of "material support" to designated foreign terrorist organizations to "coordinated teaching and advocacy furthering the designated organizations' lawful political objectives").

182. See, e.g., Jeffrey S. Nestler, Comment, The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege, 154 U. Pa. L. Rev. 201, 203 (2005) ("[J]ournalists should have a privilege, grounded in the common law and derived from the First Amendment, to refuse to answer subpoenas issued by judicial authorities.").

183. See, e.g., Heidi Kitrosser, Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information, 6 J. Nat'l Security L. & Pol'y 409, 411 (2013) ("This article argues that, contrary to the conventional wisdom, leakers merit robust First Amendment protections against prosecution.").

184. See, e.g., Tabatha Abu El-Haj, The Neglected Right of Assembly, 56 UCLA L. Rev. 543, 586–89 (2009) (critiquing the turn toward requiring prior permission for such assemblies and arguing "that the right of assembly should not be collapsed into the right of free expression"); John Inazu, Unlawful Assembly as Social Control, 64 UCLA L. Rev. 2, 8 (2017) (arguing that courts and scholars have "erroneously" limited the right of assembly "to purposes of petitioning the government" and ignored First Amendment "principles meant to constrain discretionary enforcement by public authorities").

185. See, e.g., Alex Abdo, Why Rely on the Fourth Amendment to Do the Work of the First?, 127 Yale L.J. Forum 444, 455 (2017), http://www.yalelawjournal.org/pdf/Abdo_5czbvbj9.pdf [https://perma.cc/65EU-E7S5] (suggesting that "[c]ourts could simply apply the First Amendment . . . to surveillance that substantially burdens free speech and dissent"); Neil M. Richards, Intellectual Privacy, 87 Tex. L. Rev. 387, 431–34 (2008) (arguing that government surveillance of confidential communications jeopardizes the First Amendment value of "intellectual privacy").

186. Rather than seek to carve out certain categories of speech from First Amendment coverage or protection, as a minimalist might do, some of today's progressive maximalists

actually be rectified through maximalist litigation, however, the normative cost of allowing it to persist may seem too steep.

The arguments just reviewed generally take as a given the existing state action doctrine, pursuant to which the First Amendment, like other provisions of the Bill of Rights and the Fourteenth Amendment, applies almost exclusively to government actors.[187] As nongovernmental entities such as Facebook and Google have come to dominate the online expressive environment, some have proposed the further maximalist move of directly applying the First Amendment to these companies (or, more modestly, to certain uses of their digital platforms by government officials).[188] The resurrection and expansion of *Marsh v. Alabama*,[189] a 1946 case in which the Court treated a "company town" as a state actor for First Amendment purposes, is an idée fixe of this literature.[190] Yet while these proposals are often motivated by a concern about the amount of power that a small number of technology firms wield, it is far from clear that their adoption would serve egalitarian ends. As Balkin explains, to hold Facebook, Google, and their ilk to the same First Amendment standards to which we hold public regulators "would quickly make these spaces far less valuable to end users, if not wholly ungovernable," and would significantly impair the firms' ability to tamp down on hate speech, harassment, and other forms of antisocial

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appear to seek heightened judicial solicitude for the expressive conduct of poor or otherwise disempowered speakers. The history of First Amendment Lochnerism suggests the difficulty of convincing courts to recognize any such carve-*in* and then stabilizing it across judicial appointments and political economic change. Even if this could be achieved, however, the result may be hard to reconcile with the principles of content and viewpoint neutrality, at least as those principles have been articulated in modern doctrine. See supra notes 147–153 and accompanying text; infra notes 213–217 and accompanying text. The strategic question facing these progressive maximalists is therefore not just whether they can avoid co-optation and drift, but whether arguments of this sort can be pursued to any substantial extent within the terms of the liberal compromise—or whether their success depends, instead, on a reorientation of First Amendment law toward the pursuit of substantively egalitarian governance.

187. See Klonick, supra note 97, at 1609–13 (summarizing First Amendment state action doctrine).

188. See generally Whitney, supra note 96, at 24–28 (reviewing recent lawsuits raising such claims and concluding that "the once off-the-wall theory that these companies should count as state actors for First Amendment purposes is starting to look a bit more on the table").

189. 326 U.S. 501 (1946).

190. See, e.g., Jonathan Peters, The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application—or Lack Thereof—to Third-Party Platforms, 32 Berkeley Tech. L.J. 989, 1025 (2017) (using "*Marsh* as a foundation" for "a state action theory suitable for the digital world"); Daniel Rudofsky, Note, Modern State Action Doctrine in the Age of Big Data, 71 N.Y.U. Ann. Surv. Am. L. 741, 777 (2017) ("Facebook is the town in *Marsh v. Alabama*. Only it appears to be a virtual town, and Facebook has essentially created a government over that virtual town. A strong case could be made that Facebook should be considered a state actor . . . .").

expression that disproportionately target women and racial minorities.[191] First Amendment doctrine would have to be made much more internally proregulatory before its direct application to these platforms could become a net plus for egalitarians.

B. *Speech on Both Sides*

First Amendment minimalist and maximalist arguments confine themselves to the traditional image of Anglo-American public law adjudication, pitting private right against public authority in a politically independent court of law.[192] Their underlying premise is that egalitarian ends can be achieved by recalibrating the distribution of constitutional authority between a private party's expressive interests and the state's legitimate public interests—interests ranging from social welfare to national security to antidiscrimination. In any given case, minimalist arguments tend to value the state's public interests more highly than the private party's expressive interests, and accordingly call for narrower First Amendment coverage or weaker First Amendment protection of the latter. Conversely, maximalist arguments tend to value certain expressive interests more highly than the state's public interests, and accordingly call for broader First Amendment coverage or stronger First Amendment protection of the former.

A second genre of egalitarian argument complicates this framework by introducing a set of interests that neither the private litigant nor the state necessarily represents. These interests are the expressive interests of third parties. Whereas minimalist and maximalist arguments focus on the degree to which the First Amendment should shield a particular party's expressive activity from state interference, arguments involving *speech on both sides* focus on the degree to which one party's expressive activity compromises the ability of other private parties to exercise their own First Amendment rights.

The generic speech-on-both-sides argument begins by identifying expressive interests distinct from, and downstream of, the expressive interests asserted by Speaker X in a First Amendment challenge to state regulation. The next two steps of the argument are to claim, first, that in the absence of appropriate regulation, the expression of X threatens the expressive interests of Speakers Y and Z, for example by "chilling" or "drowning out" the speech of Y and Z; and next, that these threatened interests are themselves entitled to some degree of First Amendment solicitude. The final step of the speech-on-both-sides argument is to contend that, when adjudicating X's constitutional claim, courts should

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191. Balkin, Triangle, supra note 159, at 2026.

192. See generally Peter L. Lindseth, Reconciling with the Past: John Willis and the Question of Judicial Review in Inter-War and Post-War England, 55 U. Toronto L.J. 657, 663–76 (2005) (describing the origins and persistence of this traditional image in English public law).

take into account the threat that X's expression poses to the expressive interests of Y and Z. This might lead a court to *devalue* speech by X that tends to silence Y and Z—to accord X's speech less First Amendment protection than it might otherwise enjoy.[193] Alternatively, judicial consideration of the immanent conflict between the expressive freedom of X and the expressive freedoms of Y and Z might lead a court to *accord greater weight* to the state's public interests in regulating X. Those public interests would now include preservation of the First Amendment rights of Y and Z.[194]

Whatever the precise form that it takes, the egalitarian goal of the speech-on-both-sides approach is to promote the positive liberty of those disempowered speakers who find it difficult to vindicate their expressive interests as First Amendment plaintiffs. Such speakers may suffer legally not only from a comparative lack of financial or cultural capital, but also from the adversarial, state-versus-society character of public law litigation. Judicial enforcement of the First Amendment focuses on private parties with grievances against the state for interfering with (rather than for failing to enable) their expression.[195] Speech-on-both-sides arguments seek to ameliorate this structural bias by opening the courthouse windows, so that the struggle for expressive freedom within society can be heard in the midst of adjudications formally framed as struggles between regulated speakers and their regulators.

Described in this way, speech-on-both-sides arguments have an impressive, if controversial, pedigree within contemporary First Amendment

193. When the speech-on-both-sides argument takes this form, it can also be described as a minimalist move insofar as it entails decreasing First Amendment coverage or protection for a particular kind of speech.

194. Whether or not this should be understood as a maximalist move is a tricky question. On the one hand, recognizing a strong public interest in preserving the ability of third parties to exercise their First Amendment rights does amount to greater protection of those rights. But as a matter of legal form, it is the state's authority to *restrict* speech—speech that suppresses too much other speech—that has been enhanced. Such regulation of third-party harms would seem to have a surer constitutional footing in the religious liberty context due to the interplay between the Free Exercise and Establishment Clauses, which forbid accommodations of religion that impose significant burdens on the religious liberty of others. See generally Frederick Mark Gedicks & Rebecca G. Van Tassell, RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion, 49 Harv. C.R.-C.L. L. Rev. 343, 356–71 (2014) (reviewing this constitutional argument). But cf. Micah Schwartzman, Conscience, Speech, and Money, 97 Va. L. Rev. 317, 359–71 (2011) (noting the absence of an Establishment Clause for speech but suggesting that the Supreme Court's compelled speech doctrine might provide a usable alternative).

195. See Gregory P. Magarian, Regulating Political Parties Under a "Public Rights" First Amendment, 44 Wm. & Mary L. Rev. 1939, 1943 (2003) ("The present Court, across the terrain of First Amendment doctrine, treats the freedom of expression and the attendant freedom of association as private, negative rights intended to shield individual autonomy against government regulation.").

theory.[196] Speech-on-both-sides arguments have featured prominently, for instance, in egalitarian defenses of regulations of pornography on the ground that pornography silences women and suffocates antipatriarchal speech;[197] in egalitarian defenses of regulations of campaign spending on the ground that unlimited spending by wealthy interests impedes "the kind of open public political discussion that the First Amendment seeks to sustain";[198] and in egalitarian defenses of (and proposals to expand) copyright law doctrines such as fair use on the ground that overly broad copyright protections jeopardize the free speech rights of third parties.[199]

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196. Speech-on-both-sides arguments are a subset of what Eugene Volokh calls the "constitutional tension" method, which asks why any given speaker's free speech rights should necessarily trump other constitutional values, including equality interests and the free speech interests of third parties. See generally Eugene Volokh, Freedom of Speech and the Constitutional Tension Method, 3 U. Chi. L. Sch. Roundtable 223 (1996). According to Volokh, although a constitutional tension approach to the First Amendment "comes naturally" and can be traced "to the founding of our nation," it has an "unfortunate" track record and is "not the approach the Supreme Court generally uses today." Id. at 224–25; see also Erica Goldberg, Competing Speech Values in an Age of Protest, 39 Cardozo L. Rev. 2163, 2167–68 (2018) (concluding similarly that under current doctrine "the government generally cannot advance the desire to promote free speech values . . . as an interest in restricting a private party's free speech rights").

197. Major works in this genre include Andrea Dworkin, Pornography: Men Possessing Women (1981); Catharine A. MacKinnon, Only Words (1993) [hereinafter MacKinnon, Only Words]; Alisa L. Carse, Pornography: An Uncivil Liberty?, 10 Hypatia 155 (1995); Danielle Keats Citron & Mary Anne Franks, Criminalizing Revenge Porn, 49 Wake Forest L. Rev. 345 (2014); and Rae Langton, Speech Acts and Unspeakable Acts, 22 Phil. & Pub. Aff. 293 (1993). For a succinct summary of Professor Catharine MacKinnon's and Andrea Dworkin's canonical speech-on-both-sides arguments, see Balkin, Some Realism, supra note 81, at 377–78. For MacKinnon's most recent critique of First Amendment pornography doctrine, see Catharine A. MacKinnon, The First Amendment: An Equality Reading, *in* The Free Speech Century (Lee C. Bollinger & Geoffrey R. Stone eds., forthcoming 2018) (on file with the *Columbia Law Review*).

198. Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 47 (2005); see also, e.g., Citizens United v. FEC, 558 U.S. 310, 441 (2010) (Stevens, J., concurring in part and dissenting in part) (arguing that "the Constitution does, in fact, permit numerous 'restrictions on the speech of some in order to prevent a few from drowning out the many'" (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring))); id. at 470 ("[W]hen corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears 'little or no correlation' to the ideas of natural persons or to any broader notion of the public good." (quoting Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990))); cf. Bradley A. Smith, The John Roberts Salvage Company: After *McConnell*, a New Court Looks to Repair the Constitution, 68 Ohio St. L.J. 891, 909 (2007) ("[I]t has long been a fundamental part of the 'drowning out' argument popular in [campaign finance] 'reform' circles that some doors of communication must of necessity be closed in order to open others.").

199. See, e.g., Eldred v. Ashcroft, 537 U.S. 186, 221 (2003) (describing fair use as a "free speech safeguard[]"); Ned Snow, Proving Fair Use: Burden of Proof as Burden of Speech, 31 Cardozo L. Rev. 1781, 1793–95 (2010) (summarizing judicial and scholarly arguments that fair-use expression should receive First Amendment protection); see also Rebecca Tushnet, Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation,

Speech-on-both-sides arguments have also made cameos in recent scholarship defending restrictions on employers' anti-union speech as a safeguard of employee expression and association.[200] "Behind almost every restriction on speech," Professor Erica Goldberg observes in a new article cataloguing additional examples, "lurks a potential argument that the lack of a speech regulation may be as deleterious to free speech values as a proposed speech regulation."[201]

The paradigm case of speech-on-both-sides argument concerns hate speech[202]—speech that vilifies, denigrates, or dehumanizes individuals or groups on the basis of ascriptive characteristics "such as race, ethnicity, religion, gender, or sexual orientation."[203] The traditional legal term for such speech is group defamation or group libel, and these categories still animate hate speech jurisprudence across the globe. In the United States, however, hate speech regulations have fallen out of favor in response to a growing judicial consensus that they violate the First Amendment.[204] Existing First Amendment doctrine does permit the

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42 B.C. L. Rev. 1, 67 (2000) (using copyright law to illuminate the general First Amendment problem raised "[w]hen speech interests exist on both sides of an issue").

200. See, e.g., Charlotte Garden, Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech, 79 Fordham L. Rev. 2617, 2660 (2011) (arguing that although federal regulation of employers' speech during unionization campaigns "involves restrictions on speech," these restrictions are justified in part because they enhance "employees' First Amendment associational interests"); Andrias, Robust Public Debate, supra note 150, at 2432 (arguing for a reframing of "the free speech paradigm within workplace representation elections as Speech vs. Speech").

201. Goldberg, supra note 196, at 2165. Goldberg herself is wary of speech-on-both-sides arguments and urges "a formally neutral free speech doctrine" that discounts them, as "governmental intervention into speech is," in her view, "far more corrosive than any private interference or self-censorship." Id. at 2168.

202. Cf. Volokh, supra note 196, at 224 (suggesting that the "constitutional tension" approach to the First Amendment has been most fully theorized "with regard to the hate speech debate").

203. Craig Martin, Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada, 45 Hastings Const. L.Q. 455, 455 (2018); see also Alexander Brown, Retheorizing Actionable Injuries in Civil Lawsuits Involving Targeted Hate Speech: Hate Speech as Degradation and Humiliation, 9 Ala. C.R. & C.L. L. Rev. 1, 2 (2018) (defining the "opaque idiom" of hate speech in terms of "vituperation (bitter and abusive language) or vilification (viciously disparaging or insulting language) that makes reference to the victim's race, ethnicity, nationality, citizenship status, religion, sexual orientation, gender identity, disability, or other protected characteristic").

204. While the Supreme Court's decision in Beauharnais v. Illinois, 343 U.S. 250 (1952), which upheld a state criminal law prohibiting group defamation, has never been overturned, its validity has been all but ignored for at least four decades. See, e.g., Collin v. Smith, 578 F.2d 1197, 1204 (7th Cir.) (questioning whether *Beauharnais* "would pass constitutional muster today"), cert. denied, 439 U.S. 916 (1978). For the development of the American status quo and its position as a global outlier, see Jeremy Waldron, Dignity and Defamation: The Visibility of Hate, 123 Harv. L. Rev. 1596, 1601–02 (2010). For three foundational efforts to revive the American law of group libel and defamation with respect to racist speech, see generally Richard Delgado, Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 Harv. C.R.-C.L. L. Rev. 133 (1982); Charles

prohibition of speech used to commit a criminal or civil infraction, as long as the infraction is not itself defined in terms of the expression of a particular topic or viewpoint.[205] It also permits the prohibition of speech that, in a given context, is so inflammatory as to have the force and effect of otherwise sanctionable physical conduct.[206] But typical hate speech laws do not fit well into either of these categories: They *do* define infractions in terms of the expression of a particular message, and they self-consciously *do not* confine their sanctions to speech that causes immediate physical disruption. On the contrary, the harms that hate speech laws would most specifically redress are often those that implicate psychological, dignitary, and expressive interests.

Proponents of such laws have long argued that one of the most significant costs of hate speech is its tendency to suppress the expressive and associational activity of vilified individuals and groups.[207] As Professor Mari Matsuda writes: "In order to avoid receiving hate messages, victims have had to quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor."[208] Not only can hate speech silence individuals in the short term, but both hate speech and the failure to police it can also lead to the longer-term "disassociation" of minority groups from the ostensibly democratic political community and the communicative action essential to its maintenance.[209] It is for this

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R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431; Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989).

205. See R.A.V. v. City of St. Paul, 505 U.S. 377, 383–91 (1992) (distinguishing a narrow yet constitutionally impermissible hate speech law from those categories of speech that the government may constitutionally prohibit); see also Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) (confirming the vitality of *R.A.V.*'s approach); id. at 2235 (Breyer, J., concurring in the judgment) (same); id. at 2237–38 (Kagan, J., concurring in the judgment) (same).

206. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (indicating that while the First Amendment generally protects speech that advocates violence, it allows prohibitions on advocacy that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

207. See, e.g., Martin, supra note 203, at 504 ("[H]ate speech . . . not only distorts the search for truth, but suppress[es] and silence[s] the voices of the members of the target minority. Members of the hated group are effectively muzzled and driven from the public arena and fora of debate . . . ." (footnote omitted)); see also id. at 467 n.38, 502 n.174 (collecting sources making similar arguments).

208. Matsuda, supra note 204, at 2337; see also Brown, supra note 203, at 18–22 (arguing that hate speech makes it more difficult for its targets to communicate in an effective and self-controlled manner); Delgado, supra note 204, at 146–47 (calling attention to public schools as a key institution in which the censorious dynamics of hate speech may be particularly acute and destructive).

209. Matsuda, supra note 204, at 2337–38. For the canonical "communicative" account of democratic society, see 1 Jürgen Habermas, The Theory of Communicative Action: Reason and the Rationalization of Society (Thomas McCarthy trans., Beacon Press 1984) (1981). In this spirit, Professor Richard Delgado has suggested that the legal sanctioning

reason that legal philosopher Jeremy Waldron views hate speech regulation as supporting the public good of "assurance," or "conveying to people a sense of security in the enjoyment of their most fundamental rights."[210] Beyond its immediate targets, hate speech may also impose expressive and associational costs on "non-target-group members," costs that may be of "constitutional dimension" insofar as they fracture or stultify democratic dialogue.[211] More recently, the power of hate speech to drive vulnerable individuals and groups from the public square seems to have been magnified by the rise of the platform economy. The anonymity afforded by digital communications technologies, together with the speed and scale at which content spreads across the internet, have combined to create an "unforgiving ecology" of online abuse for women and other historically subordinated groups.[212]

As the example of hate speech regulation shows, the failure of speech-on-both-sides arguments to make more headway in the courts[213] has not been for lack of theory or evidence that certain forms of speech can degrade various other forms of speech. That premise is not much in dispute. Rather, the failure of such arguments reflects both the substantively libertarian orientation of First Amendment doctrine and the arguments' awkward fit with the structure of public law litigation—a structure that disinclines judges to acknowledge and balance the competing constitutional interests of private parties.[214] Some formulations of speech-on-both-sides arguments may also run afoul of the Court's doctrines regarding content and viewpoint neutrality, which strongly disfavor laws that appear on their face to prefer one sort of speech over another (say, nonhateful speech over hateful speech). These doctrines, as Lakier explains in her essay for this Symposium, have come to embody a formalistic conception of "expressive equality" that "limit[s] the effectiveness of the

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of hate speech may be necessary precisely because such speech interrupts the normal functioning of democratic dialogue that might otherwise correct it. See Delgado, supra note 204, at 147.

210. Waldron, supra note 204, at 1626–30. Only thanks to the provision of such assurance, Waldron contends, can "people who might otherwise feel insecure, unwanted, or despised . . . put that insecurity out of their minds and concentrate on what matters to them in social interaction—its pleasures and opportunities." Id. at 1629.

211. Matsuda, supra note 204, at 2338–39.

212. Sylvain, supra note 99, at 9; see also id. at 10 (discussing Professor Danielle Citron's and Professor Mary Anne Franks's pioneering work on this issue). As Citron explained nearly a decade ago, the internet enables "bigots" to form "anonymous online mobs" and engage in numerous communicative activities that "terrorize victims, destroy reputations, corrode privacy, and impair victims' ability to participate in online and offline society as equals." Danielle Keats Citron, Cyber Civil Rights, 89 B.U. L. Rev. 61, 63–64 (2009).

213. See supra note 196 and accompanying text.

214. For a broad comparative critique of U.S. courts' efforts to avoid the explicit balancing of rights claims, see generally Jamal Greene, The Supreme Court, 2017 Term—Foreword: Rights as Trumps, 132 Harv. L. Rev. (forthcoming 2018) (on file with the *Columbia Law Review*).

First Amendment as a tool for protecting the expressive freedom of those at the bottom of the economic and social hierarchies."[215] According to these doctrines, the important thing is not that everyone's speech interests are recognized and respected; the important thing is that every person, natural and artificial, is subject to the same governmental speech rules.

Lakier herself embraces the proposition that the First Amendment contains a principle of expressive equality, but she observes, crucially, that the meaning of expressive equality may be construed in a more or less context-sensitive manner. This observation echoes the classic debate between anticlassification and antisubordination readings of the Equal Protection Clause.[216] Speech-on-both-sides arguments tend to be deeply concerned with the expressive environment's egalitarian character, only they conceptualize equality in more functionalist, materialist, and dignitarian terms than is typical in First Amendment law.[217] From this perspective, expressive equality is not about treating all speakers the same. It is about ensuring that all speakers have a more or less equal opportunity to participate in the public sphere. Lakier's essay can be read as a call for a kind of symmetry across the First and Fourteenth Amendments: Legal liberals who support an antisubordination approach to equal protection, she suggests, should want judges to incorporate antisubordination norms into free speech law as well. One way judges might do this is by giving closer consideration to the expressive interests of third parties when those interests are directly implicated by the First Amendment case at hand.

C. *From Speaker to System*

Speech-on-both-sides arguments aspire to make First Amendment law more egalitarian, and less Lochnerian, by acknowledging a wider range of expressive interests. Compared to the standard method of First Amendment analysis, these arguments take a relatively broad and dynamic view as to which speakers matter and which forms of interference with their speech raise constitutional concerns—looking not only at speakers whose expression is constrained by state regulation but

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215. Lakier, supra note 141, at 2127.

216. See id. at 2121–23. For a precursor to Lakier's proposed hybridization of free speech and equal protection, see Charles R. Lawrence III, Cross Burning and the Sound of Silence: Anti-Subordination Theory and the First Amendment, *in* The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography 114 (Laura J. Lederer & Richard Delgado eds., 1995) (discussing the relationship between antisubordination constructions of the Equal Protection Clause and the First Amendment). For a more general discussion of "hybrid" and "intersectional" constitutional rights, see Kerry Abrams & Brandon L. Garrett, Cumulative Constitutional Rights, 97 B.U. L. Rev. 1309 (2017).

217. See, e.g., MacKinnon, Only Words, supra note 197, at 98 (contrasting American free speech law's "stupid theory of equality," which is "indifferent to whether dominant or subordinated groups are hurt or helped," with the "more substantive" Canadian approach, which is "directed toward changing unequal social relations").

also at third parties whose expression may be liberated by such regulation. Yet once one begins to move away from the dyadic, speaker-versus-regulator focus of current doctrine, why stop there? Why limit the analysis to the claims of competing speakers, rather than ask which sorts of regulation would best serve the expressive environment as a whole? A final set of egalitarian strategies resists the lure of the vexing individual case and emphasizes instead the importance of examining the system of free expression at the macro level—attending to the perspective of listeners as well as speakers, and taking into account the informational and expressive interests of as many listeners and speakers as practicable.

The First Amendment literature in support of campaign finance regulation illustrates how easily speech-on-both-sides arguments can bleed into *systemic* arguments of this sort. As noted above, liberal jurists such as Justice Stephen Breyer, Justice Stevens, and Judge Wright have sought to sustain statutory limits on electioneering expenditures against First Amendment attack partly on the ground that such limits may "enhance[] the self-expression of individual citizens who lack wealth."[218] While this argument works in part by identifying the "speech on both sides" of campaign finance laws, it does so with reference to a practically uncountable number of nonwealthy third-party speakers. Furthermore, these jurists pivot almost immediately to a broader set of claims about how expenditure limits may also enhance "the truth-producing capacity of the marketplace of ideas"[219] and "the integrity, competitiveness, and democratic responsiveness of the electoral process."[220] If anything, the standard legal-liberal defense of the constitutionality of campaign finance regulation places greater weight on the interests of listener-voters than it does on the interests of speaker-campaigners. The fundamental concern is not that big-money spending will result in the suppression of ordinary people's political speech (a difficult-to-prove empirical proposition). The fundamental concern is that such spending will skew political discourse, and politics itself, in antidemocratic ways.

Speech-on-both-sides arguments, it turns out, cannot easily be confined to the courthouse. Their proponents want judges to give greater weight to the expressive, informational, and dignitarian interests of third parties who may be negatively affected by a litigant's First Amendment victory and therefore to uphold regulations designed to protect those interests. At least in principle, however, there is little reason why someone advocating this approach should not *also* want judges to give greater weight to the interests of speakers and listeners one step

218. Wright, supra note 145, at 637; see also supra notes 143–145, 198 and accompanying text.

219. Wright, supra note 145, at 636.

220. Citizens United v. FEC, 558 U.S. 310, 472 (2010) (Stevens, J., concurring in part and dissenting in part); see also Breyer, supra note 198, at 47 ("Ultimately, [campaign finance laws] seek . . . to maintain the integrity of the political process—a process that itself translates political speech into governmental action.").

further removed from any given case.[221] More than that, there is little reason why someone who supports judicially enforced redistribution of speech rights in the name of the First Amendment should not also want *legislative* and *executive* officials to pursue policies that advance the expressive, informational, and dignitarian interests of the polity. Compared to courts, legislatures and agencies are likely to be in a better position to advance such interests at a wholesale level.

Several strains of anti-Lochnerian First Amendment argument make just this move from speaker to system—from asking how to define and defend specific types of speech by specific types of persons to asking how to engineer a fairer, fuller, "freer" expressive environment for everyone. Some systemic arguments remain fairly far off the wall, such as those that militate for a First Amendment right to an adequate education[222] or to "a formal, transparent platform for individual—and, in particular, minority—voices to participate in the lawmaking process."[223] Systemic arguments in favor of campaign finance regulation are comparatively mainstream. Outside of the campaign finance context, the systemic perspective has proven especially popular in the First Amendment literature on media regulation in its widest sense, what Marvin Ammori has called the "structure of American communication."[224] Ammori's

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221. Notice in this regard that speech-on-both-sides arguments implicitly acknowledge listeners' interests. The claim that certain forms of expression on one "side" (pornography, hate speech, big-money campaign spending) are liable to undermine expression on the other "side" (speech by women, vulnerable minorities, the nonwealthy) depends upon the effects that the former is expected to have on listeners (chilling, scaring, silencing). The basic concern is that unregulated or misregulated expression at T_1 will prevent listeners at T_2 from becoming speakers themselves at T_3. Even if speech-on-both-sides arguments do not invoke listeners' interests as such, they tend to assume a certain causal relationship between the experience of listening and the production of speech.

222. See, e.g., Susan H. Bitensky, Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis, 86 Nw. U. L. Rev. 550, 596–602 (1992); Penelope A. Preovolos, *Rodriguez* Revisited: Federalism, Meaningful Access, and the Right to Adequate Education, 20 Santa Clara L. Rev. 75, 91–96 (1980); see also San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (noting the appellees' contention "that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote").

223. Maggie McKinley, Lobbying and the Petition Clause, 68 Stan. L. Rev. 1131, 1131 (2016). Drawing on a range of historical and political science sources, McKinley's innovative article suggests that the Petition Clause might be revived to challenge the current system of congressional lobbying and the preferential access this system affords to the politically powerful.

224. Marvin Ammori, First Amendment Architecture, 2012 Wis. L. Rev. 1, 10. The concept of a "structure of communication" usefully complements two other, better established concepts in twentieth-century social theory: "structure of power" and "structure of feeling." On the former, see William F. Grover & Joseph G. Peschek, The Unsustainable Presidency: Clinton, Bush, Obama, and Beyond 15 (2014) ("There is a structure of power—'the very structure and operation of society itself'—that lies beneath the distribution of governmental powers." (quoting Woodrow Wilson, The New Freedom: A

portrayal of this structure relies heavily on physical metaphor, charting a landscape of "speech spaces" and the legal "architecture" that shapes them.[225] But the broader import of his doctrinal and scholarly overview is more abstract: A venerable tradition of constitutional theorists has found the First Amendment to permit or even require the state to take affirmative steps to secure the expressive and informational interests of "all Americans,"[226] population by population and medium by medium, from internet to television to telephone to print publishing to city streets.[227]

As Ammori emphasizes, his "architectural" approach builds on the work of leading First Amendment theorists of media regulation, including Professors C. Edwin Baker, Jack Balkin, Jerome Barron, Yochai Benkler, Owen Fiss, and Cass Sunstein.[228] All of these theorists share a commitment to affirmative government intervention across a range of media, whether through financial subsidies for the press, a "fairness doctrine" requiring broadcasters to present opposing views on a controversial issue, "must-carry" rules for cable providers,[229] "net neutrality" and "open access" rules for internet carriers,[230] or any number of other regulatory strategies aimed at creating a more democratic and egalitarian

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Call for the Emancipation of the Generous Energies of a People 19 (1961))); C. Wright Mills, The Structure of Power in American Society, 9 Brit. J. Soc. 29, 32–35 (1958) (describing a "structure of power" as a network of public and private institutions that determine the real experience of being governed in a given society). On the latter, see Raymond Williams, Marxism and Literature 131–35 (1977) (describing a "structure of feeling" as the less-than-conscious attitudes and habits that members of a given society develop in response to the formal discourses and institutions that constitute the society's self-conscious communal life). By analogy, a structure of communication might be understood as the real experience of speaking and listening in a given polity, as determined by the interaction of the social, economic, and technological means of communication and the legal and political governance of those means. Cf. Ammori, supra, at 21 (describing the practices and principles that "have been core to how Americans *experience* their First Amendment protections" (emphasis added)). All three of these concepts of structure play important roles, whether explicitly or implicitly, in systemic First Amendment argument.

225. Ammori, supra note 224, *passim*.

226. Id. at 21.

227. Cf. Jack M. Balkin, Media Access: A Question of Design, 76 Geo. Wash. L. Rev. 933, 936 (2008) (cataloging a historical range of "speech conduits," from "dead tree" newspapers to "wireless services").

228. See Ammori, supra note 224, at 10, 18, 24 (noting these influences).

229. See, e.g., Cass R. Sunstein, A New Deal for Speech, 17 Hastings Comm. & Ent. L.J. 137, 138–40, 154–59 (1994) (suggesting each of the foregoing strategies, among others, as potential means "to promote freedom of speech" by "promot[ing] attention to public issues and diversity of view" and thereby "diminish[ing] the influence of money over the content of broadcasting").

230. See, e.g., Jack M. Balkin, The Future of Free Expression in a Digital Age, 36 Pepp. L. Rev. 427, 428–33 (2009) [hereinafter Balkin, Future of Free Expression] (net neutrality); Yochai Benkler, Ending the Internet's Trench Warfare, N.Y. Times (Mar. 20, 2010), http://www.nytimes.com/2010/03/21/opinion/21Benkler.html (on file with the *Columbia Law Review*) (open access).

structure of communication. In this spirit, Professor Tim Wu has recently proposed "[n]ew laws or regulations requiring that major speech platforms behave as public trustees, with general duties to police fake users, remove propaganda robots, and promote a robust speech environment surrounding matters of public concern."[231]

However exactly they are framed, these proposals reflect a conviction that a well-functioning "system of free speech depends not only on the mere absence of state censorship, but also on an infrastructure of free expression."[232] The Constitution must not stand in the way of building this infrastructure; on the contrary, it may need to be recruited as an ally in the effort. "When the state acts to enhance the quality of public debate," Fiss writes in a representative passage, "we should recognize its actions as consistent with the First Amendment."[233] "What is more, when on occasions it fails to, we can with confidence demand that the state so act."[234]

Brought together by these basic commitments, egalitarian theorists of the "system of free speech" nevertheless vary in their normative and institutional emphases. For instance, some systemic theorists seek to establish a constitutional pedigree for their policy prescriptions, insisting that the First Amendment itself demands or at least motivates their proposals. Most others, however, ground their prescriptions in the subconstitutional or extraconstitutional demands of democracy, social justice, or prudence, seeking to establish only that the First Amendment does not forbid them.[235] Likewise, some systemic theorists foreground the

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231. Wu, Obsolete, supra note 158, at 23. These measures are needed, in Wu's view, to counter the rise of "troll armies," "flooding" tactics, "fake news," and other new or intensifying threats to the digital speech environment. Id. at 11–17, 23–26.

232. Balkin, Future of Free Expression, supra note 230, at 432. As Balkin elaborated this claim in an influential early effort to reimagine the systemic perspective for the internet era:

> Protecting freedom of speech in the digital age means promoting a core set of values in legislation, administrative regulation, and the design of technology. What are those values? They are interactivity, broad popular participation, equality of access to information and communications technology, promotion of democratic control in technological design, and the practical ability of ordinary people to route around, glom on, and transform.

Balkin, Digital Speech, supra note 96, at 52.

233. Fiss, Social Structure, supra note 125, at 1416.

234. Id.; see also Owen M. Fiss, Why the State?, 100 Harv. L. Rev. 781, 783 (1987) (suggesting that state regulation of speech with the goal of "furthering free speech values . . . is consistent with, and may even be required by, the [F]irst [A]mendment"); Christopher Witteman, Information Freedom, a Constitutional Value for the 21st Century, 36 Hastings Int'l & Comp. L. Rev. 145, 245 (2013) (drawing on German constitutional jurisprudence in suggesting that the First Amendment be read to require public "access to a diversity of ideas and a fullness of information").

235. Compare, e.g., Jerome A. Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1641 (1967) (arguing for "a twentieth century interpretation

expressive interests of marginalized speakers, whereas most others appear to prioritize the informational interests of listeners.[236] And some systemic theorists envision a key role for the courts in developing robust speech architectures, whereas most others downplay the judicial function and focus on the incentives, responsibilities, and authorities that do or should lead legislators and administrators to enact their preferred reforms.[237] In the language of this Essay,[238] systemic theorists of the First Amendment tend to be more minimalist than maximalist in their visions of judicial review, asking the courts largely to step aside as the political branches experiment with measures to enhance the quality, diversity, and accessibility of public debate.

As explained above, the position that the political branches, and only the political branches, should aggressively promote egalitarian First Amendment rights fell into disrepute when the liberal compromise supplanted progressive civil libertarianism in the mid-twentieth

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of the [F]irst [A]mendment which will impose an affirmative responsibility on the monopoly newspaper to act as sounding board for new ideas and old grievances"), and Fiss, Social Structure, supra note 125, at 1411 ("What the phrase 'the freedom of speech' in the [F]irst [A]mendment refers to is a social state of affairs, not the action of an individual or institution."), with Balkin, Future of Free Expression, supra note 230, at 441 ("Protecting free speech values in the digital age will be less and less a problem of constitutional law . . . and more and more a problem of technology and administrative regulation."), and Wu, Obsolete, supra note 158, at 19 (affirming the "basic" proposition that the First Amendment is "a negative right against coercive government action," not "a right against the conduct of nongovernmental actors" or "a right that obliges the government to ensure a pristine speech environment").

236. Compare, e.g., Barron, supra note 235, at 1678 (proposing "a right to be heard" that would allow more speakers to obtain access to the mass media), with C. Edwin Baker, Media Concentration: Giving Up on Democracy, 54 Fla. L. Rev. 839, 854 (2002) (criticizing a shift in First Amendment doctrine from treating media entities "instrumentally," and protecting their speech choices only insofar as they "serve the interests of the audience in the receipt of uncensored and diverse content," toward "treating media enterprises as rights bearers in their own behalf"), and Fiss, Social Structure, supra note 125, at 1411 ("[T]he key to fulfilling the ultimate purposes of the [F]irst [A]mendment is not [speaker] autonomy . . . . In fact, autonomy adds nothing and if need be, might have to be sacrificed, to make certain that public debate is sufficiently rich to permit true collective self-determination.").

237. Compare, e.g., Ammori, supra note 224, at 21 (identifying five doctrinal "principles" that "reflect a substantive, value-laden concern for the availability of speech spaces for all Americans" and arguing that these principles "should be adopted explicitly by courts deciding questions concerning legislated or judicial access to speech spaces"), and Barron, supra note 235, at 1678 (urging "the courts to fashion a remedy for a right of access, at least in the most arbitrary cases, independently of legislation"), with C. Edwin Baker, Media Structure, Ownership Policy, and the First Amendment, 78 S. Cal. L. Rev. 733, 755–58 (2005) (criticizing "activist judicial review" of "media architecture" regulation and noting that "the market is merely one among many possible architectures"), and Cass R. Sunstein, Free Speech Now, 59 U. Chi. L. Rev. 255, 257 (1992) (criticizing judicial interpretations of the First Amendment that "invalidate democratic efforts to promote the principle of popular sovereignty").

238. See supra section IV.A.

century.[239] Few if any of today's systemic theorists openly repudiate the resulting constitutional settlement. Even as he urges state intervention to enhance public debate, for example, Fiss is careful to clarify that "[j]udges are the ultimate guardians of constitutional values" and bear a heavy "burden of guarding against the danger of First Amendment counterproductivity."[240] Yet by placing so much stock in legislative and administrative action and so little stock in judicial protection of negative rights against government infringement of speech, some of the stronger versions of the move from speaker to system may have quite disruptive implications. Indeed, the very aspiration to engineer a "better" system of free expression through the political process represents a challenge to the prevailing "negative-liberty model" of the First Amendment and its premise that "the central First Amendment purpose . . . is to keep government *out* of speech."[241] As Professor Burt Neuborne has observed, "[c]urrent Supreme Court doctrine is relentlessly speaker-centered" and inattentive to the interests of "the hearer,"[242] much less to the interests of the expressive environment writ large. This state of affairs is partly attributable to the structure of First Amendment litigation and partly to the Court's "uncompromising refusal to trust government speech regulators with any significant power."[243]

In short, to ask judges to review free speech cases through a systemic lens, or otherwise to defer to legislative and administrative judgments about the speech system, is to imagine a very different First Amendment regime from the one we have now. Insofar as the logic of egalitarian critique pushes toward a systemic perspective, the question therefore arises whether First Amendment Lochnerism could ever truly be dispelled without a radical rethinking of existing doctrine, including the limits imposed by the liberal compromise. The move from speaker to system is the most powerful move in the contemporary grammar of egalitarian First Amendment argument; its underlying account of free speech does not merely complicate or chisel away at the deregulatory Lochnerian paradigm but supplies a comprehensive alternative. It does so, however, by putting pressure on First Amendment norms ranging from content and viewpoint neutrality to the primacy of judicial enforcement to the baseline opposition to redistribution of expressive and informational resources. In threatening to displace such norms, the pursuit of systemic egalitarianism may end up looking a good deal like a revival of progressive civil libertarianism.

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239. See supra notes 147–155 and accompanying text; supra section I.B.

240. Fiss, Social Structure, supra note 125, at 1420.

241. Ammori, supra note 224, at 8 (emphasis added). The negative-liberty understanding of the First Amendment, Ammori explains, comes with the "corollaries of government distrust, value-neutrality, and anti-redistribution." Id. at 81.

242. Burt Neuborne, The Status of the Hearer in Mr. Madison's Neighborhood, 25 Wm. & Mary Bill Rts. J. 897, 897 (2017).

243. Id. at 902.

CONCLUSION: THE EGALITARIAN FIRST AMENDMENT IN EXILE?

The search for an egalitarian First Amendment has never looked harder. As this Essay has tried to show, it is not just the current composition of the Supreme Court or its most controversial free speech decisions that account for the rise of First Amendment Lochnerism—a First Amendment jurisprudence that disables redistributive regulation and exacerbates socioeconomic inequality. Beyond the recent upsurge in conservative judicial appointees, a series of more fundamental developments in American law and political economy has facilitated, and seems likely to continue to facilitate, the spread of First Amendment Lochnerism. Three in particular stand out: first, the long-term growth of numerous overlapping forms of inequality from the 1970s through the present;[244] second, the rise of informational capitalism in the marketplace and a First Amendment–industrial complex in civil society;[245] and third, the surprising degree to which the midcentury liberal compromise between progressive and reactionary understandings of the First Amendment has delegitimated efforts to redistribute expressive and informational resources while legitimating an increasingly inegalitarian socioeconomic structure.[246]

In terms of both knowledge and power, legal egalitarians are best equipped to interrogate and to challenge the third development: the tendency of the liberal compromise, and the presumptively benign First Amendment jurisprudence it has produced, to favor First Amendment Lochnerism. Yet legal egalitarians cannot simply renounce the liberal compromise. Or, at least, they cannot do so without committing to a practically difficult and normatively fraught renovation of American constitutionalism writ large. This is because the features of the liberal compromise that allow First Amendment Lochnerism to thrive are intrinsic to the broader constitutional settlement that emerged from the New Deal. These include the primacy of judicial enforcement of civil libertarian rights and the reconceptualization of such rights as limitations on the state's regulatory role, irrespective of the regulated parties' relative socioeconomic power. Although the renunciation of these features might well forestall the spread of First Amendment Lochnerism, it would also undermine the very constitutional settlement that legal egalitarians currently seek to defend from conservative attack on multiple fronts.[247]

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244. See supra notes 2–19 and accompanying text (surveying historical and economic diagnoses of contemporary American inequality).

245. See supra Part II.

246. See supra notes 37–84 and accompanying text (describing the emergence of the liberal compromise and its facilitation of inegalitarian First Amendment doctrine).

247. See generally Fishkin & Pozen, supra note 111, at 969–71 (discussing contemporary legal liberals' "defensive" constitutional posture and "small-c conservative orientation toward the Constitution").

Faced with this conundrum, this Essay has canvassed First Amendment scholarship in search of ways around it, paths that may have gone unnoticed because theorists and historians were seeking solutions to a different problem. We find that traditional First Amendment theorizing in the grand style—a style motivated by justificatory ideals such as truth, autonomy, and democracy—is too empirically thin and politically inert to be of much use in this search.[248] Elsewhere, however, in scholarship more focused on concrete policy matters and persistent doctrinal ambiguities, we identify two relatively coherent and consistent strategies that remain available to legal egalitarians opposed to First Amendment Lochnerism. These strategies parallel familiar dichotomies from the social sciences: voice and exit,[249] reform and revolution.[250] The first strategy (voice, reform) is to remain within the world of the liberal compromise and to test its institutional and doctrinal boundaries. Might these boundaries extend farther, or prove less fixed, than previously thought? Notwithstanding the current composition of the federal judiciary, might new territory be found along the margins where a more egalitarian speech environment could flourish? As discussed in Part IV, contemporary First Amendment scholars, including participants in this Symposium, have not only asked these questions but also developed a grammar with which to answer them—a set of midlevel doctrinal and empirical arguments that seek to justify special judicial solicitude for the expressive and informational interests of the socioeconomically disadvantaged. Such solicitude may take the form of either stronger or weaker enforcement of preexisting First Amendment principles, found scattered across the precedential landscape.

This egalitarian grammar is highly suggestive of new ways to practice and to theorize First Amendment law. In their very generativity, however, the most powerful egalitarian arguments tend to move rapidly toward the frontier, to the edge of the liberal compromise if not beyond it altogether. Here we find the other means of evading First Amendment Lochnerism that our overview of free speech theory and historiography has identified. What lies beyond the liberal compromise? We suspect that the answer will resemble the approach that the liberal compromise itself displaced: the progressive civil libertarianism of the early-to-mid-twentieth century.[251]

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248. See supra Part III.

249. See generally Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States 3–5 (1970) (identifying "exit" and "voice" as competing strategic responses available to dissatisfied members of an organization).

250. See generally Göran Therborn, Science, Class, and Society: On the Formation of Sociology and Historical Materialism 115–44 (Verso 1980) (1976) (describing the self-conscious emergence of the distinction between reform and revolution in the mid-nineteenth century).

251. See supra section IV.C (suggesting that standard liberal arguments for giving greater weight to the "speech on both sides" of free speech controversies tend to push

This exiled alternative to the liberal compromise is in some respects reminiscent of the "Constitution in Exile" of the conservative legal imagination.[252] Both the Constitution in Exile and progressive civil libertarianism seek to forge a new constitutional political economy—one that is more libertarian or egalitarian, respectively—by using civil libertarian argument. Both trace their origins to the far side of the New Deal settlement, a settlement that putatively committed the zealous protection of noneconomic rights to the federal judiciary while entrusting the rational management of economic rights to Congress and the executive branch. At the same time, if the conservative Constitution in Exile or progressive civil libertarianism were ever to return, each would undoubtedly look quite different from what the actual legal culture of the early twentieth century allowed. While progressive civil libertarianism does not claim an originalist pedigree, hardly anyone is a thoroughgoing originalist when it comes to free speech.[253] Perhaps the most striking divide between these two exiled legal regimes is that progressive civil libertarianism—even in an updated and domesticated form—does not claim at this time any significant constituency within the legal academy.

Yet as this Symposium reflects, the sheer ambition of today's First Amendment Lochnerism may be creating an opening for equally ambitious progressive projects. For instance, mainstream legal liberals seem more willing to question the "negative-liberty model" of the First Amendment[254] than they have been in decades. The ACLU is reportedly debating whether to reorient its free speech practice around "standing up for the marginalized."[255] Might the disruptive nature of the Roberts Court's First Amendment jurisprudence generate a countervailing movement of real consequence? The answer to this question will depend, in part, on whether progressive civil libertarianism can be reimagined for the digital age in ways that make good on its egalitarian promise while limiting possibilities for government censorship and abuse. Those scholars and practitioners who take up this challenge will inevitably

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toward a "systemic" perspective on free speech regulation, which in turn tends to push toward progressive civil libertarianism).

252. See generally Stephen E. Sachs, The "Constitution in Exile" as a Problem for Legal Theory, 89 Notre Dame L. Rev. 2253 (2014) (describing and defending the concept of a constitution in exile). "Nowadays," Sachs notes, "the idea that constitutional practice may have gone seriously wrong" is most often attributed to conservative "originalists—followers, allegedly, of a nefarious 'Constitution in Exile,' waiting in their subterranean lairs to subdue the populace and abolish the New Deal." Id. at 2254.

253. See supra notes 119–120 and accompanying text.

254. See supra notes 241–243 and accompanying text.

255. Mark Joseph Stern, Who Does the ACLU Fight For?, Slate (Aug. 27, 2018), http://slate.com/news-and-politics/2018/08/the-aclus-decision-to-defend-the-nra-is-under-attack-internally.html [https://perma.cc/78WS-CE5Z]; see also id. (stating that the ACLU has already "moved toward incorporating what one staff attorney described as 'power analysis' into its free speech litigation").

disagree on many matters of normative priority and institutional detail. But the challenge must first be seen with clear eyes. Before any meaningful progress can be made toward overcoming First Amendment Lochnerism, its critics may need to affirm a more basic theoretical and practical point, a point that we hope this Essay has helped to establish: Progressive civil libertarianism is not a contradiction in terms.

ESSAYS

FREE SPEECH IS A TRIANGLE

*Jack M. Balkin**

The vision of free expression that characterized much of the twentieth century is inadequate to protect free expression today.

The twentieth century featured a dyadic or dualist model of speech regulation with two basic kinds of players: territorial governments on the one hand, and speakers on the other. The twenty-first-century model is pluralist, with multiple players. It is easiest to think of it as a triangle. On one corner are nation-states and the European Union. On the second corner are privately owned internet-infrastructure companies, including social media companies, search engines, broadband providers, and electronic payment systems. On the third corner are many different kinds of speakers, legacy media, civil-society organizations, hackers, and trolls.

The practical ability to speak in the digital world emerges from the struggle for power between these various forces, with "old-school," "new-school," and private regulation directed at speakers, and both nation-states and civil-society organizations pressuring infrastructure owners to regulate speech.

This configuration creates three problems. First, nation-states try to pressure digital companies through new-school speech regulation, creating problems of collateral censorship and digital prior restraint. Second, social media companies create complex systems of private governance and private bureaucracy that govern end users arbitrarily and without due process and transparency. Third, end users are vulnerable to digital surveillance and manipulation.

This Essay describes how nation-states should and should not regulate the digital infrastructure consistent with the values of freedom of speech and press. Different models of regulation are appropriate for different parts of the digital infrastructure: Basic internet services should be open to all, while social media companies should be treated as information fiduciaries toward their end users. Governments can implement all of these reforms—properly designed—consistent with constitutional guarantees of free speech and free press.

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INTRODUCTION

Free speech is a triangle. The conception of free expression—and of the dangers to free expression—that characterized much of the nineteenth and twentieth centuries concerned whether nation-states and their political subdivisions would censor or regulate the speech of people living within their borders. That picture still describes many important free speech problems, yet it is increasingly outmoded and inadequate to protect free expression today. In the early twenty-first century, freedom of speech increasingly depends on a third group of players: a privately owned infrastructure of digital communication composed of firms that support and govern the digital public sphere that people use to communicate.

Consider a few recent speech controversies. The first is the European Union's "right to be forgotten." It requires search engine companies (essentially Google) to eliminate certain newspaper articles from their search results.[1] A second is the recently passed German law known

1. See Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, 2014 E.C.R. 317, ¶ 94; Robert C. Post, Data Privacy and Dignitary Privacy: Google Spain,

as NetzDG.[2] It requires social media companies to take down many different kinds of speech, including hate speech, within twenty-four hours of a complaint.[3] A third is the concern about fake news propagating through social media sites.[4] A fourth is the decision by various internet companies—following the Charlottesville march in August 2017—to block, censor, or otherwise refuse to do business with various neo-Nazi and hate sites.[5] Each of these controversies concerns the new structure of speech regulation in the digital age.

The twentieth century featured a *dualist* or *dyadic* system of speech regulation.[6] In the dualist model, there are essentially two players: the nation-state on the one hand and the speaker on the other. Nation-states regulated many different kinds of speakers and mass media of all kinds, including publishing houses, movie houses, newspapers, radio stations, and television stations.

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the Right to Be Forgotten, and the Construction of the Public Sphere, 67 Duke L.J. 981, 986 (2018).

2. See Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken [Netzwerkdurchsetzungsgesetz—NetzDG] [Network Enforcement Act], Sept. 1, 2017, Bundesgesetzblatt, Teil I [BGBl I] at 3352 (Ger.), https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationFile&v=2 [https://perma.cc/W2B8-JWHT].

3. See infra notes 90–92 and accompanying text.

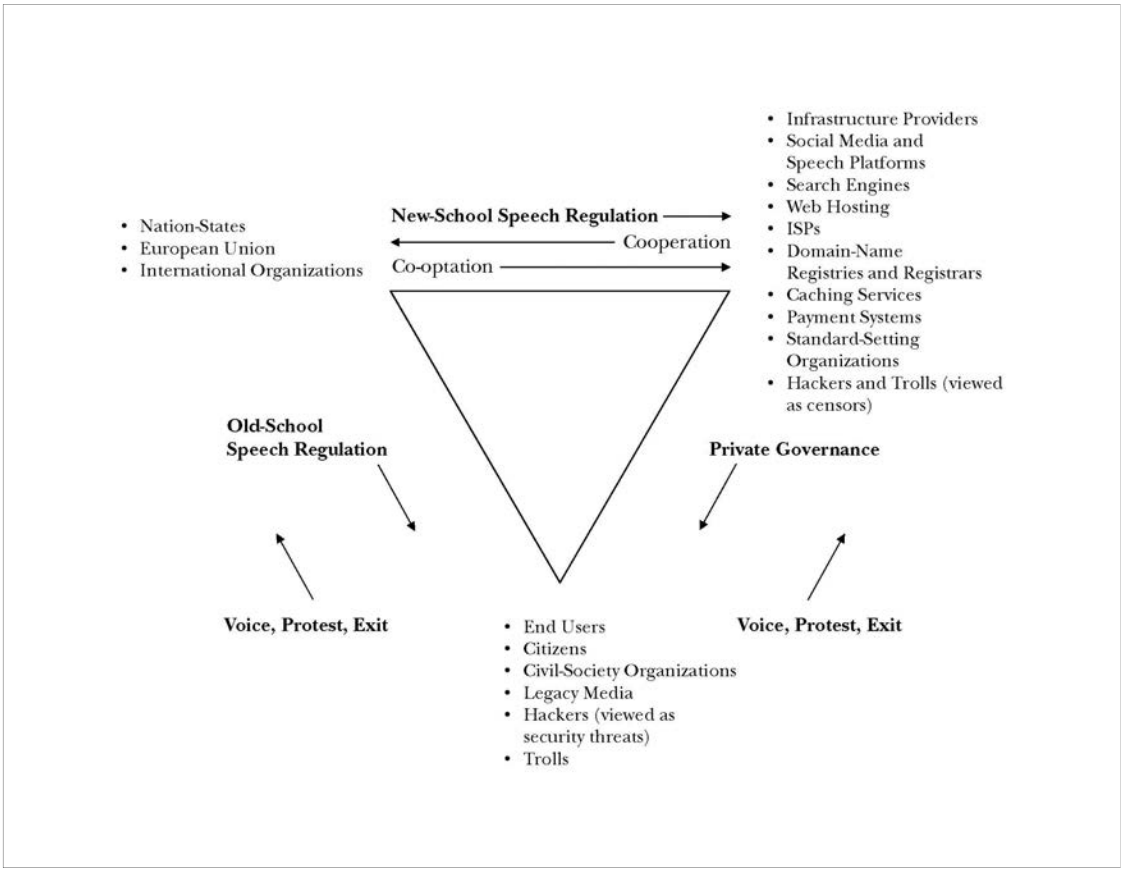
4. See, e.g., Info. Soc'y Project & The Floyd Abrams Inst. for Freedom of Expression, Fighting Fake News: Workshop Report 3 (2017), http://law.yale.edu/system/files/area/center/isp/documents/fighting_fake_news_-_workshop_report.pdf (on file with the *Columbia Law Review*); Mark Verstraete, Derek E. Bambauer & Jane R. Bambauer, Identifying and Countering Fake News 4 (Univ. of Ariz. Legal Studies, Discussion Paper No. 17-15, 2017), https://ssrn.com/abstract=3007971 (on file with the *Columbia Law Review*).

5. See, e.g., Elizabeth Flock, Spotify Has Removed White Power Music from Its Platform. But It's Still Available on Dozens of Other Sites, PBS Newshour (Aug. 18, 2017), https://www.pbs.org/newshour/art/spotify-removed-white-power-music-platform-still-available-dozens-sites [https://perma.cc/B6P3-98V3] ("In the wake of the white nationalist rally and ensuing violence in Charlottesville last weekend, Spotify announced it would remove music that promotes white nationalism from its libraries . . . ."); Kerry Flynn, After Charlottesville, Tech Companies Are Forced to Take Action Against Hate Speech, Mashable (Aug. 16, 2017), http://mashable.com/2017/08/16/after-charlottesville-tech-companies-action-nazis/#kxrJzxU9pOqP [https://perma.cc/9RJ9-5SUV] ("Facebook, Google, Spotify, Uber, Squarespace, and a variety of other tech companies are taking action to curb the use of their platforms and services by far-right organizations.").

6. Jack M. Balkin, Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation, 51 U.C. Davis L. Rev. 1149, 1187 (2018) [hereinafter Balkin, Algorithmic Society] ("The twentieth century model is a *dyadic* model: the state is on one side, speakers and publishers are on the other."); see also Jack M. Balkin, Old-School/New-School Speech Regulation, 127 Harv. L. Rev. 2296, 2298 (2014) [hereinafter Balkin, Old-School/New-School] ("Traditional or 'old-school' techniques of speech regulation have generally employed criminal penalties, civil damages, and injunctions to regulate individual speakers and publishers.").

The twenty-first-century model is *pluralist*, with many different players.[7] For ease of exposition, we might consider it as a triangle.

FIGURE 1: THE PLURALIST MODEL OF SPEECH REGULATION[8]



On one corner of the triangle are nation-states, states, municipalities, and supranational organizations like the European Union.

On the second corner of the triangle are internet-infrastructure companies. These include social media companies, search engines, internet service providers (ISPs), web-hosting services, Domain Name System (DNS) registrars and registries, cyber-defense and caching services (such as Cloudflare and Akamai), and payment systems (such as PayPal, Mastercard, and Visa). Each of these elements of the internet infrastructure is important, if not crucial, to people's practical ability to

7. See Balkin, Algorithmic Society, supra note 6, at 1189–91.

8. Id. at 1189 diagram 1.

speak. In most countries, this internet infrastructure, or important parts of it, are privately owned.[9]

On the third corner of the triangle, at the very bottom, we have speakers and legacy media, including mass-media organizations, protesters, civil-society organizations, hackers, and trolls. Although both states and infrastructure owners regulate their speech, they are sometimes able to influence states and infrastructure owners through social activism and protest.[10]

Nation-states regulate speakers and legacy mass media through *old-school speech regulation*. Nation-states regulate and attempt to co-opt and coerce internet infrastructure through *new-school speech regulation*. Finally, the internet infrastructure regulates private speakers and legacy media through techniques of *private governance*.

This is the new structure of speech regulation in the early twenty-first century, and debates about the rights of online free expression must grapple with that structure. To understand how this new system works, we must understand the distinction between old- and new-school speech regulation, explained in Part I, and the emerging system of private governance, discussed in Part II. Parts III and IV offer proposals for protecting freedom of speech in the changed environment. A brief conclusion follows.

I. OLD-SCHOOL AND NEW-SCHOOL SPEECH REGULATION

In traditional or old-school speech regulation, nation-states use threats of fines, penalties, imprisonment, or other forms of punishment or retribution to regulate or control the speech of individuals, associations, and media companies.[11] As noted above, this conception is dyadic. In this traditional conception, freedom of speech and press simply means being free of old-school speech regulation.

Old-school speech regulation still exists around the world. But digital free speech has created new problems for which old-school methods are inadequate. The early twenty-first century has developed new methods for controlling digital speech. This is the "new school" of speech regulation, and because of its ascension, freedom of speech today requires far more than freedom from old-school speech regulation.

Whereas old-school regulation is directed at speakers, new-school speech regulation is directed at the internet infrastructure.[12] Nation-states (or supranational entities like the European Union) attempt to regulate, threaten, coerce, or co-opt elements of the internet infrastructure in order to get the infrastructure to surveil, police, and control

9. See id. at 1188.

10. See id. at 1188–90.

11. Id. at 1174; Balkin, Old-School/New-School, supra note 6, at 2298.

12. Balkin, Old-School/New-School, supra note 6, at 2298.

speakers.[13] In essence, nation-states attempt to get the privately owned infrastructure to do their work for them.

Consider the free speech controversies mentioned in the Introduction.[14] Germany's NetzDG is aimed at search engines and social media companies to limit forbidden speech.[15] The European Union's "right to be forgotten" is directed (in part) at search engines in order to make it hard for people to discover embarrassing stories in newspapers. Calls for government regulation to prevent fake news demand that social media companies—and other parts of the internet infrastructure—take steps to limit the publication and distribution of false stories among end users. Following the Charlottesville protests, neo-Nazi sites were hampered or blocked not by states and municipal governments but by private-infrastructure owners.

Although nation-states continue to regulate speech directly through old-school methods, they increasingly depend on new-school speech regulation—attempting to coerce or co-opt private owners of digital infrastructure to regulate the speech of private actors. For this reason, new-school speech regulation affects the practical ability to speak every bit as much as old-school speech regulation.

A. *Collateral Censorship and Digital Prior Restraint*

New-school speech regulation poses two central problems for freedom of speech. First, it usually involves some form of *collateral censorship*. Second, it raises many of the same problems as *prior restraint*, except that the restraint is performed by private bureaucrats and algorithms in the service of the state.

1. *Collateral Censorship.* — Collateral censorship occurs when the state targets entity A to control the speech of another entity, B.[16] The state tells

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13. See Balkin, Algorithmic Society, supra note 6, at 1179–82; Balkin, Old-School/New-School, supra note 6, at 2324–29.

14. See supra notes 1–5 and accompanying text.

15. See Germany Starts Enforcing Hate Speech Law, BBC (Jan. 1, 2018), https://www.bbc.com/news/technology-42510868 [https://perma.cc/2UAA-BHR7]; infra notes 90–91.

16. J.M. Balkin, Free Speech and Hostile Environments, 99 Colum. L. Rev. 2295, 2298 (1999); Balkin, Old-School/New-School, supra note 6, at 2309; see also Christina Mulligan, Technological Intermediaries and Freedom of the Press, 66 SMU L. Rev. 157, 165–66 (2013) (arguing that collateral censorship threatens freedom of the press); Felix T. Wu, Collateral Censorship and the Limits of Intermediary Immunity, 87 Notre Dame L. Rev. 293, 299–304 (2011) (arguing that intermediary immunity should be tailored to the problem of collateral censorship).

Professor Michael Meyerson coined the term "collateral censorship." See Michael I. Meyerson, Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media, 71 Notre Dame L. Rev. 79, 118 (1995) (defining collateral censorship as "the silencing by a private party of the communication of others"); see also Seth F. Kreimer, Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link, 155 U. Pa. L. Rev. 11, 16 (2006) (coining the terms "proxy censorship" and "censorship by proxy").

A: Locate and block or censor B, or else we will punish or fine you. In effect, collateral censorship attempts to harness a private organization to regulate speech on the state's behalf.

Collateral censorship does not raise special problems for freedom of expression when A and B are part of the same entity or firm that produces the expression (for example, when B is A's employee), or when A has a traditional editorial or publishing relationship to B. Defamation law holds newspapers liable for what their reporters write and their advertisers advertise, and it holds book publishers liable for their authors' defamation.[17] When A is B's book publisher, when B works for A, or when B advertises in A's newspaper, the law assumes that A has a vested interest in defending and protecting the speech produced by B that A edits and publishes.

We cannot make the same assumption, however, when A is part of the internet infrastructure and B is one of the countless number of people who use A's services to communicate with others. Then A and B are not in the same relationship as the newspaper and its reporters, the publishing house and its authors, or the magazine and its advertisers.

In these cases, A's incentives are somewhat different. Told by the state that it must censor or block speakers like B, A will err on the side of caution.[18] It will tend to overblock or overfilter content, discarding the wheat with the chaff. In addition, A will be more likely to take down speech that anyone objects to or that it fears someone might object to. Because there are so many speakers (and because A wants to make the vast majority of its end users feel comfortable), denying access to a very small number of speakers will not damage A's business model, whereas repeated imposition of government liability for the speech of total strangers might seriously hinder its ability to do business.

2. *Digital Prior Restraint.* — Imposing liability on infrastructure providers unless they surveil and block speech, or remove speech that

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17. See Restatement (Second) Of Torts § 578 (Am. Law Inst. 1977) ("Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.").

In fact, the landmark case of *New York Times Co. v. Sullivan* involved a kind of collateral censorship. Alabama sought to hold the New York Times liable for a political advertisement, "Heed Their Rising Voices," which complained about police misconduct against civil rights demonstrators. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964). Although the Supreme Court created a constitutional privilege to protect the *New York Times*, it did not question the traditional rule of publisher liability; rather, it assumed without discussion that newspapers would exercise their traditional editorial functions with respect to advertisements published within their pages. See id. at 286–88; see also Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 253–54 (1974) (approving a jury charge that permitted the imposition of vicarious liability upon a publisher for the knowing falsehoods written by its staff writer).

18. Balkin, Old-School/New-School, supra note 6, at 2309; see also Kreimer, supra note 16, at 28–29; Wu, supra note 16, at 300–01.

others complain about, has many features of a prior restraint, although technically it is not identical to a classic prior restraint.[19]

Administrative prior restraints deny people the right to speak without a full judicial determination of whether their speech is protected or unprotected and without the procedural protections of the Bill of Rights.[20] In addition, administrative prior restraints place the burden of inertia on the speaker and the benefit of inertia on the government.[21] People have to get someone else's permission before they can speak (or speak again, if the order comes down after they have begun to publish copies). Administrative review acts as a bottleneck to free speech; nothing will happen until the bureaucrat gets around to deciding, and the decision, when it occurs, may happen in secret with no transparency or due process.[22]

Many of these problems also occur when internet-infrastructure companies block, filter, or take down content. If end users are blocked, or their speech is taken down, they do not get to speak until somebody in the infrastructure company decides that they have permission. This blocking or removal occurs without any judicial determination of whether their speech is protected or unprotected, without any Bill of Rights protections, without any due process rights to a hearing before the action is taken, or indeed, without any obligation to consider and resolve end-user objections promptly.[23] Rather, some company functionary or bureaucrat—or algorithm—decides whether and when they get to speak.[24]

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19. Balkin, Algorithmic Society, supra note 6, at 1177–79; Balkin, Old-School/New-School, supra note 6, at 2299, 2309–10, 2318–20.

Mention prior restraints and most lawyers will think of judicial injunctions like the injunction that the Nixon Administration sought against the publication of the Pentagon Papers in New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam). However, the concept of prior restraints is much older; it originally concerned prior restraints by executive authorities against those who owned and operated printing presses. See Fredrick Seaton Siebert, Freedom of the Press in England 1476–1776: The Rise and Decline of Government Control 21–30 (1952) (discussing the history of administrative prior restraint); Philip Hamburger, The Development of the Law of Seditious Libel and the Control of the Press, 37 Stan. L. Rev. 661, 673 (1985) (explaining how licensing systems allowed the Crown to control the use of printing presses). Like the internet in our own day, the printing press was a powerful technology of mass distribution and therefore feared by the state, which sought to control its dangers.

20. Balkin, Old-School/New-School, supra note 6, at 2316–17; see also Thomas I. Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Probs. 648, 657–58 (1955).

21. Balkin, Old-School/New-School, supra note 6, at 2316–17; see also Emerson, supra note 20, at 657.

22. Balkin, Old-School/New-School, supra note 6, at 2316–17; see also Emerson, supra note 20, at 657–58.

23. Balkin, Algorithmic Society, supra note 6, at 1196–98; see also Balkin, Old-School/New-School, supra note 6, at 2318–19 (explaining how governments and cooperating private companies filter and block content without affording speakers due process).

24. See James Grimmelmann, The Virtues of Moderation, 17 Yale J.L. & Tech. 42, 63–65 (2015) (describing cost and efficiency advantages of moderation by computer code); Kate Klonick, The New Governors: The People, Rules, and Processes Governing Online

In this way, our twenty-first-century digital world has recreated the prior restraints of the sixteenth and seventeenth centuries, offering a twenty-first-century version of administrative prior restraint. There are two important differences, of course. First, although some content is blocked at the outset, other content is removed after appearing for a brief period of time.[25] Second, the restraint is not at the hands of government bureaucrats, but at the hands of privately owned companies who act to avoid threats of liability by nation-states.[26]

B. *Public–Private Cooperation and Co-optation*

This leads to the next key feature of new-school speech regulation: public–private cooperation and co-optation. Governments attempt to coax, cajole, or coerce private-infrastructure owners to do their bidding and to help them surveil and regulate speech.[27] Public–private cooperation—or co-optation—is a natural consequence of new-school speech regulation.

First, the technical capacities of infrastructure owners for identifying and removing content far outstrip those of most countries; hence it is easier to get private companies to perform these tasks for the government.[28]

Second, new-school speech regulation often depends on data surveillance—or else is in aid of data surveillance—because many methods of speech regulation require some ability to know what end users are doing.[29] Owners of private infrastructure are essential to effective data collection and surveillance; indeed, the very same infrastructure that makes broad participation in free expression possible is also the infrastructure that facilitates widespread digital surveillance.[30]

Third, complementary incentives drive nation-states to develop new-school speech regulation and private-infrastructure owners to cooperate

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Speech, 131 Harv. L. Rev. 1598, 1635–48 (2018) [hereinafter Klonick, New Governors] (describing bureaucracies at Facebook, YouTube, and Twitter); Katrin Bennhold, Germany Acts to Tame Facebook, Learning from Its Own History of Hate, N.Y. Times (May 19, 2018), https://www.nytimes.com/2018/05/19/technology/facebook-deletion-center-germany.html (on file with the *Columbia Law Review*) (describing Facebook's bureaucratic operations in Germany, organized to enforce Germany's NetzDG law). These bureaucrats apply rules and filters to regulate content, either ex ante (preventing publication of content uploaded to the site) or ex post (taking down content that has already been published).

As a result of public pressure and media coverage, Facebook recently released some of its guidelines for content moderation. Julia Carrie Wong & Olivia Solon, Facebook Releases Content Moderation Guidelines—Rules Long Kept Secret, Guardian (Apr. 24, 2018), https://www.theguardian.com/technology/2018/apr/24/facebook-releases-content-moderation-guidelines-secret-rules [https://perma.cc/F3A3-LYFX].

25. See Klonick, New Governors, supra note 24, at 1635.

26. Balkin, Algorithmic Society, supra note 6, at 1176.

27. See id. at 1179–80; Balkin, Old-School/New-School, supra note 6, at 2324 ("Public/private cooperation and co-optation are hallmarks of new-school speech regulation.").

28. Balkin, Algorithmic Society, supra note 6, at 1175.

29. Balkin, Old-School/New-School, supra note 6, at 2304–05.

30. Id. at 2297.

with this regulation, whether grudgingly or willingly.[31] It is usually easier for nation-states to regulate the infrastructure operator or owner than to locate and regulate individual speakers: There may be too many speakers, they may be anonymous or not even people, they may be difficult to find, or they may be located outside of the nation-state's jurisdiction.[32] Conversely, infrastructure providers are usually easier to locate, and most have good reasons to be receptive to state pressure.[33] They want to make money, and they want to expand their markets to reach customers within the nation-state's jurisdiction.[34] Even if infrastructure companies strongly believe in civil liberties and would rather not abridge the speech of their customers and end users, they may nevertheless conclude that cooperating with nation-states better furthers their profit-making goals.[35]

Fourth, market incentives and repeated public–private interactions have also driven the development of private governance and new-school speech regulation. Infrastructure owners' technical capacities for surveillance and control continue to grow over time, not only because of market competition and demands from business partners but also as a result of continual political pressure from nation-states and the European Union.[36] The more powerful infrastructure operators become, and the greater their capacity for governance of large populations of end users, the more valuable targets they become for new-school speech regulation.

The result is a burgeoning dialectic of governing power and public–private cooperation. Private-infrastructure companies develop ever greater governing capacities.[37] Nation-states attempt to co-opt these capacities through coercion or threats of regulation. This, in turn, causes increased development of governing, surveilling, and regulatory capacities. And this, in turn, makes private-infrastructure owners even more tempting targets for government pressure—because private companies can no longer pretend that they cannot actually do what governments want them to do.[38]

This dialectic encourages new-school speech regulation, making it ever more important to nation-states as a method of surveilling, regulating, and controlling forbidden speech and conduct on the internet. This dialectic was not so obvious in the early days of the internet, before the rise of social media companies, when surveillance and filtering techniques were far more primitive. But as technology companies grew,

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31. Balkin, Algorithmic Society, supra note 6, at 1180–81.

32. Balkin, Old-School/New-School, supra note 6, at 2338.

33. Id. at 2305.

34. Balkin, Algorithmic Society, supra note 6, at 1179–80, 1182.

35. See Balkin, Old-School/New-School, supra note 6, at 2329 (describing pressure placed on private enterprises to stop doing business with WikiLeaks).

36. See Balkin, Algorithmic Society, supra note 6, at 1180–81.

37. Investments in capacity will depend on a company's place in the digital infrastructure. Search-engine companies like Google and social media companies like Facebook may invest far more in surveillance and control technologies than DNS registrars. Id. at 1182.

38. Id. at 1180–82.

expanded internationally, and became ever more technically proficient, nation-states began to demand more and more from them.[39]

II. PRIVATE GOVERNANCE AND PRIVATE BUREAUCRACY

A. *Private Governance*

Technology companies' ever-expanding capacities for private surveillance and control lead naturally to viewing them as a new form of private governance. By this I mean that we 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.[40] Instead of viewing digital-infrastructure companies as mere conduits or platforms, we should recognize them as the governors of social spaces.

Professor Kate Klonick has developed this idea in her study of the emergence of internal bureaucracies in social media companies such as Facebook, Twitter, and YouTube.[41] She explains how the concept of community governance, and the creation of large global bureaucracies, emerged almost by accident as social media companies sought to enforce their terms-of-service agreements and had to respond to pressure from various nation-states to control or curb speech that these countries regarded as illegal or undesirable.[42] Faced with an unruly and unpredictable collection of all types of people from around the world (not to mention agents of various nation-states), these companies learned that they had to govern—that is, promulgate and enforce the values and norms that their communities stood for.[43] They did so through a combination of contract (that is, terms of service or end-user license agreements) and code.[44] Over time, social media companies, which originally thought of themselves only as technology companies, accepted their role as community governors and developed elaborate bureaucracies, which are effectively governance structures.[45]

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39. See id. at 1180–81.

40. See id. at 1194–97; Klonick, New Governors, supra note 24, at 1602–03.

41. See Klonick, New Governors, supra note 24.

42. See id. at 1618–30.

43. Balkin, Algorithmic Society, supra note 6, at 1195–97.

44. Id. at 1186–87.

45. Id. at 1181–82; see also Klonick, New Governors, supra note 24, at 1634–35 (describing the development of Facebook's complex "Community Standards" and the evolution of content moderation at Facebook and YouTube). The evolution of social media companies mirrors the experience of system administrators for online worlds in the early days of the internet. These system administrators were sometimes called "game gods" because they created and ran multiplayer online games. People occasionally abused these spaces by finding exploits in the games or harassing and trolling other players. Eventually, the game gods had to step in to govern the space, specifying what was or was not a permitted move in the game and sanctioning or expelling people who would not behave properly. See, e.g.,

The task of governing online spaces need not be wholly public spirited. It may be driven by market incentives or by the quest for economic and political power. Facebook has adopted community rules because of its business model, which requires that its space be safe, attractive, and absorbing for its billions of users around the world.[46] Social media companies cannot afford to scare off their customers because they need to capture end users' scarce attention to make money. The business model of social media companies requires vast numbers of individuals to repeatedly check the site, read the site, and post to the site so that the company can sell their scarce attention to advertisers.[47]

Companies like Facebook generate growth—and thus please the demands of their shareholders—in one of two ways: First, they can expand their membership to more people around the world. Second, they can gain a greater share of their end users' attention.[48] The first strategy offers limited possibilities for a company as large as Facebook; therefore, the second strategy begins to dominate. As Professor Tim Wu has pointed out, social media companies have an incentive to make their services addictive so that they can garner a larger share of their end users' attention.[49]

Before Roblox: An Online Rape When Cyberspace Was New, Village Voice (July 25, 2018), https://www.villagevoice.com/2018/07/25/before-roblox-an-online-rape-when-cyberspace-was-new/ [https://perma.cc/FT8E-KF9U] (reprinting Julian Dibbel, A Rape in Cyberspace, Village Voice (Dec. 23, 1993)).

46. See Balkin, Algorithmic Society, supra note 6, at 1181; see also Danielle Keats Citron & Helen Norton, Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age, 91 B.U. L. Rev. 1435, 1454–55 (2011) (arguing that intermediaries regulate speech as a matter of corporate responsibility and to protect profits); Klonick, New Governors, supra note 24, at 1625 ("Platforms create rules and systems to curate speech out of a sense of corporate social responsibility, but also, more importantly, because their economic viability depends on meeting users' speech and community norms.").

47. See Klonick, New Governors, supra note 24, at 1627 ("[T]he primary reason companies take down obscene and violent material is the threat that allowing such material poses to potential profits based in advertising revenue.").

48. See Peter Eavis, How You're Making Facebook a Money Machine, N.Y. Times: The Upshot (Apr. 29, 2016), https://www.nytimes.com/2016/04/30/upshot/how-youre-making-facebook-a-money-machine.html (on file with the *Columbia Law Review*) ("[T]hat constant lure [to check Facebook], a fix you can easily satisfy both on a phone and a desktop computer, explains why Facebook is pulling ahead of every other large technology company right now."); James B. Stewart, Facebook Has 50 Minutes of Your Time Each Day. It Wants More., N.Y. Times (May 5, 2016), https://www.nytimes.com/2016/05/06/business/facebook-bends-the-rules-of-audience-engagement-to-its-advantage.html (on file with the *Columbia Law Review*) ("Time is the best measure of engagement, and engagement correlates with advertising effectiveness . . . . And time enables Facebook to learn more about its users—their habits and interests—and thus better target its ads.").

49. See Tim Wu, The Attention Merchants: The Epic Scramble to Get Inside Our Heads 289–302 (2016) [hereinafter Wu, Attention Merchants] (describing how social media companies attempt to attract advertisers by cornering the market on attention and addicting customers); Tim Wu, Opinion, Subtle and Insidious, Technology Is Designed to Addict Us, Wash. Post (Mar. 2, 2017), https://www.washingtonpost.com/opinions/subtle-and-insidious-technology-is-designed-to-addict-us/2017/03/02/5b983ef4-fcee-11e6-99b4-9e613afeb09f_

Twentieth-century freedom of speech faced a problem of scarcity of access to media.[50] Twenty-first-century freedom of speech faces the problem of scarcity of attention.[51] The logic of scarcity of attention drives the business models of many twenty-first-century digital companies that attract end users by offering free (or subsidized) services in exchange for brokering end users' attention to advertisers.

The capitalist logic of digital media services requires continuous growth either through expansion of membership or through expansion of attention.[52] To seize attention, a social media platform must have both absorbing content *and* provide a community in which people feel safe; otherwise end users will not spend time on the site. Hence, the economic logic of advertiser-driven social media leads them to become governors of their spaces.

Moreover, to sell end users' attention to advertisers, it is necessary to know things about them so that advertising dollars are not wasted. The ability to serve different ads to different audiences requires knowledge about audiences, and thus the collection of ever-greater amounts of data about end users. The logic of digital capitalism, in other words, also drives companies toward surveillance as well as governance.[53]

The same logic of digital capitalism that leads to governance and surveillance of end users also leads to the creation of bureaucracies, which consist of the company's digital workers using easy-to-apply rules for deciding vast numbers of cases and controversies, while pushing a

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story.html [https://perma.cc/78ND-N8SD] [hereinafter Wu, Subtle and Insidious] ("[F]or a product like Facebook, success and user addiction are the same thing.").

50. See Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.").

51. See Zeynep Tufekci, Twitter and Tear Gas: The Power and Fragility of Networked Protest 271 (2017); Jack M. Balkin, Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society, 79 N.Y.U. L. Rev. 1, 7 (2004) [hereinafter Balkin, Digital Speech] ("The digital revolution made a different kind of scarcity salient. It is not the scarcity of bandwidth but the scarcity of audiences, and, in particular, scarcity of audience attention."); Herbert A. Simon, Designing Organizations for an Information-Rich World, *in* Computers, Communications, and the Public Interest 37, 40 (Martin Greenberger ed., 1971) ("[A] wealth of information creates a poverty of attention.").

52. Other parts of the internet infrastructure have different business models, but all require growth over time.

53. Zeynep Tufekci, Opinion, Facebook's Surveillance Machine, N.Y. Times (Mar. 19, 2018), https://www.nytimes.com/2018/03/19/opinion/facebook-cambridge-analytica.html (on file with the *Columbia Law Review*) [hereinafter Tufekci, Facebook's Surveillance Machine] ("Facebook makes money, in other words, by profiling us and then selling our attention to advertisers, political actors and others. These are Facebook's true customers, whom it works hard to please."). These business models, and the incentives they create, are examples of what Professor Shoshana Zuboff calls "surveillance capitalism." See Shoshana Zuboff, Big Other: Surveillance Capitalism and the Prospects of an Information Civilization, 30 J. Info. Tech. 75, 75 (2015) (defining "surveillance capitalism" as a "new logic of accumulation" and a "new form of information capitalism [that] aims to predict and modify human behavior as a means to produce revenue and market control").

small number of more complicated cases up the chain of decision.[54] This follows naturally from the global nature of both the company's end users and its employees: When both content and employees come from everywhere, social media companies need simple, easily understandable, easy-to-apply rules that can be followed uniformly.[55]

Another method for lowering costs and ensuring uniformity is to substitute algorithmic for human judgment.[56] Algorithmic employees cost even less than human employees: They do not have families, they do not take coffee breaks, and they can do some—but by no means all—of the work of discovery and selection that human employees can do. Algorithms may be especially useful in ex ante blocking of content—for example, identifying child pornography or preventing the upload of content that has been digitally watermarked as copyright protected.[57]

Governance by Facebook, Twitter, and YouTube has many aspects of a nineteenth-century autocratic state, one that protects basic civil freedoms but responds to public opinion only in limited ways. The end users—akin to the citizens or subjects—are in effect unpaid laborers for the site, in the same way that anyone who uses open-source software and reports bugs is an unpaid laborer for the open-source project.[58] When end users spot bugs, make complaints, or demand new features, this helps inform the company, its bureaucrats, and its programmers how best to attract and mollify end users and keep profits flowing. Every end user is a potential reporting or surveillance device for maintaining community standards.[59] Every time end users complain about racist speech or trolling, they are in effect working for Facebook because they provide the company with information that helps it enforce its community standards.[60]

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54. Klonick, New Governors, supra note 24, at 1638–42 (describing the structure of ex post review of content by human moderators).

55. See id. at 1632–34 (describing how social media companies moved to concrete rules that can be consistently applied because of the global diversity of their workforce); id. at 1642 (noting that "Facebook's Community Standards were applied globally, without differentiation along cultural or national boundaries").

56. Id. at 1636–37 (describing the use of algorithmic systems to protect copyright interests and to block spam); cf. Jack M. Balkin, The Path of Robotics Law, 5 Calif. L. Rev. Cir. 45, 46, 55–58 (2015), http://www.californialawreview.org/wp-content/uploads/2015/06/Balkin-Circuit.pdf [https://perma.cc/D8F6-8KSJ] (describing the "substitution effect[s]" produced by attempts to substitute robots and artificial intelligence agents for human beings.).

57. Klonick, New Governors, supra note 24, at 1636–37.

58. See Catherine Buni & Soraya Chemaly, The Secret Rules of the Internet: The Murky History of Moderation, and How It's Shaping the Future of Free Speech, Verge (Apr. 13, 2016), https://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech [https://perma.cc/DQ6P-SGH6] ("[U]sers are not so much customers as uncompensated digital laborers who play dynamic and indispensable functions (despite being largely uninformed about the ways in which their labor is being used and capitalized).").

59. See id.

60. See id.

Because the governance of social media companies is generally autocratic, their governance policies are, for the most part, nontransparent and waived whenever necessary or convenient.[61] There is normally little in the way of due process for end users, much less a right to a hearing either before or immediately after sanctions are applied.[62] Companies often make special exceptions for powerful and influential actors and organizations.[63] But if the speaker is a "puny anonymit[y],"[64] it is far more likely that a social media company will sanction or ban the speaker.[65]

B. *Should Private Governance Be Private?*

Nevertheless, the best alternative to this autocracy is not the imposition of First Amendment doctrines by analogy to the public forum or the company town.[66] Of course, new-school speech regulation may violate the First Amendment—because the state has passed laws that pressure infrastructure providers to do its bidding.[67] But when we focus

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61. See id. ("The details of moderation practices are routinely hidden from public view, siloed within companies and treated as trade secrets when it comes to users and the public.").

62. See id.

63. See Klonick, New Governors, supra note 24, at 1654–55 (noting that Facebook may "disproportionately favor people with power over the individual users" (footnote omitted)). For example, the President of the United States is a serial violator of the community policies of Facebook and Twitter, but neither site has yet banned him, and they appear unlikely to do so. See id. at 1655 (noting Facebook founder Mark Zuckerberg's decision to keep Trump on Facebook despite his violations of the company's hate speech policies); Doug Bolton, This Is Why Facebook Isn't Removing Donald Trump's 'Hate Speech' from the Site, Independent (Dec. 15, 2015), http://www.independent.co.uk/life-style/gadgets-and-tech/news/donaldtrump-muslim-hate-speech-facebook-a6774676.html [https://perma.cc/L5HH-DX9S] (noting special rules for Trump on Facebook); Arjun Kharpal, Why Twitter Won't Take Down Donald Trump's Tweet Which North Korea Called a 'Declaration of War,' CNBC (Sept. 26, 2017), https://www.cnbc.com/2017/09/26/donald-trump-north-korea-twitter-tweet.html [https://perma.cc/S9FT-VE9S] (noting special rules on Twitter for Trump); Deepa Seetharaman, Facebook Employees Pushed to Remove Trump's Posts as Hate Speech, Wall St. J. (Oct. 21, 2016), https://www.wsj.com/articles/facebook-employees-pushed-to-remove-trump-posts-as-hate-speech-1477075392 (on file with the *Columbia Law Review*) (noting special rules for Trump on Facebook).

64. Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting) (arguing, among other things, that the Court should have reversed the Espionage Act convictions of defendants because few people would have paid attention to them).

65. See Kate Klonick, Facebook v. Sullivan 28–31 (Apr. 2018) (unpublished manuscript) (on file with the *Columbia Law Review*) (describing how Facebook has reinterpreted concepts like "public figure" and "newsworthiness" to govern its community).

66. Cf. Marsh v. Alabama, 326 U.S. 501, 505–09 (1946) (holding that a company town could not refuse access to Jehovah's Witnesses engaging in leafletting and would be treated as the effective equivalent of a government-owned public forum).

67. See, e.g., Reno v. ACLU, 521 U.S. 844, 874 (1997) (striking down a federal law that required filtering and blocking of content purportedly harmful to minors); ACLU v. Mukasey, 534 F.3d 181, 197–98 (3d Cir. 2008) (striking down the federal Child Online Protection Act, which required sites to filter, segregate, and block content); Ctr. for

on social media governance that is *not* the result of new-school speech regulation, our analysis should be different. Social media companies should recognize and protect free speech values as well as due process values in the resolution of complaints. Even so, it is generally a bad idea to hold social media spaces to the same standards as municipal governments under the First Amendment.

Imposing the same First Amendment doctrines that apply to municipalities to social media companies would quickly make these spaces far less valuable to end users, if not wholly ungovernable. First Amendment law significantly limits the ability of municipalities to regulate anonymous or pseudonymous speech in public forums;[68] yet sites may want to require real names or easily identifiable pseudonyms in order to prevent cyberbullying, harassment, and trolling. Under current First Amendment doctrine, sites might not be able to ban hate speech or other kinds of abusive and emotionally upsetting speech that make the site far less valuable for the vast majority of customers.[69] Municipalities can ban fighting words,[70] but speakers on the internet may be nowhere near the recipients of their venom so that an immediate breach of the peace is highly unlikely.[71] Although the Supreme Court has not declared the tort of intentional infliction of emotional distress unconstitutional, it has been careful to suggest that speech that causes emotional distress is protected if it discusses matters of public concern.[72]

A final problem is that, unlike municipalities, social media sites cannot levy damages or fines. They have only limited sanctions for

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Democracy & Tech. v. Pappert, 337 F. Supp. 2d 606, 611 (E.D. Pa. 2004) (striking down a state law that required filtering of child pornography).

68. See, e.g., McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (striking down a law banning distribution of anonymous campaign literature); Talley v. California, 362 U.S. 60, 64–65 (1960) (striking down a law banning handbills unless they identified the distributor's name and address).

69. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (striking down a city ordinance that banned fighting words directed at others on the basis of race, ethnicity, gender, or religion).

70. See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (stating that fighting words constitute words that by their nature result in an immediate breach of the peace). *Chaplinsky* stated that words that "by their very utterance inflict injury" also constitute fighting words. Id. But in *R.A.V.*, the Court explained that the fighting words doctrine does not allow states to punish speech that merely causes emotional upset. *R.A.V.*, 505 U.S. at 414 (White, J., concurring in the judgment); see also United States v. Eichman, 496 U.S. 310, 318 (1990) (explaining that although "desecration of the flag is deeply offensive to many[,] . . . the same might be said . . . of virulent ethnic and religious epithets").

71. See Texas v. Johnson, 491 U.S. 397, 409 (1989) (holding that the government may not classify provocative ideas as fighting words without "careful consideration of the actual circumstances surrounding such expression," including "whether the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action'" (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969))).

72. See Snyder v. Phelps, 562 U.S. 443, 458 (2011) ("Such speech cannot be restricted simply because it is upsetting or arouses contempt.").

misbehavior: denying access to the site, either temporarily or permanently, and removing some or all of an offender's previous content.[73] Denying access to a public forum and removing all of an end user's content as punishment for previous conduct may create problems under prior restraint doctrine. Take the example of defamation: Under current First Amendment law, the government—and hence a social media site treated as an arm of the state—might not be able to deny access to an end user and remove some or all of the end user's previous posts because he or she had previously defamed a person. Courts might regard this as a prior restraint and no more constitutional than denying future access to a public park to a person who had previously defamed someone in the park.[74] Moreover, removing all of an end user's content as punishment, even when significant parts of that content constitute protected speech, would seem to raise serious First Amendment problems.

The result is that—at least until the courts begin to treat cyberspaces differently from other public fora—applying First Amendment law would cripple social media sites' abilities to impose civility norms. When spaces seem unsafe and are riddled with racist speech and personal abuse, many people will avoid them.

Second, under a First Amendment regime, social media sites would be unable to curate content in order to provide personalized feeds. The creation of personalized feeds is inevitably content-based—social media sites have to decide what content is likely to be most interesting to their end users.[75] As Professor Tarleton Gillespie has pointed out, social media sites thrive on content-based moderation, even if the moderation is invisible to most users.[76] The same is true of search engines; ideally, their purpose is to help end users reach information that is relevant to their search engine queries. Furthering this task requires multiple content-based distinctions about the relevance and arrangement of links.[77]

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73. See, e.g., Jack Nicas, Alex Jones and Infowars Content Is Removed from Apple, Facebook and YouTube, N.Y. Times (Aug. 6, 2018), https://www.nytimes.com/2018/08/06/technology/infowars-alex-jones-apple-facebook-spotify.html (on file with the *Columbia Law Review*) (noting that Apple removed the majority of Alex Jones's podcasts as hate speech, Facebook removed four Facebook pages for glorifying violence and dehumanizing speech, and YouTube removed Jones's entire channel for repeated violations of its terms of service).

74. Cf. Near v. Minnesota, 283 U.S. 697, 712–13 (1931) (striking down a Minnesota law that banned future publication of newspapers that had previously published defamatory material).

75. Tarleton Gillespie, Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media 5 (2018) (arguing that all platforms must make content-based decisions in order to govern their spaces).

76. Id. at 6–7.

77. See James Grimmelmann, Speech Engines, 98 Minn. L. Rev. 868, 874, 893–95 (2014) (offering a theory about the proper behavior of search engines, which argues that a search engine acts as a "trusted advisor").

The free speech values characteristic of this environment—and that promise to work best within it—do not necessarily conform to First Amendment doctrine. To be sure, the degree of free speech protection that exists on these sites is due in no small part to the fact that they were originally created by American-led companies and have been deeply influenced by American free speech values.[78] But because social media companies operate around the world, they cannot realistically apply American First Amendment doctrines everywhere, in part because American free speech law requires Americans to tolerate all sorts of things that people in other countries simply will not put up with.[79]

Given its global reach, Facebook has decided to have a worldwide policy, which applies more or less uniformly in every country.[80] According to this policy, the company takes down hate speech and disrespectful speech that would almost certainly be protected by the American First Amendment.[81] This policy is hardly surprising from a company that seeks to do business around the world. A global company that governs a global online community requires global rules on freedom of expression that are not necessarily American free speech rules, much less doctrines originally designed for public streets and parks.

C. *Privatized Bureaucracy*

So far, this Essay has introduced the ideas of old-school and new-school speech regulation and the crucial connection between new-school speech regulation and private governance. The last piece of the puzzle emerges out of this connection. It is the emerging system of *privatized bureaucracy*.[82]

For the reasons described above, new-school speech regulation depends on the expansion and promulgation of private governance.[83] Indeed, new-school speech regulation and private governance egg each other on. As digital-infrastructure companies become increasingly powerful in governing their spaces and collecting and analyzing content from their end users, nation-states may demand more from them through new-

78. See Klonick, New Governors, supra note 24, at 1621–22 (describing the influence of American free speech values on the moderation policies of Facebook, Twitter, and YouTube).

79. See id. at 1623 (describing problems of applying American free speech norms around the world).

80. Id. at 1642; Julia Angwin & Hannes Grassegger, Facebook's Secret Censorship Rules Protect White Men from Hate Speech but Not Black Children, ProPublica (June 28, 2017), https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms [https://perma.cc/RDF8-JEQB] (describing Facebook's attempts to enforce its hate speech rules worldwide and the arbitrariness of its categories).

81. See supra notes 67–72 and accompanying text.

82. See Balkin, Algorithmic Society, supra note 6, at 1226–28 (describing how nation-states co-opt private governance to create a new kind of bureaucracy).

83. See supra section II.A.

school speech regulation. As nation-states attempt to co-opt and coerce private-infrastructure operators, they increasingly attempt to get private companies to take on state functions of speech regulation and surveillance. As social media and search engine companies develop governing bureaucracies and algorithms, nation-states seek to harness that capacity to accomplish the nation-state's governance goals. These processes lead to a new phenomenon: privatized bureaucracy. Bureaucracies within private-infrastructure companies (including their contractors) serve as the front line for the nation-state's governance of online speech and conduct.

Two examples demonstrate how this phenomenon works: the right to be forgotten, which applies in the European Union generally, and Germany's recent NetzDG law.[84]

Consider how the European Union protects the right to be forgotten. Suppose that a petitioner objects to the presence of an embarrassing article on a search engine such as Google. The European Court of Justice (ECJ) has ordered Google to develop a bureaucratic system for deciding in the first instance whether a particular article should be delinked from its search engines. If the petitioner disagrees with Google's decision, he or she can sue in the courts.[85] This is, in essence, a system of administrative law, requiring an exhaustion of administrative remedies before one can use the court system. But the administrative agency in this case is a private company.

The ECJ chose this solution because the European Union and its member states lack the technical capacity to monitor the internet and protect the right to be forgotten on their own.[86] The number of complaints is likely to be very large and processing these complaints would require the creation of a sizeable new bureaucracy in each member state.[87] In order to protect those rights that the ECJ asserts should exist under European law, the European Union has essentially deputized a private company to serve as its bureaucracy.[88] This deputizing of privately owned infrastructure companies is the culmination of the logic of new-school speech regulation.[89]

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84. See supra notes 1–2 and accompanying text.

85. See generally European Comm'n, Factsheet on the "Right to Be Forgotten" Ruling (C-131/12), https://www.inforights.im/media/1186/cl_eu_commission_factsheet_right_to_be-forgotten.pdf [https://perma.cc/ERG6-D3EP] (last visited Aug. 1, 2018) (describing Google's obligations under European law to make initial determinations about the right to be forgotten); see also Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, 2014 E.C.R. 317, ¶¶ 93–94 (explaining that parties should first apply for relief to Google, which has the initial obligation to investigate).

86. Balkin, Algorithmic Society, supra note 6, at 1206 (describing the reasons why nation-states privatize bureaucratic governance).

87. Id. at 1206–07.

88. Id. at 1207.

89. Hate speech regulation offers another example. In May 2016, the European Commission reached an agreement with Facebook, Microsoft, Twitter, and YouTube to create a "code of conduct on countering illegal hate speech online" that requires them to work with local authorities and NGOs to identify and take down hate speech in social media. Code of Conduct on Countering Illegal Hate Speech Online 1–3, https://www.statewatch.

Similarly, Germany's new NetzDG law was designed to co-opt social media companies into monitoring and taking down prohibited content in Germany, including hate speech.[90] Although some internet companies, such as Facebook, already have hate speech policies, Germany demanded stricter enforcement and prompt takedown—essentially within 24 hours of notice for "manifestly unlawful" speech.[91] Failure to comply with the state's requirements leads to sanctions against the company.[92]

From one perspective, NetzDG is just collateral censorship—a nation-state puts pressure on digital-infrastructure companies to block, take down, and censor content by end users. But from another perspective, NetzDG involves an agreement between the German state and various private companies in which the companies act as a private bureaucracy that implements the state's speech policies. Because Germany currently lacks the technical capability to perform this task on its own, it coerces or co-opts Facebook, Google, and Twitter to do it instead. Once again, this is the logical outcome of new-school speech regulation.

One might make four different objections to a government program like NetzDG, and it is important to distinguish them because they represent four different objections to new-school speech regulation. Three of these concern speech, while the last concerns surveillance.

First, one might object to Germany's substantive hate speech doctrines as insufficiently speech protective. This objection is really not about internet regulation at all, for Germany would presumably enforce the same restrictions on speech that did not appear on social media sites.

Second, one might object that Germany will attempt to impose its content regulation outside of its geographical boundaries. Because German citizens may access the internet everywhere (or use internet proxies to simulate being outside the country), Germany may eventually

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org/news/2017/sep/eu-com-illegal-content-online-code-of-conduct.pdf [https://perma.cc/CG3N-2YX7] (last visited Aug. 1, 2018); Press Release, European Comm'n, Countering Illegal Hate Speech Online #NoPlace4Hate (July 11, 2018), https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54300 [http://perma.cc/L29F-3YGP].

90. Jenny Gesley, Germany: Social Media Platforms to Be Held Accountable for Hosted Content Under "Facebook Act," Library of Cong.: Glob. Legal Monitor (July 11, 2017), http://www.loc.gov/law/foreign-news/article/germany-social-media-platforms-to-be-held-accountable-for-hosted-content-under-facebook-act/ [https://perma.cc/XKT3-PFG9] ("[T]he so-called Facebook Act . . . aims to combat hate speech and fake news in social networks."); Overview of the NetzDG Network Enforcement Law, Ctr. for Democracy & Tech. (July 17, 2017), https://cdt.org/insight/overview-of-the-netzdg-network-enforcement-law/ [https://perma.cc/Z6WS-Q9A3] (summarizing the new law).

91. Network Enforcement Act, Sept. 1, 2017, BGBl I, at 3352, § 3(1) (Ger.), https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationFile&v=2 [https://perma.cc/W2B8-JWHT] ("The provider of a social network shall maintain an effective and transparent procedure for handling complaints about unlawful content . . . ."); id at § 3(2).2 ("The procedure shall ensure that the provider of the social network . . . removes or blocks access to content that is manifestly unlawful within 24 hours of receiving the complaint . . . .").

92. See id. §§ 4(1).3, 4(1).4, 4(2).

demand global jurisdiction for its speech regulations. Similarly, the European Union and its member states may try to enforce the right to be forgotten around the world.[93]

In some cases, it may not even be necessary to formally assert jurisdiction over a company's operations around the world. Governments can achieve similar effects through indirection. They may encourage companies to alter their terms of service to better conform to the state's substantive law.[94] Then governments and associated law enforcement agencies can inform companies that content violates the company's terms of service and request removal, achieving worldwide enforcement by other means.[95]

This objection is distinct from the question of whether Germany or the European Union have adopted the correct substantive understanding of the right of freedom of speech. Instead, this objection is related to new-school speech regulation because enforcing universal jurisdiction involves coercing or co-opting infrastructure providers to enforce particular speech norms universally. The better infrastructure providers are at locating and enforcing speech regulations around the world, the more nation-states may be tempted to harness these technical capacities for their own ends.

Third, quite apart from concerns about substantive law and global jurisdiction, speakers get no judicial determination of whether their speech is legally protected or unprotected when private companies block, censor, or take down their speech. Instead, some nontransparent form of private governance or bureaucracy serves as prosecutor, judge, jury, and executioner. Speakers thus get no due process protections of notice or hearing. This is a problem of collateral censorship, which, as noted above in section I.A, has aspects of administrative prior restraint.

Fourth, when nation-states co-opt private infrastructure to regulate speech, they may also co-opt private infrastructures' capacities for surveillance, data collection, and analysis to solve their own problems of governance and control.[96]

One must pay attention to all four of these issues when considering any question of online speech today. The first issue—the question of

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93. See, e.g., Miquel Peguera, Right to Be Forgotten and Global Delisting: Some News from Spain, Stanford Ctr. for Internet & Soc'y (Dec. 17, 2017), http://cyberlaw.stanford.edu/blog/2017/12/right-be-forgotten-and-global-delisting-some-news-spain [https://perma.cc/A6P9-LRUP] (describing the ongoing controversy over global delisting to protect the right to be forgotten).

94. See Danielle Citron, Extremist Speech, Compelled Conformity, and Censorship Creep, 93 Notre Dame L. Rev. 1035, 1038 (2018) ("By insisting upon changes to platforms' speech rules and practices, EU regulators have exerted their will across the globe. Unlike national laws that apply only within a country's borders, terms of service apply wherever platforms are accessed.").

95. Id.

96. Balkin, Old-School/New-School, supra note 6, at 2298–99, 2304–05, 2329–30.

substantive standards—is often the most salient to Americans because Americans generally have a much more libertarian free speech policy than the rest of the world. The second is the looming possibility of global jurisdiction, with countries vying with each other to impose their parochial speech regulations on the entire world—a race to the top, which, in American eyes, would be a race to the bottom. The third and fourth problems—privatized bureaucracy and surveillance—arise from the combination of new-school speech regulation and ever more technically effective private governance.

The result is a complicated array of relationships of power, control, and surveillance. End users, citizens, legacy media, and civil-society organizations are now targets of both old-school and new-school speech regulation by nation-states, as well as the subjects of private governance by digital-infrastructure companies.

End users are by no means powerless in this new environment—for example, coordinated campaigns by end users and mass media may pressure companies to change their policies.[97] The larger point, however, is that speakers face multiple threats from public *and* private governance and power, instead of merely the traditional threats of old-school speech regulation.

III. PROTECTING FREE SPEECH VALUES IN A PLURALIST SYSTEM OF REGULATION

If the characteristic feature of free speech regulation in our time is a triangle that combines new-school speech regulation with private governance, then the best way to protect free speech values today is to combat and compensate for that triangle's evolving logic of public and private regulation. The solution will not necessarily—or even primarily—involve enforcing the doctrines of the First Amendment jot for jot against private-infrastructure providers. To be sure, it *will* concern the free speech *values* that animate the First Amendment. But the best way to protect those values is not to apply doctrines developed for states as rules for private actors. Instead, protecting free speech in a digital age often involves technical, regulatory, and administrative solutions that apply in contexts where the First Amendment does not reach.[98] Judge-made

97. See, e.g., Yuki Noguchi, Facebook Changing Privacy Controls as Criticism Escalates, NPR: The Two-Way (Mar. 28, 2018), https://www.npr.org/sections/thetwo-way/2018/03/28/597587830/criticism-prompts-facebook-to-change-privacy-controls (on file with the *Columbia Law Review*).

98. See Balkin, Digital Speech, supra note 51, at 2, 50–52; Jack M. Balkin, The Future of Free Expression in a Digital Age, 36 Pepp. L. Rev. 427, 432–33 (2009) [hereinafter Balkin, Future of Free Expression] (arguing that policies that promote the development of the infrastructure of free expression "better serve the interests of freedom of speech in the long run, even though such innovation policies do not, at least on their face, seem to be about government censorship").

doctrines of First Amendment law can do only limited work, and sometimes they will actually hinder necessary reforms.[99]

Protecting free speech values in a pluralist model has two basic goals. The first goal is to prevent or ameliorate, as much as possible, collateral censorship and new forms of digital prior restraint. The second goal is to protect people from new methods of digital surveillance and manipulation—new methods that emerged from the rise of large multinational companies that depend on the collection, surveillance, analysis, control, and distribution of personal data.[100]

The four problems mentioned above—collateral censorship, privatized prior restraint, surveillance, and manipulation—are predictable features of private governance, of new-school speech regulation, and of public–private cooperation and co-optation. To protect free speech values in the new era, one must aim at all of them.

A. *Permissible Government Regulations: Structural Reform and Procompetition Policies*

Protecting free speech values does not mean rejecting all government regulation of digital infrastructure. Some regulations do not produce the problems of new-school speech regulation—collateral censorship and digital prior restraint.[101] To the contrary, they actually protect free speech values. These kinds of regulations may not only be perfectly appropriate, they may actually be necessary to provide practical freedom for end users.

One example of permissible regulation is the structural regulation of telecommunications facilities. Examples include municipal broadband projects; open-access rules, which make it possible to have many different kinds of internet service providers;[102] and network neutrality rules, which

99. See Balkin, Digital Speech, supra note 51, at 50–52; Balkin, Future of Free Expression, supra note 98, at 437–39, 443–44.

100. The success of social media companies, for example, depends on increasing advertising revenues, which depends on garnering ever-larger shares of scarce attention. Grabbing scarce attention, in turn, depends on discovering ever-new ways to attract and manipulate end users and collect and analyze the data that emerges from their behavior and interactions. See Tufekci, Facebook's Surveillance Machine, supra note 53 (describing Facebook's surveillance of its users to increase advertising revenue). Social media companies are hardly unique in this respect. Many other businesses—and government programs—also depend on the collection, analysis, and use of data to predict behavior and control populations. See Zuboff, supra note 53, at 75–76 (describing surveillance capitalism).

101. See supra section I.A.

102. See Jonathan E. Nuechterlein & Philip J. Weiser, Digital Crossroads: Telecommunications Law and Policy in the Internet Age 192–96 (2d ed. 2013) (explaining the idea of open access as a method for ISP competition and how it was eventually displaced in the United States).

prevent discrimination against content and applications.[103] These structural regulations of infrastructure are not new-school speech regulation: They do not encourage collateral censorship or digital prior restraints, and they do not raise the same problems of due process. In fact, network neutrality helps avoid many of the problems of collateral censorship because broadband providers may not block or slow down traffic based on its content or viewpoint in a network neutrality regime.[104]

A second and very important kind of regulation is procompetition regulation, which might include both antitrust law and media concentration rules.[105] Procompetition policies are important not only because of the potential power of privately owned bureaucracies but also because of their potential vulnerabilities.[106] The hacking of the 2016 election might have been different, and possibly less effective, if there were multiple Facebooks with different affordances, technologies, and advertising models.[107] There is only one Facebook today not simply because of economies of scale and network effects but because Facebook strategically

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103. See Barbara van Schewick, Internet Architecture and Innovation 72–73, 220 (2010) (arguing that a key feature of all versions of network neutrality is nondiscrimination against content and applications).

104. See id.

105. I use the more general term "procompetition policy" instead of "antitrust" because, at least as it has developed in the United States in the past forty years, antitrust law has tended to focus on consumer welfare, and some scholars, following Robert Bork, have argued that this should be its only focus. See, e.g., NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 107–08 (1984) ("'Congress designed the Sherman Act as a "consumer welfare prescription."' . . . Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." (citation omitted) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979))); Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 7 (1978) ("[T]he only legitimate goal of antitrust is the maximization of consumer welfare."). Because social media and search engines offer their services for free, demonstrating that their business practices harm consumer welfare takes some ingenuity—for example, one might focus on control of digital advertising networks. Perhaps more important, an exclusive focus on consumer welfare may miss the point of what is most troubling about these business practices. A larger class of procompetition policies, by contrast, might focus on the effects of anticompetitive behavior on democracy and free expression. Rather than rehash debates about the "true" purposes of current antitrust law, I simply employ the more general term to describe possible reforms.

106. See Sally Hubbard, Fake News Is a Real Antitrust Problem, CPI Antitrust Chron., Dec. 2017, at 1, 1, https://www.competitionpolicyinternational.com/wp-content/uploads/2017/12/CPI-Hubbard.pdf [https://perma.cc/9PME-JHX2] ("Facebook and Google['s] . . . algorithms have an outsized impact on the flow of information, and fake news purveyors can deceive hundreds of millions of users simply by gaming a single algorithm.").

107. See id. at 5 ("Having two dominant algorithms controlling the flow of information enables deception on a massive scale, meaning that the concentration of the search and social markets is directly related to the scope of fake news' damage."); Sean Illing, Why "Fake News" Is an Antitrust Problem, Vox (July 18, 2018), https://www.vox.com/technology/2017/9/22/16330008/eu-fines-google-amazon-monopoly-antitrust-regulation [https://perma.cc/Z6L5-N3ZY] (quoting Sally Hubbard for the proposition that multiplying social media would make it harder for fake news sites to manipulate digital companies' algorithms).

bought up a number of potential competitors, incorporating some of their innovations and blocking others.[108] In this way, it forestalled the development of a wide range of potential competitors and innovators in social media.

More social media competitors, each with differing approaches and goals, would provide more platforms for innovation, more software features, more types of security measures that hackers would have to circumvent, more models for social spaces and communities, and a wider variety of speech policies.[109]

With stronger enforcement of antitrust and procompetition laws, innovations might have proliferated more widely, and we might have a healthier competition among social media companies and their sorting algorithms. Although we cannot be certain that this would have made it harder for foreign propaganda and fake news to proliferate and disrupt our democracy, it is generally harder to attack and compromise twelve targets than to attack and compromise one.

One might object that this degree of fragmentation—we might even call it balkanization—is undesirable.[110] But procompetition policies serve democratic values in a second way. Modern democracies increasingly rely on social media to facilitate public conversation, organize public discussion, and enforce civility norms.[111] Therefore, it is especially important to make sure that there are many such organizations, in order to prevent a small number of powerful for-profit companies from dominating how public opinion is organized and governed. Social media enforcement of civility norms is imperfect and often arbitrary,[112] and some organizations, like Facebook, attempt to impose the same standards around the world.[113] Thus, when people expect and even demand that a multinational corporation like Facebook ban hate speech, it is important to have many Facebooks, not a single one. The flip side of the expectation

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108. See Erin Griffith, Will Facebook Kill All Future Facebooks?, Wired (Oct. 25, 2017), http://www.wired.com/story/facebooks-aggressive-moves-on-startups-threaten-innovation/ [http://perma.cc/W2L3-TP8E] (describing Facebook's strategy of preempting competition by purchasing startups and rival companies, potentially inhibiting innovation).

109. Even in the current landscape, it is easy to see that YouTube has different affordances and functions than Twitter, which has different affordances and functions than Snapchat, which has different affordances and functions than Facebook.

110. Of course, I myself have no objection to Balkinization!

111. See infra section IV.A.

112. See Gillespie, supra note 75, at 76–77, 107–08 (explaining the inherent difficulties of moderating content on a vast scale and the imperfections of algorithmic tools used to deal with the problem); Molly Roberts, Opinion, Alex Jones Does Not Compute, Wash. Post (Aug. 17, 2018), https://www.washingtonpost.com/opinions/twitter-infowars-and-techs-existential-crisis/2018/08/17/7c4c84bc-a232-11e8-8e87-c869fe70a721_story.html (on file with the *Columbia Law Review*) (observing the divergent, and widely criticized, responses by Facebook, Google, and Twitter to posts of inflammatory content by Alex Jones).

113. See Angwin & Grassegger, supra note 80.

that social media sites should enforce civility norms is the need for multiple social media sites serving different values and different publics.

One might also object that network effects will prevent broad diversity in social media because users will flock to the platforms with the largest user base.[114] Yet network effects will not necessarily prevent the growth of multiple social media sites.[115]

First, Facebook, like MySpace before it, will not be dominant forever. Often people—and especially generations—migrate from application to application without completely abandoning any of them.[116] How much time people spend on different sites may be fluid and may change over time as people age or have new experiences; moreover, the sites themselves may add new features as they compete for scarce attention.

Second, Professor Klonick has pointed out that people may see social media sites like Facebook, Twitter, and YouTube as complementary goods rather than rival goods.[117] People might use all three services for different purposes.

Third, social media sites are not like countries—one can both inhabit and be a "citizen" of many of them at the same time. The best model for the new digital public sphere is not the familiar model of competition between geographically distinct states.[118] Rather, it is one of diaspora, in which immigrants have connections both to their country of origin and to their current country and may also have relatives in many different countries. Digital diaspora may be a better model for thinking about the ecology of social media than the model of exclusionary network effects.

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114. See, e.g., Michael A. Cusumano, Platform Wars Come to Social Media, Comms. ACM, Apr. 2011, at 31, 32–33 ("Because of the power of network effects and positive feedback, a relatively small number of sites will probably draw most of the user traffic and advertising dollars.").

115. See David S. Evans & Richard Schmalensee, Why Winner-Takes-All Thinking Doesn't Apply to the Platform Economy, Harv. Bus. Rev. (May 4, 2016), https://hbr.org/2016/05/why-winner-takes-all-thinking-doesnt-apply-to-silicon-valley [https://perma.cc/FF7Z-4FXQ] ("With low entry costs, trivial sunk capital, easy switching by consumers, and disruptive innovation showing no signs of tapering off, every internet-based business faces risk, even if it has temporarily achieved winner-takes-all status.").

116. See, e.g., Monica Anderson & Jingjing Jiang, Pew Research Ctr., Teens, Social Media & Technology 2018, at 2 (2018), http://assets.pewresearch.org/wp-content/uploads/sites/14/2018/05/31102617/PI_2018.05.31_TeensTech_FINAL.pdf [https://perma.cc/7S4N-BNM5] (describing the shift among younger Americans to use Facebook less and Instagram, YouTube, or Snapchat more).

117. See Klonick, New Governors, supra note 24, at 1630 (arguing that end users may employ multiple platforms because "[t]he commodity is not just the user, but rather it is the content created and engaged with by a user culture").

118. See Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416, 423–24 (1956) (arguing that citizens would exit states in search of the most desirable combination of goods and services).

B. *The Responsibilities of Private Infrastructure*

Different parts of the internet infrastructure should have different responsibilities to protect freedom of speech online. For convenience, one might divide the digital infrastructure of free expression into three basic groups.[119]

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119. The division of internet services offered in the text is related to two other sets of distinctions, although it is not, strictly speaking, identical with either.

The first approach analyzes internet traffic in terms of layers: for example, the hardware, protocol, applications, and content layers. See generally Lawrence B. Solum & Minn Chung, The Layers Principle: Internet Architecture and the Law, 79 Notre Dame L. Rev. 815 (2004) (arguing that legal regulation of the internet should recognize and respect the different layers of internet architecture).

The point of thinking in terms of layers is that different layers of internet traffic may require different regulatory norms. For example, one might contend that the hardware and protocol layers should remain neutral with respect to the carriage of content and applications, but actors in the applications and content layers should be free to curate, edit, and therefore discriminate on the basis of content. Governments should respect this basic division of labor between the various layers. They should not attempt to interfere with the efficiency of the hardware and protocol layers, for example, by requiring broadband companies or DNS servers to filter or block content.

The second approach argues that government regulation should respect the end-to-end principle of internet design. This principle distinguishes between decisions made at the edge of the internet (for example, by end users and applications companies) and decisions made in the core of the internet (for example, by internet service providers). See van Schewick, supra note 103, at 57–69 (explaining the different versions of the end-to-end principle).

Using this approach, one might argue that decisionmaking about content and applications should be located at the edge of the network and not in the middle. As a result, content regulation and discrimination should occur, if at all, at the edges of the network rather than in the center. It follows that broadband companies, which are located in the center of the network, should respect network neutrality—that is, they should not discriminate in content or applications. Likewise, governments should attempt to regulate content, if at all, by aiming only at the edges of the network rather than requiring players in the middle of the network to regulate or filter content. See Annemarie Bridy, Remediating Social Media: A Layer-Conscious Approach, 24 B.U. J. Sci. & Tech. L. (forthcoming 2018) (manuscript at 199–213), https://ssrn.com/abstract=3154117 (on file with the *Columbia Law Review*) (distinguishing between regulation of basic internet services and social media sites based on layers analysis and the end-to-end principle).

The approach in this Essay differs slightly from these two approaches for three reasons. First, payment systems are not, strictly speaking, layers of internet traffic; although they are edge services, I argue in this Essay that nondiscrimination norms should apply to them. See infra notes 127–128 and accompanying text.

Second, governments can reasonably require some services in the application layer—for example, email services—to be nondiscriminatory and open to all in much the same way as other basic internet services, while other services in the application layer—for example, social media services like Facebook and YouTube—should be treated as curators of content that are entitled to control access and make content-based decisions.

Third, the end-to-end design principle makes the most sense if we think of Facebook, Google, and other social media companies as located only at the "edge" of the internet—rather than squarely in the middle of it—because they provide, among other things, telecommunications, DNS, and hosting services. These companies' investments in telecommunications infrastructure have made them central governors and gatekeepers within the internet, straining the metaphor of "edge services." See supra note 40 and accompanying text.

The first group is *basic internet services*. It consists of four types of companies:

(a) Hosting services (such as Amazon Web Services or Gmail), which host websites, software applications, and platforms;
(b) Telecommunications services, which include internet backbone operators, ISPs, transit providers, and certificate authorities (which issue SSL certificates to websites and other applications);
(c) Domain name services, which include registrars that register domain names (such as GoDaddy), registries that run top-level domains (such as Verisign), and DNS providers that resolve domain names (such as Cloudflare and Google); and
(d) Caching and defense services (such as Akamai and Cloudflare), which smooth and speed up internet traffic and may also provide cybersecurity and defense against DNS attacks.[120]

The second group consists of *payment services* that allow people to conduct business and make payments online (such as Mastercard, Visa, and PayPal). Although payment services do not regulate traffic flows, many online enterprises would be effectively impossible without them.[121]

The third group consists of *content curators*. These companies include both platforms (such as Facebook, YouTube, Twitter, and Instagram) and search engines (such as Google). These companies make regular and pervasive content-based decisions as part of their business models using human bureaucracies, algorithms, or some combination of the two.[122]

Generally speaking, basic internet services should adopt policies of nondiscrimination with respect to the content and viewpoint of traffic that flows through them or that is stored on them. Network neutrality rules attempt to enforce this principle against broadband providers and ISPs, but analogous principles should apply to the rest of the delivery system.

For example, caching and defense services like Cloudflare should not, as a general rule, discriminate on the basis of content or viewpoint. There are three reasons for this. First, as a practical matter, these services

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120. For a list of key players and functions in basic internet services, see Matthew Prince, Why We Terminated Daily Stormer, Cloudflare (Aug. 16, 2017), https://blog.cloudflare.com/why-we-terminated-daily-stormer [https://perma.cc/8QKY-GK8H]; see also James Grimmelmann, Internet Law: Cases & Problems 27–35 (8th ed. 2018) (describing elements of the internet "stack"); Balkin, Old-School/New-School, supra note 6, at 2303–04 (listing elements of the digital infrastructure of free expression); Free Speech: Only as Strong as the Weakest Link, Elec. Frontier Found., https://www.eff.org/free-speech-weak-link [https://perma.cc/X2KB-WXB5] (last visited Aug. 1, 2018) (describing elements of digital infrastructure).

121. For example, when the U.S. government sought to shut down WikiLeaks in 2011, it pressured payment services to stop doing business with the organization. See supra note 35 and accompanying text; see also infra note 127 and accompanying text.

122. See infra Part IV.

are increasingly important for unpopular speakers or for speakers likely to be targeted by others.[123] Second, withholding caching or defense services for particular disfavored sites will likely have significant collateral effects for other content on those sites that deserves protection. Third, withholding services will have many features of an administrative prior restraint: The decisions will be nontransparent and lack due process.

The analysis of DNS services is a little different. The initial grant of a domain name is usually content-based, if only because two applicants cannot have the same domain name; moreover, permissible top-level domain names are regulated by the Internet Corporation for Assigned Names and Numbers (ICANN).[124] The point, rather, is that once a domain name has been granted, the DNS system should not refuse to resolve a domain name because DNS service providers disapprove of the content appearing on a site that employs a given domain name. A fortiori, governments should not try to leverage the domain name system to block or censor content.[125] Suspension of domain names, refusal to resolve domain names, and blocking content by domain name offer extreme examples of collateral censorship.[126] As before, these decisions will also likely lack transparency, notice, and due process.

The second group, payment systems, presents still another set of problems. We might best analogize payment systems to public accommodations. They should be open to all people, groups, and businesses that do not use the service to engage in illegal activities. Public accommodations usually protect people against discrimination based on their identities—race, religion, sex, and so forth. In this context, however, the goal is to prevent discrimination based on the content of what people lawfully publish online. Even so, payment systems should be able to refuse to do business with those who seek to use their systems to facilitate illegal enterprises, which may include the sale of content whose distribution is illegal in a particular jurisdiction. But where the publication of content is not illegal, payment systems should not discriminate among their customers. In 2011, for example, the United States put pressure on payment systems to refuse to do business with WikiLeaks.[127]

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123. See Prince, supra note 120 ("[I]f you don't have a network like Cloudflare in front of your content, and you upset anyone, you will be knocked offline.").

124. About ICANN, ICANN, https://www.icann.org/resources/pages/welcome-2012-02-25-en [https://perma.cc/55YL-4EDY] (last visited Aug. 1, 2018).

125. See, e.g., Mark Lemley, David S. Levine & David G. Post, Don't Break the Internet, 64 Stan. L. Rev. Online 34, 34–38 (2011), http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2011/12/64-SLRO-34_0.pdf [https://perma.cc/6LV8-5KLV] (explaining that congressional attempts to protect intellectual property by commandeering the DNS system would have disastrous policy consequences).

126. See Balkin, Old-School/New-School, supra note 6, at 2318 (arguing that using the DNS system for content regulation is especially overbroad).

127. Id. at 2327–29; see also Yochai Benkler, WikiLeaks and the PROTECT-IP Act: A New Public-Private Threat to the Internet Commons, Daedalus, Fall 2011, at 154, 156–57

What made this episode especially worrisome was that, at that point, WikiLeaks was in much the same position as an American newspaper, which could not be prosecuted for publishing the very same information.[128]

Because basic internet services and payment systems should not engage in content regulation—with certain exceptions for the DNS system noted above—government regulation that enforces nondiscrimination obligations should ordinarily not be objectionable on free speech grounds. These companies should not exercise editorial control in the first place; hence government regulations that enforce obligations similar or analogous to common carriage, nondiscrimination, or public accommodation should normally be appropriate, both from a First Amendment and a more general free speech perspective.[129]

The problem, of course, is that nation-states may be tempted to do precisely the opposite—not to forestall content discrimination but to demand it through new-school speech regulation. Once the telecommunications system, the DNS system, and the system of electronic payments begin blocking, censoring, or discriminating against certain speakers, nation-states will attempt to piggyback on their technical capabilities. As we have seen, state pressure on infrastructure owners to surveil, block, and filter content creates predictable problems of collateral censorship and privatized prior restraint.

IV. THE OBLIGATIONS OF DIGITAL CURATORS—CURATIONAL DUE PROCESS AND INFORMATION FIDUCIARIES

Curators are in a different position than either payment systems or basic internet services because they curate and personalize information for end users. They also facilitate communication through curation. For example, an end user's Facebook feed does not offer every possible

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(noting that "American political figures widely denounced the disclosures" and that a number of private parties severed ties to WikiLeaks).

128. Jack M. Balkin, The First Amendment Is an Information Policy, 41 Hofstra L. Rev. 1, 22 (2012) (arguing that WikiLeaks and the *New York Times* are essentially in the same position with respect to First Amendment doctrine); Yochai Benkler, A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate, 46 Harv. C.R.-C.L. L. Rev. 311, 314 (2011) ("[I]t is not, as a matter of law, sustainable to treat Wikileaks or Assange any differently than the *New York Times* and its reporters . . . ."); Jack Goldsmith, Seven Thoughts on WikiLeaks, Lawfare (Dec. 10, 2010), https://www.lawfareblog.com/seven-thoughts-wikileaks [https://perma.cc/Y7HQ-X8LY] ("I do not understand why so much ire is directed at Assange and so little at the *New York Times*.").

129. See U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 740–44 (D.C. Cir. 2016) (rejecting a First Amendment challenge to the FCC's network neutrality rules); Stuart Minor Benjamin, Transmitting, Editing, and Communicating: Determining What "the Freedom of Speech" Encompasses, 60 Duke L.J. 1673, 1696–712 (2011) (arguing that network neutrality rules and common-carriage obligations in telecommunications law do not violate the First Amendment); Susan Crawford, First Amendment Common Sense, 127 Harv. L. Rev. 2343, 2375–78 (2014) (same).

posting from the user's Facebook friends in the order they were posted; instead, Facebook decides which posts are most relevant and in what order to display them.[130] Google tries to provide the links that are most helpful to end users who make search requests,[131] and it tries to deter companies that seek to game the system of search engine results.[132]

Because companies like Facebook and Google act as curators and personalizers, they cannot really avoid making decisions about content. We should therefore think about their obligations differently than payment systems and basic internet services. Familiar concepts like content and viewpoint neutrality are simply unhelpful in describing their responsibilities in the emerging global system of free expression. Above all, these curators need to be *trustworthy* providers of search and communications services and *nonarbitrary* in their governance of communities.

A. *Digital Curators as Professionals and the Successors of Twentieth-Century Mass Media*

The obligation of trustworthiness makes digital curators both similar to and different from twentieth-century (or "legacy") mass media such as newspapers, broadcasters, and cable channels. Like twentieth-century mass media, digital curators have become important custodians of the public sphere and of democratic self-government. Hence, whether they like it or not, digital curators have social and moral obligations to the public—as opposed to legal obligations. With those obligations comes a corresponding duty to develop and abide by professional norms of curation and governance.

Social media companies and search engines have social and moral obligations to the public because they perform three connected public services. First, they *facilitate public participation* in art, politics, and culture. Second, they *organize public conversation* so that people can easily find and communicate with each other. Third, they *curate public opinion* by providing individualized feeds and search results, and by enforcing civility norms through their terms-of-service obligations and community guidelines.

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130. See, e.g., Victor Luckerson, Here's How Facebook's News Feed Actually Works, Time (July 9, 2015), http://time.com/collection-post/3950525/facebook-news-feed-algorithm/ [https://perma.cc/LLT8-U2DQ] ("[M]ost users see only a sliver of the potential posts in their network each day.").

131. See How Search Algorithms Work, Google, https://www.google.com/search/howsearchworks/algorithms/ [https://perma.cc/MEP7-GMJ9] (last visited Aug. 1, 2018) ("Google ranking systems . . . are made up of a series of algorithms that analyze what it is you are looking for and what information to return to you.").

132. See Kaspar Szymanski, Google Penalties and Messages Explained—Search Engine Land's Ultimate Guide, Search Engine Land, https://searchengineland.com/guide/google-penalties [https://perma.cc/TL6C-NGVG] (last visited Aug. 1, 2018) (explaining how and why Google demotes links to penalize firms that attempt to manipulate its search rankings system).

Social media companies and search engines present themselves as more than ordinary profit-making enterprises.[133] They explain that they use their special technological expertise to promote public-spirited goals like access to knowledge, freedom of expression, and community building.[134] In this way, they encourage the idea that they do act and should act according to public-regarding, professional norms. Moreover, social media companies and search engines invoke these professional and public-regarding norms to justify their decisions to organize search-engine results, to curate public discourse, and to enforce (or sometimes refrain from enforcing) civility norms.[135] The public, politicians, and civil-society organizations repeatedly push back, claiming that digital

133. For example, as Google's founders explain: "Google is not a conventional company. We do not intend to become one." 2004 Founders' IPO Letter, Alphabet, http://abc.xyz/investor/founders-letters/2004/ipo-letter.html [https://perma.cc/NW3Q-BN82] (last visited Aug. 30, 2018). Google's stated purpose is to "organize the world's information and make it universally accessible and usable." Our Company, Google, https://www.google.com/about/our-company/ [https://perma.cc/UFS8-PSJN] (last visited Aug. 21, 2018).

134. In addition to its goal of "organiz[ing] the world's information and mak[ing] it universally accessible and usable," Google also aims "to develop services that significantly improve the lives of as many people as possible." 2004 Founders' IPO Letter, supra note 133.

Twitter explains that it "offer[s] Twitter and other services in order to give everyone the power to create and share ideas and information instantly, without barriers." Our Services and Corporate Affiliates, Twitter, https://help.twitter.com/en/rules-and-policies/twitter-services-and-corporate-affiliates [https://perma.cc/AE8Z-TJFR] (last visited Aug. 21, 2018).

In 2017, Facebook announced a new mission statement: "To give people the power to build community and bring the world closer together." Heather Kelly, Mark Zuckerberg Explains Why He Just Changed Facebook's Mission, CNN (June 22, 2017), https://money.cnn.com/2017/06/22/technology/facebook-zuckerberg-interview [https://perma.cc/CNX2-VYC5] ("It's important to give people a voice, to get a diversity of opinions out there, but on top of that, you also need to do this work of building common ground so that way we can all move forward together." (internal quotation marks omitted) (quoting Mark Zuckerberg)).

135. See Community Standards, Facebook, https://www.facebook.com/communitystandards [https://perma.cc/L4US-ZB7Z] (last visited Aug. 21, 2018) ("The goal of our Community Standards is to encourage expression and create a safe environment. We base our policies on input from our community and from experts in fields such as technology and public safety."); How Search Works: Our Mission, Google, https://www.google.com/search/howsearchworks/mission/ [https://perma.cc/SFP4-SL3P] (last visited Aug. 21, 2018) ("From innovations like the Knowledge Graph to updates to our ranking algorithms that ensure we're continuing to highlight relevant and authoritative content, our goal is always to improve the usefulness of your results."); The Twitter Rules, Twitter, https://help.twitter.com/en/rules-and-policies/twitter-rules [https://perma.cc/DZ2P-E62A] (last visited Aug. 21, 2018) ("We believe that everyone should have the power to create and share ideas and information instantly, without barriers. In order to protect the experience and safety of people who use Twitter, there are some limitations on the type of content and behavior that we allow.").

companies have fallen short of these professions of public-spiritedness and demanding that companies act according to the public interest.[136]

A similar process happened to journalism in the early twentieth century. Newspapers were confronted with the rise of propaganda, advertising, and public relations. Seeking to differentiate themselves from these practices, newspapers gradually accepted that they had distinctive professional obligations to the public in how they covered and reported the news.[137] This growing sense of responsibility to the public developed into what we now know as the professional norms of modern journalism.[138] The twentieth-century vision of objective journalism in the public interest did not arise overnight—it was shaped by economic, social, and technological developments.

Just as in the case of twentieth-century mass media, however, the state constitutionally cannot force these professional norms—or their twenty-first-century equivalents—on digital curators. But this does not mean that the public cannot or should not demand these norms. We are beginning to see a slow and halting evolution of platforms' self-understanding precisely along these lines. This learning process is the result of wave after wave of public pressure on companies like Google, Facebook, and Twitter, often facilitated by journalists who themselves apply professional norms of news reporting developed in the previous century.[139] Companies that once viewed themselves purely as technology

136. See, e.g., Carole Cadwalladr, Google, Democracy and the Truth About Internet Search, Guardian (Dec. 4, 2016), https://www.theguardian.com/technology/2016/dec/04/google-democracy-truth-internet-search-facebook [https://perma.cc/WS2B-MFEF] (criticizing Google's search results for promoting anti-Semitism); Cecilia Kang & Kate Conger, Inside Twitter's Struggle over What Gets Banned, N.Y. Times (Aug. 10, 2018), https://www.nytimes.com/2018/08/10/technology/twitter-free-speech-infowars.html (on file with the *Columbia Law Review*) (describing internal debates in response to mounting public criticism of Twitter for its failure to discipline Alex Jones and Infowars); Alyssa Newcomb, A Timeline of Facebook's Privacy Issues—And Its Responses, NBC News (Mar. 24, 2018), https://www.nbcnews.com/tech/social-media/timeline-facebook-s-privacy-issues-its-responses-n859651 [https://perma.cc/H9A2-9UHQ] (describing successive episodes of public criticism of Facebook for its privacy policies).

137. See Michael Schudson, The Objectivity Norm in American Journalism, 2 Journalism 149, 159–63 (2001).

138. Id.

139. See, e.g., Angwin & Grassegger, supra note 80 (describing public objections to Facebook's policies for removing content and sanctioning end users); Vindu Goel, Some Privacy, Please? Facebook, Under Pressure, Gets the Message, N.Y. Times (May 22, 2014), https://www.nytimes.com/2014/05/23/technology/facebook-offers-privacy-checkup-to-all-1-28-billion-users.html (on file with the *Columbia Law Review*); Dave Lee, Facebook Amends 'Real Name' Policy After Protests, BBC (Dec. 15, 2015), http://www.bbc.com/news/technology-35109045 [https://perma.cc/9WF3-MJFS]; Joel Schectman, Facebook Releases New Privacy Safeguards After Ceding to Pressure from Advertisers, Reuters (June 13, 2018), https://www.reuters.com/article/us-facebook-privacy-broker/facebook-releases-new-privacy-safeguards-after-ceding-to-pressure-from-advertisers-idUSKBN1J924P [https://perma.cc/6UV4-GUWN]. Investigative journalists like Carole Cadwalladr and Emma Graham-Harrison of the *Guardian* uncovered the Cambridge Analytica scandal, discussed infra at

companies are beginning to understand their public responsibilities as twenty-first-century media companies.

In saying this, it is important not to wax nostalgic over twentieth-century mass media or to assume that the twentieth century represents a lost, golden age of media responsibility.[140] Nor should we assume that twenty-first-century media will adopt professional norms identical to those of twentieth-century journalism. The point is rather that twentieth-century media, with all of its faults, served as a countervailing force to government power in a democracy. In the same way, twenty-first-century media companies, at best, may provide platforms for democratic organization and protest and act as checks on the power of territorial governments, even as these governments are necessary checks on technology companies' burgeoning economic and political power.

B. *Legal Obligations—Curational Due Process*

If digital curators were just like twentieth-century mass media, that would be the end of the story. These companies would have public obligations—that is, moral duties—to develop professional norms in the public interest, and the public (and legacy media) might pressure them into adopting and adhering to those norms. The state, however, would be forbidden from enforcing these norms by law. But that is not the end of the story. The new digital curators differ from twentieth-century mass media in two important respects.

The first difference is that digital media companies have curatorial obligations of due process. These obligations made little sense in a world in which very few people had access to mass media but are central in a world in which everyone is a broadcaster. For this reason, to the extent that digital curators block, censor, or take down content from their end users, they have obligations of due process toward their end users.[141] That is especially so if their content regulation is at the behest of nation-states employing new-school speech regulation.

To see how these due process obligations might operate in practice, a good place to start is the Manila Principles on Intermediary Liability, a

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notes 168–177 and accompanying text, which led to increased public pressure for the reform of social media.

140. See Morgan N. Weiland, The Paradox of Platforms-as-Press: Unwinding This Analogy to Solve the Platform Accountability Problem 2–3 (Apr. 10, 2018) (unpublished manuscript) (on file with the *Columbia Law Review*). The famous Hutchins Commission Report of 1947 argued that the press had a social responsibility to the public in a democracy and warned against commercialization, tendencies toward monopoly, ownership conflicts of interest, and sensationalism. See A Free and Responsible Press: A General Report on Mass Communication (Robert D. Leigh ed., 1947) (Hutchins Commission Report). Many of these concerns are still with us today. Although highly influential, the report hardly quelled concerns about whether the press was living up to its social responsibilities in a democracy.

141. Balkin, Algorithmic Society, supra note 6, at 1197.

series of reform proposals developed by civil society organizations in 2015.[142] The Manila Principles require, among other things: (1) clear and public notice of the content-regulation policies companies actually employ; (2) an explanation and an effective right to be heard before content is removed; and (3) when this is impractical, an obligation to provide a post facto explanation and review of a decision to remove content as soon as practically possible.[143] One might call these and similar norms the obligations of *curational due process*.

The Manila Principles focus on removing content that is illegal in a given country,[144] but the same principles could also apply to content that violates the company's terms of service or end-user license agreement. In fact, instead of passing new speech regulations, nation-states may find it more convenient to press curators to enforce their existing terms of service. This has the additional advantage of leveraging private speech codes that operate globally to serve the nation-state's parochial ends.[145]

Curational due process made little sense for twentieth-century mass media because twentieth-century mass media largely published their own content or the content of a relatively small number of people and businesses. Most people had no access to mass-media publication, and few people expected an explanation or a right to be heard either before or after the *New York Times* rejected their proposed letters to the editor. Twenty-first-century media companies, by contrast, primarily publish content by the general public. Digital curators exist to facilitate mass cultural participation, and their end users expect and depend on the fact that curators will help them in this process. Therefore, curators need to provide assurances that when they block or limit participation, they are not being overbroad or arbitrary.

Legislation that requires digital curators to provide due process would not necessarily violate the First Amendment. Curators would probably argue that such rules would interfere with their editorial functions.[146] But one can avoid constitutional problems by making due process obligations part of a safe harbor from intermediary liability.

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142. See Manila Principles on Intermediary Liability, https://www.manilaprinciples.org/ [https://perma.cc/U7SD-VCUW] (last visited Aug. 2, 2018).

143. See Manila Principles on Intermediary Liability 2– 5 (2015), https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf [https://perma.cc/W693-TSUW].

144. See id.

145. See supra text accompanying notes 94–95. Thus, when the European Union pressed four major curators to help it combat hate speech, it essentially asked for more prompt and efficient enforcement of the curators' own hate speech policies. See, e.g., Code of Conduct on Countering Illegal Hate Speech Online, supra note 89, at 1.

146. See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994) (holding that cable broadcasters exercise editorial functions protected by the First Amendment "[t]hrough 'original programming or by exercising editorial discretion over which stations or programs to include in [their] repertoire'" (quoting Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 494 (1986))).

Section 230 of the 1996 Telecommunications Act protects digital curators from liability for content appearing on their sites.[147] Some aspects of intermediary immunity are probably required by the Constitution, so that if Congress repealed § 230, certain constitutional protections would still be in force.[148] For example, it might be unconstitutional to hold digital curators strictly liable for any defamatory or obscene content that appears on their sites.[149] But the boundaries of constitutional protection are uncertain. Would a negligence standard be sufficient? What about other kinds of unlawful content?[150] What if digital curators are notified that the material is defamatory, tortious, or otherwise unlawful?[151] These and similar questions remain unsettled. Moreover, § 230(c)(2)—which holds digital curators harmless for editing or deleting content of end users—is probably not required by the First Amendment.[152]

The best way to guarantee curatorial due process, therefore, is to resolve these uncertainties by creating a safe harbor provision that would

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147. See 47 U.S.C. § 230 (2012); see also Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (holding that § 230 immunized an online service provider from liability for content appearing on its site created by another party).

148. See Note, Section 230 as First Amendment Rule, 131 Harv. L. Rev. 2027, 2028, 2030 (2018) (arguing that certain aspects of § 230 immunity for defamation are required by the Constitution despite the fact that "[j]udges and academics are nearly in consensus in assuming that the First Amendment does not require § 230").

149. See Smith v. California, 361 U.S. 147, 152–55 (1959) (striking down a California law that held booksellers strictly liable for possession of obscene books with no requirement of knowledge of the contents of the books).

150. Section 230 excludes content that violates intellectual property law, federal privacy law, and federal criminal law from its immunity. See 47 U.S.C. § 230(e) (listing exemptions). In 2018, Congress passed the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (to be codified at 18 U.S.C. § 2421A; 47 U.S.C. § 230(e)(5)), which removes § 230 immunities for sex-trafficking and prostitution-related offenses.

151. Section 512(g) of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512(g) (2012), provides less protection for hosting materials that infringe copyright than § 230 does for hosting defamatory materials. Section 512(g) creates a safe harbor from copyright liability if an online service provider removes content upon notice. The notice-and-takedown rules create incentives for collateral censorship. See Balkin, Old-School/New-School, supra note 6, at 2314; Mulligan, supra note 16, at 181–84; Rebecca Tushnet, Power Without Responsibility: Intermediaries and the First Amendment, 76 Geo. Wash. L. Rev. 986, 1003 (2008) ("Because DMCA notice requirements are minimal and ISPs have no incentive to investigate, the notice-and-takedown process can be used to suppress critical speech as well as copyright infringement.").

152. See Balkin, Old-School/New-School, supra note 6, at 2318 & n.82 (arguing that if online service providers are not state actors, then their filtering of internet content, which is protected from liability under § 230(c)(2), does not violate the First Amendment). Although it is certainly possible to imagine scenarios under which a grant of legal immunity to one private party for censoring or editing the expression of another private party might violate the second party's First Amendment rights, § 230(c)(2) is probably facially constitutional.

amend § 230.[153] If digital curators agree to adopt something similar to the Manila Principles, they will retain their intermediary immunity. If not, they will have to be content with constitutional limitations on intermediary liability, which are both uncertain and likely to be far less than the statutory guarantee.

Note that this solution would employ a new-school technique because it would reduce the intermediary immunity of digital curators with respect to the status quo. But it would use that technique for the opposite goal of most new-school speech regulation: It would attempt to protect the free speech interests of end users.

C. *Legal Obligations—Information Fiduciaries*

The second difference between twentieth-century mass-media companies and twenty-first-century digital curators is that twenty-first-century companies have developed elaborate technologies and techniques for individualized surveillance, manipulation, and control that were not really possible for twentieth-century mass media.[154] To be sure, twentieth-century mass media also hoped to appeal to certain demographics in order to attract advertisers. Yet their abilities to surveil, target, manipulate, and even addict their audiences could not be so effective or so precise as those of twenty-first-century companies.

Indeed, the characteristic feature of twenty-first-century digital media companies is not merely that they enable mass participation. It is that in doing so they also engage in mass data collection and surveillance, and that they develop ever more effective means for influencing (and thus potentially manipulating) their audiences in order to gain their scarce attention.[155] The flip side of mass cultural participation is mass personal surveillance, and the danger of widespread digital participation is widespread digital manipulation.

Digital curation is not simply the selection of content for end users; it also involves using knowledge about end users to control, shape, and govern their behavior.[156] Digital curators are private governors not only

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153. Such a safe harbor might be modeled along the lines of the DMCA's § 512(g). See supra note 151.

154. See Wu, Attention Merchants, supra note 49, at 323–25; Louise Matsakis, Facebook's Targeted Ads Are More Complex than It Lets On, Wired (Apr. 25, 2018), https://www.wired.com/story/facebooks-targeted-ads-are-more-complex-than-it-lets-on/ [https://perma.cc/6BWV-JG7H] (explaining that in comparison with twentieth-century mass-media companies, advertisers "who use Facebook have a near-endless number of data points with which to target their ads, and can show them to much narrower slices of the population").

155. See Wu, Attention Merchants, supra note 49, at 323–25.

156. See, e.g., Zuboff, supra note 53, at 85 ("[S]urveillance capitalism . . . produces the possibility of modifying the behaviors of persons and things for profit and control."); Samuel Gibbs, Facebook Apologises for Psychological Experiments on Users, Guardian (July 2, 2014), https://www.theguardian.com/technology/2014/jul/02/facebook-apologises-psychological-experiments-on-users [https://perma.cc/56UY-S372] ("[Facebook's] researchers decided after

in establishing and enforcing community norms but also in their attempts to govern and direct end users through surveillance. The problem of digital curators, which makes them different in kind from twentieth-century mass-media companies, is the far greater danger that they will engage in acts of manipulation and breach of trust through the use of personal data.

In the algorithmic age, many digital companies—and not merely digital curators—take on new kinds of obligations. These new obligations arise from people's increasing dependence on and vulnerability to digital services that collect data about them but whose operations are not transparent to them. Companies that create and maintain these relations of digital dependence and vulnerability should be considered *information fiduciaries* toward their end users.[157]

We rely on digital companies to perform many different tasks for us. In the process, these companies learn a great deal about us, but we do not know very much about their operations.[158] As a result, we are especially vulnerable to them, and we have to trust that they will not betray us or manipulate us for their own ends.

The law has long recognized that clients or patients of professionals like doctors and lawyers are in a similar situation: We need to trust these professionals with sensitive personal informational about ourselves, but they could injure us as a result. Therefore the law treats them as fiduciaries.[159] Fiduciary relationships are relationships of good faith and loyalty toward people who are in special positions of vulnerability. Fiduciaries have special duties of care, confidentiality, and loyalty toward their clients and beneficiaries.[160]

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tweaking the content of people's 'news feeds' that there was 'emotional contagion' across the social network."); Luckerson, supra note 130 (describing how Facebook attempts to manage end users' behavior through personalized news feeds); Tufekci, Facebook's Surveillance Machine, supra note 53 (describing the use of Facebook data by Cambridge Analytica as "an all-too-natural consequence of Facebook's business model, which involves having people go to the site for social interaction, only to be quietly subjected to an enormous level of surveillance").

157. See Jack M. Balkin, Information Fiduciaries and the First Amendment, 49 U.C. Davis L. Rev. 1183, 1209 (2016) [hereinafter Balkin, Information Fiduciaries] ("An information fiduciary is a person or business who, because of their relationship with another, has taken on special duties with respect to the information they obtain in the course of the relationship."); Jack M. Balkin, The Three Laws of Robotics in the Age of Big Data, 78 Ohio St. L.J. 1217, 1228 (2018) [hereinafter Balkin, Three Laws of Robotics] ("When fiduciaries collect and process information about their clients, . . . [t]hey are information fiduciaries.").

158. See Frank Pasquale, The Black Box Society 3–4 (2015) (emphasizing the knowledge asymmetries between digital companies and end users).

159. Tamar Frankel, Fiduciary Law 42–45 (2011) [hereinafter Frankel, Fiduciary Law] (listing traditional fiduciaries, including professionals like doctors and lawyers).

160. See Balkin, Information Fiduciaries, supra note 157, at 1206–08 (describing duties of care, loyalty, and confidentiality); Deborah A. DeMott, Beyond Metaphor: An Analysis of Fiduciary Obligation, 1988 Duke L.J. 879, 882 (explaining that fiduciaries

Because digital companies collect enormous amounts of data about their end users, and use this data to predict and control what end users will do—including, among other things, matching them with advertisers—digital curators are perhaps the most important example of the new information fiduciaries of the digital age.[161] Even so, we should treat the analogy to doctors and lawyers with some care. The kinds of fiduciary duties that a company has depend on the nature of its social role and its business.[162] Digital companies are not trained professionals like doctors and lawyers. They offer a different set of services, consumers expect different things from them, and therefore we should expect that they will not have all of the same obligations as doctors and lawyers.[163]

For example, unlike doctors and lawyers, social media companies and search engines offer their services for free in return for the right to serve targeted ads to their end users. The practice of offering free or heavily subsidized services in return for surveillance and collection of data creates a potential conflict of interest between end users and digital companies. Companies will always be tempted to use the data in ways that sacrifice the interests of their end users to the company's economic or political interests. Nevertheless, unless governments outlaw the practice of financing free (or subsidized) digital products altogether, one must start with the assumption that the law can cure potential conflicts of interest through appropriate regulation; if so, this means that social media companies will be able to monetize personal data in some ways but not in others. Their fiduciary duties will constrain the ways they are allowed to collect, monetize, and employ end-user data. What constitutes a breach of trust depends on the nature of their business, and this, in turn, depends on what consumers would reasonably consider unexpected or abusive for digital companies to do.[164]

A good example of how information fiduciaries should *not* act—and how fiduciary duties would constrain their behavior—is the story of how

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"must be loyal to the interests of the other person" and that "[t]he fiduciary's duties go beyond mere fairness and honesty; they oblige him to act to further the beneficiary's best interests").

161. See Balkin, Algorithmic Society, supra note 6, at 1162; Balkin, Information Fiduciaries, supra note 157, at 1221.

162. See Frankel, Fiduciary Law, supra note 159, at 53 (noting that "[t]he process of recognizing new fiduciary relationships is ongoing," depending on the nature of their services, the power relations and temptations they create, and the ability of institutions and markets to control them); Balkin, Information Fiduciaries, supra note 157, at 1225 ("The duties that we impose on traditional fiduciaries can be fairly extensive; but the duties we might justifiably impose on online service providers may be different and sometimes considerably narrower, especially if we want these duties to be consistent with the First Amendment.").

163. See Balkin, Information Fiduciaries, supra note 157, at 1227–29 (describing three differences between digital-information fiduciaries and traditional fiduciaries).

164. Id. at 1229; see also Tamar Frankel, Fiduciary Law, 71 Calif. L. Rev. 795, 810 (1983) ("Fiduciary relations vary by the extent to which each type of fiduciary can abuse his power to the detriment of the entrustor.").

Facebook allowed third parties to exploit its end users' data. This practice came to light in the Cambridge Analytica scandal in the spring of 2018.[165]

Until the middle of 2014, Facebook had a policy of sharing access to end-user data with third parties, including for-profit companies and academic researchers.[166] This practice offered Facebook additional ways to monetize consumer data.[167] In 2014, Facebook allowed a data scientist, Aleksandr Kogan, to conduct social-science experiments using end-user data.[168] Kogan used Amazon's Mechanical Turk and similar platforms to find people who were willing to take a personality quiz for a few dollars; the participants signed onto the test using their Facebook accounts.[169] This gave Kogan access to the data that Facebook associated with their personal accounts as well as the data of all of their Facebook friends.[170] In this way, Kogan was able to leverage the approximately 300,000 users who took the quiz to obtain access to some 87 million end users' data profiles.[171]

What Kogan did not tell Facebook, however, was that he was secretly working with Cambridge Analytica, a for-profit consulting company that

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165. See Alvin Chang, The Facebook and Cambridge Analytica Scandal, Explained with a Simple Diagram, Vox (May 2, 2018), https://www.vox.com/policy-and-politics/2018/3/23/17151916/facebook-cambridge-analytica-trump-diagram [https://perma.cc/7QCM-5QPZ].

166. Paul Lewis, 'Utterly Horrifying': Ex-Facebook Insider Says Covert Data Harvesting Was Routine, Guardian (Mar. 20, 2018), https://www.theguardian.com/news/2018/mar/20/facebook-data-cambridge-analytica-sandy-parakilas [https://perma.cc/4GPN-NZNJ] [hereinafter Lewis, Covert Data Harvesting] (explaining that under the policy, "'a majority of Facebook users' could have had their data harvested by app developers without their knowledge" (quoting Sandy Parakilas, former platform operations manager at Facebook)).

167. See id. ("Facebook took a 30% cut of payments made through apps, but in return enabled their creators to have access to Facebook user data.").

168. See Carole Cadwalladr & Emma Graham-Harrison, How Cambridge Analytica Turned Facebook 'Likes' into a Lucrative Political Tool, Guardian (Mar. 17, 2018), https://www.theguardian.com/technology/2018/mar/17/facebook-cambridge-analytica-kogan-data-algorithm [https://perma.cc/VJR6-KPCK] [hereinafter Cadwalladr & Graham-Harrison, How Cambridge Analytica Turned Facebook 'Likes'].

169. Id.

170. Id.

171. See Michael Riley et al., Understanding the Facebook-Cambridge Analytica Story: QuickTake, Wash. Post (Apr. 9, 2018), https://www.washingtonpost.com/business/understanding-the-facebook-cambridge-analytica-story-quicktake/2018/04/09/0f18d91c-3c1c-11e8-955b-7d2e19b79966_story.html [https://perma.cc/PKV5-9SGX] (estimating that 300,000 people participated and that 87 million users had their data harvested); Matthew Rosenberg et al., How Trump Consultants Exploited the Facebook Data of Millions, N.Y. Times (Mar. 17, 2018), https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html (on file with the *Columbia Law Review*) ("Only about 270,000 users—those who participated in the survey—had consented to having their data harvested."); Mike Schroepfer, An Update on Our Plans to Restrict Data Access on Facebook, Facebook Newsroom (Apr. 4, 2018), https://newsroom.fb.com/news/2018/04/restricting-data-access/ (on file with the *Columbia Law Review*) (offering an updated estimate of 87 million persons, including some 70 million in the United States, whose data was harvested by Cambridge Analytica).

uses personal data to serve targeted political ads based on psychological profiles constructed from the data.[172] Kogan violated Facebook's platform policy for researchers and scientists by turning over the data to a for-profit company.[173] Facebook learned about the arrangement in 2015 but did not reveal it to the public.[174] It asked Kogan and Cambridge Analytica to delete the data they had harvested but did not ensure that the data was actually erased, and Cambridge Analytica kept the data.[175] When the news of the arrangement leaked out in the spring of 2018, it caused a scandal, and Facebook's founder, Mark Zuckerberg, was asked to testify before Congress.[176] Following the disclosures, Zuckerberg admitted that the company had "made mistakes" and described the scandal as a "breach of trust" toward his end users.[177] That well describes the central issue.

As an information fiduciary, Facebook has three different kinds of duties toward its end users: a duty of confidentiality, a duty of care, and a duty of loyalty.[178] The duties of confidentiality and care mean that Facebook must keep its customers' data confidential and secure. It must make sure that fiduciary duties "run with the data": In other words, Facebook must ensure that anyone who shares or uses the data is equally trustworthy and is legally bound by the same legal requirements of confidentiality, care,

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172. Riley et al., supra note 171 ("Facebook says Kogan 'lied to us' by saying he was gathering the data for research purposes and violated the company's policies by passing the data to Cambridge Analytica[,] . . . a company that 'uses data to change audience behavior,' both commercially and politically, according to its website.").

173. Cadwalladr & Graham-Harrison, How Cambridge Analytica Turned Facebook 'Likes,' supra note 168.

174. Carole Cadwalladr & Emma Graham-Harrison, Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach, Guardian (Mar. 17, 2018), https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election [https://perma.cc/J2BS-QCDW].

175. Id.; see also Paul Grewal, Suspending Cambridge Analytica and SCL Group from Facebook, Facebook Newsroom (Mar. 16, 2018), https://newsroom.fb.com/news/2018/03/suspending-cambridge-analytica/ (on file with the *Columbia Law Review*).

176. Mark Zuckerberg Testimony: Senators Question Facebook's Commitment to Privacy, N.Y. Times (Apr. 10, 2018), https://www.nytimes.com/2018/04/10/us/politics/mark-zuckerberg-testimony.html (on file with the *Columbia Law Review*).

177. Mark Zuckerberg, Facebook (Mar. 21, 2018), https://www.facebook.com/zuck/posts/10104712037900071 (on file with the *Columbia Law Review*) ("This was a breach of trust between Kogan, Cambridge Analytica and Facebook. But it was also a breach of trust between Facebook and the people who share their data with us and expect us to protect it. We need to fix that.").

178. See Frankel, Fiduciary Law, supra note 159, at 106 (describing the duties of care and loyalty); see also Restatement (Third) of Agency § 8.05 (Am. Law Inst. 2006) ("An agent has a duty . . . (2) not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party."); Restatement (Third) of the Law Governing Lawyers §§ 16, 49, 60 (Am. Law Inst. 2000) (stating lawyers' fiduciary duties to respect client confidences); Restatement (Second) of Torts § 874 reporter's note (Am. Law Inst. 1979) ("One breach of fiduciary duty that is more commonly regarded as giving rise to an action in tort is the disclosure of confidential information."); Mark A. Hall, Mary Anne Bobinski & David Orentlicher, Medical Liability and Treatment Relationships 171 (3d ed. 2013) (stating physicians' fiduciary duties of confidentiality).

and loyalty as Facebook is. The company must vet its potential partners to make sure that they are ethical and reliable, subject them to regular audits, and, if they violate the terms of their agreements, it must take steps to get back all the data that the company shared with them.

Facebook failed these duties in several ways. It did not properly limit who could use its data and for what purposes, it did not vet or audit its partners properly, and it did not claw back the data obtained in violation of its policies. In short, it breached its duties of confidentiality and care because it did not keep its data confidential and secure.

Next consider the duty of loyalty. The previous discussion assumed that Facebook would not breach its duty of loyalty simply by serving targeted ads for consumer products in return for free services. In part, that is because people more or less expect that Facebook will serve them ads based on the data it collects. But when Facebook departs from these consumer expectations to benefit itself to the disadvantage of its end users, it may breach its duty of loyalty. The problem arises when Facebook uses the data in unexpected ways that people would find offensive and a breach of trust. The problem is exacerbated when Facebook shares data with third parties without adequate controls over use and disclosure, or when Facebook allows third parties access to its end users by having end users sign in to third-party applications through their Facebook accounts. It is one thing for Facebook to serve you ads for shampoo; it is quite another for Facebook to hand your data off to third parties who have no qualms about manipulating you.

In fact, the Cambridge Analytica scandal appears to have been only the tip of the iceberg. In the hopes of increasing profit margins, Facebook granted access to end users' information to a host of for-profit companies without adequate safeguards as to whether companies were manipulating its end users.[179] This created a conflict of interest because it gave Facebook an incentive to look the other way, which it apparently did.[180] Facebook may have also breached its duty of loyalty by allowing third parties to perform social-science experiments on its end users without the equivalent of a human-subjects review board to minimize harm and to prevent overreaching and manipulation.[181] Finally, if, as critics

179. See Lewis, Covert Data Harvesting, supra note 166 (reporting an account of a former platform-operations manager at Facebook that Facebook deliberately avoided finding out whether and how data was being abused by third parties); Asher Schechter, Roger McNamee: "I Think You Can Make a Legitimate Case that Facebook Has Become Parasitic," ProMarket (Mar. 23, 2018), https://promarket.org/roger-mcnamee-think-can-make-legitimate-case-facebook-become-parasitic/ [https://perma.cc/WNZ3-AC2H] (describing an interview with Roger McNamee, an early Facebook investor, who argued that "Facebook's algorithms and business model essentially enable bad actors to harm innocent people" (internal quotation marks omitted)).

180. See Lewis, Covert Data Harvesting, supra note 166.

181. See Rey Junco, Why Facebook's User Manipulation Research Study Is Ethically Troubling, Venture Beat (July 6, 2014), https://venturebeat.com/2014/07/06/why-facebooks-user-manipulation-research-study-is-ethically-troubling/ [https://perma.cc/8BV8-LFPB] (arguing

charge, Facebook designed its applications and employed its end users' data to psychologically manipulate and addict them to the site,[182] it would also have breached its duty of loyalty, creating a conflict of interest between the company and its end users.

The duties of information fiduciaries depend in part on what is reasonable to expect from them given their business models. But the most general obligation of digital-information fiduciaries is that they may not act like con artists.[183] They may not induce trust in their end users to obtain personal information from them and then turn around and betray that trust by harming and manipulating them for the company's own benefit. Digital businesses may not hold themselves out as providing safe and welcoming digital communities that respect privacy and then manipulate their end users; nor should they be permitted to give access to end-user data to third parties who will not accept similar duties of care, confidentiality, and good faith.[184]

Although companies can violate these duties when they violate their privacy policies, fiduciary duties extend beyond the precise terms of those privacy policies to duties of good faith, respect, and nonmanipulation.[185] Social media companies engage in manipulation when—under conditions of extreme information asymmetry and vulnerability—end users must provide information about themselves in order to use the service, and companies use this information in ways that both benefit the

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that some social media experiments should require an institutional review board and that "[r]esearchers are obliged not only to ensure they do no harm, but also to maximize the potential benefits[,] . . . minimize the potential harms of a study," and put checks and balances in place). But see Timothy J. Ryan, On the Ethics of Facebook Experiments, Wash. Post (July 3, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/07/03/on-the-ethics-of-facebook-experiments/ [https://perma.cc/9TFN-8DLF] (arguing that fears of manipulation are overblown and that many experiments do not require informed consent from human subjects).

182. See Mike Allen, Sean Parker Unloads on Facebook: "God Only Knows What It's Doing to Our Children's Brains," Axios (Nov. 9, 2017), https://www.axios.com/sean-parker-unloads-on-facebook-god-only-knows-what-its-doing-to-our-childrens-brains-1513306792-f855e7b4-4e99-4d60-8d51-2775559c2671.html [https://perma.cc/B8JV-FASH] (quoting a statement by the former president of Facebook that social media applications are designed to "exploit[] a vulnerability in human psychology" using psychological methods to "consume as much of your time and conscious attention as possible" and keep users locked into the site (internal quotation marks omitted)); Paul Lewis, 'Our Minds Can Be Hijacked': The Tech Insiders Who Fear a Smartphone Dystopia, Guardian (Oct. 6, 2017), https://www.theguardian.com/technology/2017/oct/05/smartphone-addiction-silicon-valley-dystopia [https://perma.cc/P9AA-CU2X] (interviewing former employees at Google and Facebook who report that technologies are designed to addict users and monopolize their attention).

183. See Balkin, Algorithmic Society, supra note 6, at 1163; Balkin, Information Fiduciaries, supra note 157, at 1224.

184. See Balkin, Three Laws of Robotics, supra note 157, at 1229–30.

185. Balkin, Information Fiduciaries, supra note 157, at 1225–26 ("Digital information fiduciaries may be held to reasonable ethical standards of trust and confidentiality, even if they do not make specific representations, because of the nature and kind of business they are in.").

fiduciary and harm the end user. Governments may act to protect these obligations of good faith, respect, and nonmanipulation, which sound both in consumer protection and privacy.

Digital curators operating in the United States may object to any regulation of their operations on the ground that the First Amendment protects their right to collect, collate, analyze, use, and distribute data as they choose. Although the Supreme Court has suggested that data is speech,[186] the protection of fiduciary relationships between social media companies and their end users should be constitutional for two reasons.

First, information gathered by digital curators in the context of a fiduciary relationship is not part of public discourse any more than the information gathered in the course of other fiduciary relationships like those between clients and doctors, lawyers, and estate managers.[187] The First Amendment allows governments to regulate fiduciaries' collection, collation, use, and distribution of personal information to prevent overreaching and breach of trust.[188] In the same way, the First Amendment should not foreclose regulations designed to protect the relationships of trust between the new class of digital-information fiduciaries and their end users.

Second, Congress can avoid any potential constitutional difficulties under the First Amendment by creating safe harbors for digital companies as described above.[189] Professor Jonathan Zittrain and I have proposed a Digital Millennium Privacy Act under which the federal government would preempt state regulation if digital media companies accept the obligations of information fiduciaries toward their end users.[190] Offering digital media companies greater protections than the Constitution affords as part of a grand bargain to protect end users should be constitutional.

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186. See Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011) ("[T]he creation and dissemination of information are speech within the meaning of the First Amendment."); see also Jane Bambauer, Is Data Speech?, 66 Stan. L. Rev. 57, 71–72 (2014) (arguing that data should be treated as speech for purposes of the First Amendment).

187. Balkin, Information Fiduciaries, supra note 157, at 1209–10, 1215–20.

188. Id. at 1215–20; see also Lowe v. SEC, 472 U.S. 181, 210–11 (1985) (distinguishing between regulation of investment advisors addressing the general public and regulation of advisors counseling individual clients in order to prevent "fraud, deception, or overreaching"); Robert C. Post, Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State 22–23 (2012) (arguing that a central distinction in First Amendment law is between public discourse, which the state can regulate only in limited ways, and professional speech, which the state can regulate broadly to protect the interests of clients and beneficiaries).

189. See supra notes 146–153 and accompanying text.

190. See Jack M. Balkin & Jonathan Zittrain, A Grand Bargain to Make Tech Companies Trustworthy, Atlantic (Oct. 3, 2016), https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346/ [https://perma.cc/4QK5-SLFY] (proposing that if digital businesses "agree to a set of fair information practices, including security and privacy guarantees, . . . the federal government would preempt a wide range of state and local laws" affecting them).

CONCLUSION

Free speech today is a triangle. Its three corners are nation-states, private infrastructure, and speakers.

This triangle creates three problems: (1) new-school speech regulation that produces collateral censorship and digital prior restraint; (2) abuse by privatized bureaucracies that govern end users arbitrarily and without due process and transparency; and (3) digital surveillance that facilitates manipulation.

Three reforms will help address these problems: (1) structural regulation that promotes competition and prevents discrimination by payment systems and basic internet services; (2) guarantees of curatorial due process; and (3) the recognition of a new class of information fiduciaries with duties of trustworthiness and good faith toward their end users.

A PROGRESSIVE LABOR VISION OF THE FIRST AMENDMENT: PAST AS PROLOGUE

*Catherine L. Fisk**

Any progressive agenda for change will require robust exercise of speech and associational rights that law currently restricts for labor unions. Although the Supreme Court's conservative First Amendment judicial activism has raised doubts about whether constitutional protection for free speech can serve progressive ends, this Essay identifies a silver lining to the deregulatory use of the First Amendment. The Roberts Court's extension of heightened First Amendment scrutiny to regulation, like labor law, that was formerly deemed economic and subject to rational basis review provides an opportunity for progressive activists. Not only does labor protest today resemble the labor protest that the Court deemed protected free speech in the late 1930s, but the constitutional line between labor and civil rights protest that emerged between 1950 and 1965 has not survived the conditions that gave rise to it. Restoring the First Amendment protection that labor protest once enjoyed will not jeopardize antitrust or other regulation of expressive conduct in the workplace. The intellectual credibility of the First Amendment under any theory of free speech jurisprudence—whether in enabling democratic government, facilitating the discovery of truth, advancing autonomy, or promoting tolerance—depends on even-handed protection for peaceful expression in public forums on matters of public concern.

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INTRODUCTION

The First Amendment was once the banner under which labor and civil rights activists mobilized to create a more equitable political economy.[1] That activism paid off. By 1940, in the case of labor,[2] and 1963, in the case of civil rights,[3] activists had won both First Amendment protection and major legislative changes, including the National Labor Relations Act of 1935[4] (NLRA) and the Civil Rights Act of 1964.[5] Those political wins reduced Gilded Age inequality[6] and ended aspects of Jim Crow.[7]

Labor protest is rarer than it once was, but it remains powerful. In spring 2018, teachers in half a dozen states engaged in massive strikes and protest rallies that, in some states, spurred partial legislative reversals of education funding cuts, galvanized new political engagement by ordinary citizens, and forced reconsideration of the politics of tax and funding cuts.[8] To the extent that constitutional protection for picketing and rallies in public forums enables this kind of action, the Free Speech Clause remains "essential to the poorly financed causes"[9] of those seeking

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1. See Risa Goluboff, The Lost Promise of Civil Rights 30–32 (2013) (describing civil rights leaders' use of First Amendment freedom of speech and freedom of association guarantees to mobilize activists); Laura Weinrib, The Taming of Free Speech 1–2 (2017) (explaining how the American Civil Liberties Union advocated a "freedom to espouse" the labor movement's redistributive aims using the First Amendment).

2. See Thornhill v. Alabama, 310 U.S. 88, 101–05 (1940) (striking down an Alabama statute that criminalized various union-organizing activities as an unconstitutional restraint on freedom of speech).

3. See Edwards v. South Carolina, 372 U.S. 229, 235–38 (1963) (reversing on First Amendment grounds breach of the peace convictions of individuals who assembled on South Carolina state grounds to peacefully protest racially discriminatory state actions).

4. Ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

5. Pub L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h (2012)).

6. See, e.g., William E. Forbath, The Distributive Constitution and Workers' Rights, 72 Ohio St. L.J. 1115, 1129–30 (2011) (discussing how the NLRA "upended whole constellations of social power").

7. See, e.g., Julian Maxwell Hayter, To End Divisions: Reflections on the Civil Rights Act of 1964, 18 Rich. J.L. & Pub. Int. 499, 506–11 (2015) (surveying the positive effects of the Civil Rights Act of 1964 in addressing inequality in education, economic opportunity, and public accommodation).

8. See Melissa Daniels, Teachers Channel Momentum from Strikes into Midterm Races, U.S. News & World Report (May 17, 2018), http://www.usnews.com/news/us/articles/2018-05-17/teachers-who-led-strikes-now-turning-focus-to-elections (on file with the *Columbia Law Review*) (describing political actions galvanized by teacher strikes and rallies); Dana Goldstein & Alexander Burns, Teacher Walkouts Threaten Republican Grip on Conservative States, N.Y. Times (Apr. 12, 2018), http://www.nytimes.com/2018/04/12/us/teacher-walkouts-threaten-republican-grip-on-conservative-states.html (on file with the *Columbia Law Review*) (describing political consequences of teacher protests); Steven Greenhouse, Making Teachers' Strikes Illegal Won't Stop Them, N.Y. Times (May 9, 2018), http://www.nytimes.com/2018/05/09/opinion/teacher-strikes-illegal-arizona-carolina.html (on file with the *Columbia Law Review*) (assessing the political effects of teacher protests in six states).

9. Martin v. City of Struthers, 319 U.S. 141, 146 (1943).

to combat low wages, rising economic inequality, declining union density, criminalization of immigration, and outsourcing and subcontracting.[10]

The First Amendment now seems less friend than foe of egalitarian values. The well-heeled have used it to deregulate campaign finance,[11] invalidate protections for workers and consumers,[12] and attack civil rights laws[13] and reproductive freedom.[14] As one critic on the left said, what was once "a shield for . . . the dispossessed, has become a sword for authoritarians, racists and misogynists, Nazis and Klansmen, pornographers and corporations buying elections."[15]

Nevertheless, progressives would be mistaken to abandon the Free Speech Clause[16] because the new First Amendment offers promise along with peril for progressive causes.[17] Its promise is to legalize forms of labor

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10. See, e.g., Chris Zepeda-Millán, Latino Mass Mobilization: Immigration, Racialization, and Activism 25–40 (2017).

11. See Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018) (declaring as unconstitutional statutes and public employer labor agreements requiring union-represented employees to pay their pro rata share of the union's costs incurred in bargaining and contract administration).

12. See Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1151 (2017) (holding that a law regulating how cash discounts and credit card surcharges are advertised requires First Amendment scrutiny); Sorrell v. IMS Health Inc., 564 U.S. 552, 579–80 (2011) (holding unconstitutional a law regulating the sale of physician prescription information); Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015) (invalidating an agency rule that imposed on companies certain conflict mineral disclosure requirements); Am. Meat Inst. v. USDA, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc) (sustaining an agency rule requiring disclosure of the country of origin of commodities); cf. Chamber of Commerce v. NLRB, 721 F.3d 152, 154 (4th Cir. 2013) (invalidating an agency rule requiring employers to post notice of employee rights).

13. See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018) (declining to address whether a baker's discrimination against gay customers violated the Free Speech or Free Exercise Clauses).

14. See Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2368, 2375–78 (2018) (declaring unconstitutional a California law that required unlicensed crisis pregnancy centers to disclose that they are not licensed to provide medical services, and licensed centers to disclose to patients the availability of low-cost abortion services at other facilities within the state). See generally Charlotte Garden, The Deregulatory First Amendment at Work, 51 Harv. C.R.-C.L. L. Rev. 323 (2016) (highlighting the "potentially calamitous" effects of deregulatory First Amendment theories on workers); Amanda Shanor, The New *Lochner*, 2016 Wis. L. Rev. 133 (exploring the deregulatory application of the First Amendment in an administrative law context and analyzing its implications).

15. Adam Liptak, How Conservatives Weaponized the First Amendment, N.Y. Times (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Catharine A. MacKinnon, The First Amendment: An Equality Reading, *in* The Free Speech Century (Lee C. Bollinger & Geoffrey R. Stone eds.) (forthcoming Dec. 2018)).

16. Cf. Louis Michael Seidman, Can Free Speech Be Progressive?, 118 Colum. L. Rev. 2219, 2223 (2018) ("There is no doubt that the assertion of free speech rights can advance progressive goals in particular times and places.").

17. See Catherine Fisk & Jessica Rutter, Labor Protest Under the New First Amendment, 36 Berkeley J. Emp. & Lab. L. 277, 328 (2015) ("*Citizens United*, *McCutcheon*, and *Sorrell* clearly hold that the First Amendment protects speech by economic actors, that

protest that have been illegal for half a century since the Taft–Hartley Act of 1947 imposed viewpoint- and speaker-discriminatory restrictions on labor union speech.[18] The Supreme Court never held that the government has a *compelling* interest in preventing picketing aimed at organizing a union,[19] or in preventing calls for a boycott of a business due to unfair practices in its supply chain,[20] because the Court treated restrictions on labor protest as economic regulation that it sustained under the 1940s version of deferential rational basis review. The Court's recent embrace of strict scrutiny for economic regulation opens up an avenue of new constitutional attack.[21] If restrictions on data mining,[22] street directional signs,[23] sidewalk anti-abortion protests,[24] and homophobic funeral picketing are unconstitutional,[25] it defies logic to suggest that restrictions on peaceful union protest about working conditions are constitutional. If price advertising is speech protected by the First Amendment,[26] labor cost advocacy should be too.

Advocates should consider potential consequences before seeking to invalidate Taft–Hartley's restrictions on labor protests on First Amendment

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strict scrutiny applies to content and speaker discrimination, and that workers and unions enjoy at least the same speech rights as corporations."). But see NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers Union, Local 433, 891 F.3d 1182, 1187 (9th Cir. 2018) (holding that peaceful picketing at a government building is not protected by the First Amendment under Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015), because the statute prohibits "these forms of harassing and intimidating conduct" and other "conventional avenues of government protest remain available for Ironworkers").

18. As will be explained below, the NLRA as amended by Taft–Hartley prohibits labor organizations and their agents (but no one else) from picketing or encouraging a strike or boycott when the advocacy is directed at organizing a union, demanding employer recognition of a union, or coordinating a secondary boycott. 29 U.S.C. § 158(b)(4), (7) (2012).

19. This is organizational and recognitional picketing prohibited by 29 U.S.C. § 158(b)(7).

20. This is secondary boycott activity prohibited by 29 U.S.C. § 158(b)(4).

21. It must be acknowledged, however, that federal courts have rejected recent constitutional challenges to restrictions on labor protest, pointing to the Supreme Court cases from the 1950s to 1980 upholding these statutes and insisting it is up to the high court, not the courts of appeals, to reconcile its recent First Amendment jurisprudence with the older decisions. See *Local 433*, 891 F.3d at 1186 (citing NLRB v. Retail Store Emps. Union, Local 1001, 447 U.S. 607 (1980), and holding that peaceful picketing at a government building that had been proscribed by section 8(b)(4) of the NLRA is not protected by the First Amendment and that *Reed* did not change the governing labor law); NLRB v. Teamsters Union Local No. 70, 668 F. App'x 283, 284 (9th Cir. 2016) (rejecting a similar challenge).

22. Sorrell v. IMS Health Inc., 564 U.S. 552, 580 (2011) (invalidating a law restricting the sale of prescriber-identifying information).

23. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015) (holding a street sign ordinance unconstitutional).

24. McCullen v. Coakley, 134 S. Ct. 2518, 2541 (2014) (holding a prohibition on sidewalk anti-abortion "counseling" unconstitutional).

25. Snyder v. Phelps, 562 U.S. 443, 458–59 (2011) (holding unconstitutional a tort judgment for emotional distress caused by homophobic funeral picketing).

26. Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1151 (2017) (treating a state law regulating price differentials for cash and credit card transactions as a speech regulation and remanding to the court of appeals to consider its constitutionality).

grounds. A successful challenge (or even an unsuccessful one) will further smudge the line between economic regulations that have been presumptively constitutional since 1937 and laws regulating political speech that are constitutionally suspect.[27] That line—though often breached in cases involving Communist Party membership or other allegedly dangerous speech—was essential to as much of a détente in free speech battles as the United States ever had.[28] Laws restricting labor speech were an important aspect of mid-twentieth-century economic regulation that aimed to manage the countervailing forces of labor and capital.[29] Economic regulation depends on adhering to a constitutional distinction between political activism and economic behavior, even though both involve speech.[30] Challenging laws that have long been on the economic side of the line risks inviting and legitimating challenges to other regulations of speech in or around the workplace. And, the argument continues, once the line between economic and political expression is breached, there is no reason to expect conservative federal courts to reject challenges to labor and employment discrimination laws restricting allegedly coercive employer speech. As Professors Laura Weinrib and Jeremy Kessler point out, the history of free speech in the courts gives reason to be skeptical of claims that the Supreme Court or other courts will use the First Amendment to aid the efforts of progressive challengers to economic

27. See Jeremy Kessler, The Early Years of First Amendment Lochnerism, 116 Colum. L. Rev. 1915, 1918 (2016) (outlining a history of "First Amendment Lochnerism" as the judicial conflation of economic and civil libertarianism).

28. The line between permissible regulation of economic activity, including speech, and impermissible regulation of political activity was never clear and courts did not always adhere to it. From 1942 through the 1970s, the period when the *Carolene Products* Footnote Four theory prescribed upholding economic regulation and striking down laws burdening fundamental rights and discrete and insular minorities, the courts rejected numerous constitutional challenges to denials of speech and association rights of labor, alleged Communists, and civil rights activists. See, e.g., Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 102–03 (1961) (rejecting a constitutional challenge to a law requiring that communist organizations register with the federal government); Dennis v. United States, 341 U.S. 494, 516–17 (1951) (rejecting a First Amendment challenge to indictments under the Smith Act, which made it a crime to teach the desirability of overthrowing by force or violence any government in the United States , or to print or disseminate literature so teaching, or to help organize a group to so teach). Nevertheless, accepting that the normative argument against seeking First Amendment protection for labor protest rests on respect for a discernable line between political and economic regulation, this Essay argues that labor protest is on the political side.

29. See Luke P. Norris, Labor and the Origins of Civil Procedure, 92 N.Y.U. L. Rev. 462, 544 (2017) ("The crafters of the [Norris–LaGuardia Act] were concerned with issues of corporate concentration and bargaining disparities between institutionalized firms and diffuse workers . . . .").

30. See, e.g., Robert Post & Amanda Shanor, Adam Smith's First Amendment, 128 Harv. L. Rev. Forum 165, 170 (2015), https://harvardlawreview.org/2015/03/adam-smiths-first-amendment [https://perma.cc/33DX-DPCD] ("Commercial speech doctrine was invented with the clear understanding that the state would be freer to regulate in the domain of commercial speech than it was 'in the realm of noncommercial expression.'" (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978))).

inequality.[31] That may be true, as a matter of prediction. But what *will* happen in the law is different from what *should* happen. Belief in doctrinal consistency and in the importance of labor protest to progressive and democratic governance compels consideration of why challenging the restrictions on labor protest should be part of a progressive vision of the Free Speech Clause.

The Court's determination to erase the First Amendment line between political and economic speech in the labor law realm could hasten the demise of unions, but it could also aid their resurgence. The demise has been a Roberts Court project. In *Janus v. AFSCME*, the Court invalidated statutes and collective bargaining agreements in twenty-two states, the District of Columbia, and Puerto Rico that required union-represented government employees to pay fees for their fair share of the cost of negotiating and administering a collective bargaining agreement.[32] Explaining why collective bargaining should be regarded as a form of political speech for which financial support cannot be compelled, the five Republican-appointed Justices noted that labor costs have a substantial budget impact and bargaining implicates education, health care, anti-discrimination, and other policy.[33] The *Janus* majority denied the existence of a line between "political" and "economic" regulation in just the way that Justice Frankfurter did when the Court first began applying constitutional free speech principles to union security and union dues provisions.[34] But *Janus* drew precisely the opposite conclusion. For Frankfurter, the fact that unions pursued worker interests through "political" action as well as through the "economic" channels of collective bargaining meant that labor unions were economic actors; on that basis, he wrote numerous majority opinions upholding laws regulating their speech against First Amendment challenge.[35] For the *Janus* majority, that unions pursue worker

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31. See Weinrib, supra note 1, at 13 ("[Labor radicals] knew how often courts had blocked the way to democratic change. . . . We are still living with the legacy of the deal they struck."); Kessler, supra note 27, at 1918 ("[T]he worry that aggressive judicial enforcement of the First Amendment might enhance the economic power of some private actors at the expense of other private and public interests has a long history.").

32. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2485–86 & n.27 (2018).

33. Id. at 2475. In reaching this decision, the Court relied on its earlier decision in Harris v. Quinn, 134 S. Ct. 2618, 2639, 2642 (2014), which invalidated fair share fees for home health aides paid with public funds under Medicare or Medicaid. See *Janus*, 138 S. Ct. at 2465. In *Harris v. Quinn*, the five conservative Justices likewise emphasized that the subjects of collective bargaining—"increased wages and benefits"—are a "matter of great public concern." 134 S. Ct. at 2642–43.

34. Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 814 (1961) (Frankfurter, J., dissenting) ("The notion that economic and political concerns are separable is pre-Victorian. Presidents of the United States and Committees of Congress invite views of labor on matters not immediately concerned with wages, hours, and conditions of employment.").

35. Among Justice Frankfurter's numerous majority opinions for the Court in labor picketing cases, many upheld state and federal court injunctions against picketing. See, e.g., Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 295 (1957) (upholding a

interests through political actions as well as bargaining means that all union speech raises constitutional issues.[36] But if all union speech is political, that must mean that restrictions on union speech are unconstitutional. The Court cannot have it both ways: It cannot be that all speech by and about unions is political except when union supporters gather in a public forum to urge workers and consumers to boycott. If regulation of the funding that enables collective bargaining violates the First Amendment, regulation of labor protest should too.[37]

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state court injunction against picketing seeking to organize a workplace on the ground that the picketing would coerce the employer to coerce the employees to join the union); Int'l Bhd. of Teamsters, Local 309 v. Hanke, 339 U.S. 470, 479 (1950) (upholding a state court injunction against peaceful picketing seeking to organize sole proprietors on the ground that the state deemed the object of the picketing unlawful); Hughes v. Superior Court, 339 U.S. 460, 468 (1950) (upholding a state court injunction against civil rights picketing); Carpenters & Joiners Union, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 727–28 (1942) (upholding a state court injunction against secondary picketing on the ground that the state is justified in limiting picketing to "the area of the industry within which a labor dispute arises"); Hotel & Rest. Emps.' Int'l All., Local No. 122 v. Wis. Emp't Relations Bd., 315 U.S. 437, 439 n.1 (1942) (upholding a state court injunction against picketing that had been accompanied by use of force to block ingress and egress from a business); Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 294 (1941) (rejecting a First Amendment challenge to a state court injunction against picketing of dairies).

In a few cases, however, Justice Frankfurter wrote majority opinions that struck down injunctions against peaceful labor picketing. See, e.g., Cafeteria Emps. Union, Local 302 v. Angelos, 320 U.S. 293, 295 (1943) ("[H]ere we have no attempt by the state through its courts to restrict conduct justifiably found to be an abusive exercise of the right to picket."); AFL v. Swing, 312 U.S. 321, 325 (1941) ("Such a ban of free communication is inconsistent with the guarantee of freedom of speech.").

36. The NLRA authorizes a union chosen by a majority to be the exclusive bargaining representative of all represented workers. 29 U.S.C. § 159(a) (2012). If deeming a union authorized to speak on behalf of another is compelled speech, the exclusive representation principle of the NLRA is constitutionally problematic. In *Janus*, the Court invited a constitutional challenge to the principle of majority rule in union representation. See *Janus*, 138 S. Ct. at 2460 (remarking that "[d]esignating a union as the employees' exclusive representative substantially restricts the rights of individual employees"); id. at 2478 (noting that the Court "simply draw[s] the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views"). Numerous cases have been filed in lower courts arguing that exclusive representation is unconstitutional; all such cases failed before *Janus*. See, e.g., Hill v. Serv. Emps. Int'l Union, 850 F.3d 861, 864–66 (7th Cir. 2017); Jarvis v. Cuomo, 660 F. App'x 72, 74–75 (2d Cir. 2016); D'Agostino v. Baker, 812 F.3d 240, 241–42 (1st Cir. 2016); Bierman v. Dayton, 227 F. Supp. 3d 1022, 1031–32 (D. Minn. 2017), aff'd, 900 F.3d 570 (8th Cir. 2018); Mentele v. Inslee, No. C15-5134-RBL, 2016 WL 3017713, at *4 (W.D. Wash. filed Mar. 4, 2015).

37. The contention that the Taft–Hartley Act's restrictions on labor protest are unconstitutional is not novel. See, e.g., James G. Pope, The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole, 11 Hastings Const. L.Q. 189, 195 n.35 (1984) (summarizing cases in which Taft–Hartley Act restrictions on labor speech have been challenged); see also Cynthia Estlund, Are Unions a Constitutional Anomaly?, 114 Mich. L. Rev. 169, 225–28 (2015); Charlotte Garden, Citizens, United and *Citizens United*: The Future of Labor Speech Rights?, 53 Wm. & Mary L. Rev. 1, 18–19 (2011) (noting that First Amendment challenges to the NLRA's restrictions on labor picketing "have often

To use *Janus* and the Court's other First Amendment cases to rebuild labor action requires charting a doctrinal path that enables the invalidation of restrictions on labor protest without compelling invalidation of restrictions on employer anti-union speech or even the right of a union selected by the majority to represent (speak on behalf of) all workers in the workplace. The past offers a guide. The antipicketing decisions of the 1940s and 1950s were based on now-discredited rules that labor protest was conduct, not pure speech, and that government could prohibit peaceful picketing in "a broad field" to "enforc[e] some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts."[38] The Court rejected those ideas in the 1960s and 1970s when it extended First Amendment protection to antiwar and civil rights advocacy.[39] The last Supreme Court labor protest cases, from the 1980s, distinguished the civil rights cases and rejected First Amendment challenges by saying that labor picketing and boycotts are, by their nature, coercive.[40] But it is no longer plausible to say that labor picketing or calls for secondary boycotts are coercive and civil rights protest is not. The Court, moreover, has long distinguished between speech on matters of public concern in traditional public forums and laws regulating coercive, harassing, or threatening speech inside the workplace.[41]

Part I shows that the cases granting broad protection for labor and civil rights activism in the late 1930s and early 1940s remain good law. Not only does labor protest today resemble the labor protest that the Court protected in that era and the civil rights protest of the 1960s, the

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failed based on the rationale that picketing is at least partly coercive conduct, which the First Amendment does not protect").

38. *Vogt*, 354 U.S. at 293.

39. See Cox v. Louisiana, 379 U.S. 536, 558 (1965) (overturning on First Amendment grounds convictions for disturbing the peace in which individuals engaged in peaceful parades and meetings to protest racial segregation); Edwards v. South Carolina, 372 U.S. 229, 235–38 (1963) (holding that a conviction based on evidence that speech merely "stirred people to anger" may not stand (internal quotation marks omitted) (quoting Terminiello v. City of Chicago, 337 U.S. 1, 5 (1949))).

40. See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 584 (1988) (distinguishing persuasive and coercive picketing and handbilling); Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 226 (1982) (holding a partial work stoppage as part of a secondary boycott to be coercive and therefore not protected by the First Amendment); NLRB v. Retail Store Emps. Union, Local 1001, 447 U.S. 607, 616 (1980) (holding that asking consumers to engage in a secondary boycott is coercive, and therefore not constitutionally protected, when the target business is heavily dependent on the struck product).

41. See R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) (holding a hate speech law to be unconstitutional but saying in dictum that the government may prohibit sexually harassing speech as part of "Title VII's general prohibition against sexual discrimination in employment practices"). Compare Pleasant Grove City v. Summum, 555 U.S. 460, 469–70 (2009) (holding that government content regulation of speech in public streets and parks must satisfy strict scrutiny, though the government's own speech need not, and a monument in a park is government speech), with NLRB v. Gissel Packing Co., 395 U.S. 575, 617–20 (1969) (rejecting a First Amendment challenge to the NLRB's restriction of employer speech threatening retaliation against employees who vote to unionize).

constitutional dividing line between labor and civil rights protest that emerged between 1950 and 1965 has not survived the conditions that gave rise to it. Part II identifies in the Court's recent First Amendment cases a basis for distinguishing or overruling the labor picketing and secondary boycott cases from the late 1940s and 1950s. Part III explains why labor protest is political speech, not economic activity, why labor picketing and boycotts are not coercive, and why restoring 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.

I. LABOR PROTEST AND THE FIRST AMENDMENT IN THE TWENTIETH CENTURY

The modern First Amendment protections for contemporary civil liberties and civil rights are the product of mass worker activism of the 1920s and 1930s.[42] Until the late 1930s, courts had treated labor picketing as either a crime or a tort, or both, and presumed picketing wrongful unless justified in particular circumstances.[43] Under that vague nineteenth-century standard, government could criminalize or enjoin protest that advocated any objective the state considered unlawful or punish advocacy of a lawful objective through an improper means. The law began to change in 1937, when the Court upheld a Wisconsin law that stripped state courts of the power to issue injunctions in certain labor disputes.[44] And then, in 1939 and 1940, with ringing endorsements of constitutional protection for labor leafleting[45] and picketing,[46] the Court delivered canonical rulings requiring heightened judicial scrutiny of restrictions on political speech in public forums.

Nevertheless, many or most state courts persisted in enforcing common law rules that concerted labor activities could be directed only toward "lawful labor objectives" even after the Supreme Court held picketing to be protected by the First Amendment.[47] The persistence of such state court injunctions against labor protest,[48] along with NLRB enforcement of

42. See Goluboff, supra note 1, at 30–36; Weinrib, supra note 1, at 1–2.

43. See Ludwig Teller, Picketing and Free Speech, 56 Harv. L. Rev. 180, 180–82 (1942).

44. Senn v. Tile Layers Protective Union, 301 U.S. 468, 478, 481 (1937). The Wisconsin law was similar to the Norris–LaGuardia Act of 1932, 29 U.S.C. §§ 101–115 (2012).

45. Schneider v. New Jersey, 308 U.S. 147, 164–65 (1939); Hague v. Comm. for Indus. Org., 307 U.S. 496, 505 (1939).

46. Carlson v. California, 310 U.S. 106, 113 (1940); Thornhill v. Alabama, 310 U.S. 88, 105–06 (1940).

47. See Barbara Nachtrieb Armstrong, Where Are We Going with Picketing? Intra-Union Coercion Is Not Free Speech, 36 Calif. L. Rev. 1, 34–35 (1948).

48. See, e.g., Cameron v. Johnson, 390 U.S. 611, 622 (1968) (rejecting a void for vagueness challenge against the enforcement of a state law prohibiting civil rights picketing); Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 295 (1957) (upholding a state court injunction against picketing to organize workers); Local Union No. 10, United Ass'n

federal restrictions on picketing and boycotts enacted in 1947 and 1959,[49] prompted the Court to decide well over fifty cases involving the legality of sidewalk speech about working conditions.[50] Most involved picketing by workers affiliated with labor unions, but some involved civil rights. The Court granted robust protection for labor protest from 1939 to 1942,[51]

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of Journeymen Plumbers v. Graham, 345 U.S. 192, 201 (1953) (upholding a state court injunction against picketing at a construction site urging a general contractor to deal only with unionized subcontractors); Hughes v. Superior Court, 339 U.S. 460, 469 (1950) (upholding a state court injunction against picketing urging a grocery store to cease employment discrimination against African Americans and to hire more African Americans); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 504 (1949) (upholding a state court injunction against picketing wholesalers urging them to deal only with unionized delivery drivers); Bakery & Pastry Drivers Local 802 v. Wohl, 315 U.S. 769, 775 (1942) (reversing a state court injunction against picketing at a place where drivers picked up goods and where they delivered goods).

49. See infra note 99 and accompanying text (describing NLRB rules distinguishing protected from unprotected forms of labor speech).

50. See, e.g., *Thornhill*, 310 U.S. 88 (finding that the First Amendment protects labor protest in one of the Court's earliest First Amendment decisions on labor picketing). The most recent include FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (rejecting First Amendment protection for a boycott protesting low pay for indigent criminal defense lawyers); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (holding that the First Amendment protects civil rights boycotting); Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212 (1982) (holding that the First Amendment does not protect labor boycotting). In a pair of cases handed down the same day, the Court held that the constitution protects civil rights picketing, Carey v. Brown, 447 U.S. 455 (1980), and does not protect labor picketing, NLRB v. Retail Store Emps. Union, Local 1001, 447 U.S. 607 (1980). The law review literature on the Court's picketing decisions is abundant and largely, but not uniformly, critical of the Court's handiwork. See, e.g., Armstrong, supra note 47; Pope, supra note 37.

51. See Cafeteria Emps. Union, Local 302 v. Angelos, 320 U.S. 293, 296 (1943) (holding that "the right to picket" cannot be revoked "merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing"); *Wohl*, 315 U.S. at 774 (holding that "one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive"); AFL v. Swing, 312 U.S. 321, 325 (1941) (holding that the guarantee of freedom of speech is infringed when state common law forbids "'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him"); *Carlson*, 310 U.S. at 112–13 (holding that a county ordinance which "proscribed the carrying of signs" in the "vicinity of a labor dispute to convey information about the dispute" unconstitutionally "abridges liberty of discussion"); *Thornhill*, 310 U.S. at 102–03 (holding that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution"); Schneider v. State (Town of Irvington), 308 U.S. 147, 160 (1939) ("The freedom of speech and of the press secured by the First Amendment against abridgement by the United States is similarly secured to all persons by the Fourteenth against abridgement by a state."); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (holding that an ordinance which allowed "arbitrary suppression of free expression of views on national affairs" in state parks to be "void upon its face" for abridging the privileges and immunities of citizens of the United States under the Fourteenth Amendment).

pared back protection between 1942 and 1950,[52] and then expanded protection for civil rights picketing beginning in 1963[53] without reconciling the civil rights and labor cases.[54]

In the expansive period from 1939 to 1942, the Court reversed injunctions against peaceful picketing because it found them to restrict speech on matters of public concern.[55] This was true even when the picketers were not employed by the targeted business,[56] or the picketers had organized for the benefit of independent-contractor peddlers rather than employees,[57] or the signs falsely accused the business of selling bad products and its customers of "aiding the cause of Fascism."[58] "Free discussion concerning the conditions in industry and the causes of labor disputes," the Court held, was "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."[59] Moreover, "satisfactory hours and wages and working conditions" were crucial to the "health of the present generation and of those as yet unborn."[60] The Court treated peaceful picketing as persuasion, not coercion, even though the persuasion might inflict economic harm or

52. See, e.g., *Vogt*, 354 U.S. at 293–95 (holding that a state may constitutionally enjoin peaceful picketing aimed at coercing an employer to put pressure on his employees to join a union in violation of the declared state policy); *Giboney*, 336 U.S. at 498 (holding that a state may prohibit peaceful picketing when the sole purpose of the picketing is to restrain the freedom of trade in violation of a state penal statute); Carpenters & Joiners Union, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 726–38 (1942) (holding that the state's injunction against picketing against a restaurant "which industrially has no connection to the [labor] dispute" by union members did not violate the Fourteenth Amendment); Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 296–98 (1941) (holding that a state can authorize its courts "to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation").

53. See Cox v. Louisiana, 379 U.S. 559, 571 (1965) (holding that police could not convict protesters from demonstrating near a courthouse when the police had previously sanctioned the location of the protest, as doing so would allow a type of entrapment violative of the Due Process Clause); Edwards v. South Carolina, 372 U.S. 229, 235–38 (1963) (holding that South Carolina infringed on the First Amendment rights of protesters who were arrested and ultimately convicted for the common law crime of breach of the peace for engaging in peaceful protest).

54. See, e.g., *Carey*, 447 U.S. at 459–61 (striking down a local ordinance that "impermissibly distinguished between labor picketing and all other peaceful picketing" without evidence proving nonlabor picketing as any less peaceful than labor picketing); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95–96 (1972) (same).

55. The major cases upholding a free speech right to picket and assemble were *Cafeteria Emps.*, 320 U.S. at 295; *Wohl*, 315 U.S. at 775; *Swing*, 312 U.S. at 325; *Carlson*, 310 U.S. at 113; *Thornhill*, 310 U.S. at 102–03; *Schneider*, 308 U.S. at 160; *Hague*, 307 U.S. at 515.

56. *Swing*, 312 U.S. at 326.

57. *Wohl*, 315 U.S. at 769–70, 772.

58. *Cafeteria Emps.*, 320 U.S. at 294.

59. *Thornhill*, 310 U.S. at 103.

60. Id.

offense to some listeners.[61] Finally, place matters: "[S]treets and parks . . . , time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[62]

The Court responded to the business case against picketing—that "loose language" may sometimes be offensive or harmful to a business—by insisting it was "part of the conventional give-and-take in our economic and political controversies" and, therefore, "a state cannot exclude working men in a particular industry from putting their case to the public in a peaceful way."[63] As to the argument that government may ban protest because of its effects on neutral businesses and consumers, the Court insisted that those interested in a labor dispute were not just the employer and the pickets. Rather, "the practices in a single factory may have economic repercussions upon a whole region."[64]

In the restrictive period from 1943 to 1957, the Court portrayed picketing as an economic tactic that states could restrict to avoid inconvenience to business or consumers. The shift from the political speech to the economic regulation perspective is illustrated by a pair of cases involving picketing by independent contractors ("peddlers") who delivered goods from manufacturers to retailers. In 1942, the Court found such picketing to be constitutionally protected free speech because the peddlers' "insulation from the public as middlemen made it practically impossible for [them] to make known their legitimate grievances to the public whose patronage was sustaining the peddler system" in any way other than through picketing on a sidewalk.[65] But in 1949, it upheld an injunction against such picketing because the peddlers' "placards were to effectuate the purposes of an unlawful combination" that had the "sole, unlawful immediate objective" of inducing a business not to deal with nonunion peddlers.[66] The Court later upheld restrictions on picketing targeting secondary employers,[67] advocating for affirmative action and an end to race discrimination in hiring,[68] and seeking to organize a nonunion business.[69]

The switch was brought about by a change in the composition of the Court, Justices Black and Frankfurter changing their views about the nature of labor protest and the desirability of constitutional protection for it, and, overall, the Court's determination to remove itself from judging the

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61. Id. at 104 ("[T]he group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.").

62. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

63. *Cafeteria Emps.*, 320 U.S. at 295–96.

64. *Thornhill*, 310 U.S. at 103.

65. Bakery & Pastry Drivers Local 802 v. Wohl, 315 U.S. 769, 775 (1942).

66. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

67. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 688–89 (1951).

68. Hughes v. Superior Court, 339 U.S. 460, 464 (1950).

69. Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 294 (1957).

wisdom of economic regulation.[70] For example, in 1941, Justice Frankfurter, writing for the Court, held that the First Amendment protected picketers who were not employed at the target business even though their speech concerned "economic interests."[71] But the next year, Frankfurter wrote an opinion that rejected both points.[72] The Court upheld an injunction against picketing at a café whose owner had hired a nonunion contractor to build on another property.[73] The Court decided the union had no dispute with the café owner, only with the contractor, and it would be wrong to "compel the states to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose."[74] One might argue the union's effort was to make the protest less narrowly economic (about pay in a particular workplace) and more political (solidarity among workers and consumers across industries), and, therefore, the claim to constitutional protection might be stronger. But, perhaps because Congress had recently passed a law prohibiting secondary boycotts and picketing to organize an employer,[75] the Court retreated from its earlier approach.

The line between political and economic conduct was never going to be easy to draw.[76] But it got much harder as the Civil Rights Movement entered the direct-action phase of the bus boycotts, mass marches, and sit-ins. Labor and civil rights groups used picketing and boycotts to improve the working conditions of their members, but for a variety of reasons they did not do so together very often. This ultimately resulted in the Supreme Court treating civil rights picketing as political speech even while the Court insisted that restrictions on labor speech were permissible economic regulation. In the beginning, the Court treated restrictions on both kinds of protest as raising the same legal issues. In 1938, in its first civil rights picketing case, *New Negro Alliance v. Sanitary Grocery Co.*, the Court held that picketing as part of the NAACP's "don't shop where you can't work" campaign was protected by the Norris–LaGuardia Act,

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70. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

71. AFL v. Swing, 312 U.S. 321, 326 (1941).

72. See Carpenters & Joiners Union, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 728 (1942).

73. Id. at 724.

74. Id. at 728.

75. See Labor Management Relations (Taft–Hartley) Act, Pub. L. No. 80-101, ch. 120, sec. 101, § 8(b)(4), (7), 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 158(b)(4), (7) (2012)).

76. Not surprisingly, the Court's effort to distinguish between political and economic regulation of labor speech was excoriated as arbitrary and unprincipled. See, e.g., Armstrong, supra note 47, at 39 (stating that the distinction, drawn by the Supreme Court in *Ritter's Cafe*, between permissible and impermissible labor picketing "drew a factual line that logically is so difficult to defend, as to invite state courts . . . to draw any line that they choose").

just as labor picketing was.[77] It seemed for a time that the constitutional protection for labor and civil rights picketing would therefore be the same. After the Court pared back constitutional protections for labor picketing, it likewise held in *Hughes v. Superior Court*, decided in 1950, that civil rights picketing urging a California grocery store to hire black employees was not constitutionally protected.[78] Handed down the same day as two opinions upholding injunctions against labor picketing seeking to persuade a business to recognize a union[79] and one upholding the provision of the Taft–Hartley Act that required unions to purge all Communist Party members from leadership positions,[80] *Hughes* signaled a retreat from First Amendment protection for *any* aspect of labor activity.[81]

Since the early 1940s, with the exception of the long series of decisions culminating in *Janus* that invalidated statutory or contractual obligations to join a union or pay union dues, the First Amendment has not been salient to labor law.[82] When it became apparent in the late 1950s that the NLRB and state courts disagreed about which labor goals and tactics were permissible, the Court reclaimed for the NLRB the territory it had ceded to the states by holding that federal labor law broadly preempts state law.[83] Therefore, although the Court withdrew labor from the First Amendment field, it trusted the NLRB and Congress to protect that which was worthy of protection.[84] The Court has not issued a decision squarely holding labor picketing to be protected by the First Amendment

77. 303 U.S. 552, 559–60 (1938).

78. 339 U.S. 460, 464 (1950). Efforts to challenge race discrimination in California, of which *Hughes* was a part, are chronicled in Mark Brilliant, The Color of America Has Changed: How Racial Diversity Shaped Civil Rights Reform in California, 1941–1978, at 119–22 (2010).

79. Bldg. Serv. Emps. Int'l Union, Local 262 v. Gazzam, 339 U.S. 532, 539 (1950); Int'l Bhd. of Teamsters, Local 309 v. Hanke, 339 U.S. 470, 479 (1950). Three years later, the Court extended the reasoning of *Hanke* and *Gazzam* to hold that a state could prohibit picketing to protest hiring of nonunion labor. Local Union No. 10, United Ass'n of Journeymen Plumbers v. Graham, 345 U.S. 192, 201 (1953).

80. Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 396 (1950).

81. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982) ("This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association."); Cox v. Louisiana, 379 U.S. 536, 552, 558 (1965) (overturning a conviction for giving a speech condemning race discrimination and urging a sit-in).

82. For a few years, the Court held that the First Amendment required owners of private property used as a shopping mall to allow picketing in the public areas of the mall, but the Court eventually overruled that decision. See Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 325 (1968), overruled by Hudgens v. NLRB, 424 U.S. 507 (1976).

83. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).

84. See id. ("[T]o allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes."); Youngdahl v. Rainfair, Inc., 355 U.S. 131, 139–40 (1957) (holding that an injunction prohibiting peaceful picketing was preempted and upholding the injunction only insofar as it prohibited violence).

since 1958,[85] and has not issued an opinion so holding since 1942.[86] As Professor Frederick Schauer put it, "most of labor law proceeds unimpeded by the First Amendment," just like antitrust, securities regulation, copyright, and a host of laws regulating economic activity.[87]

II. LABOR PROTEST AND THE FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY

There has been only one growth area for freedom of speech in the labor field since the 1940s: the right of workers to refuse to join or pay fees to a union.[88] As union opponents have litigated dozens of cases in the Supreme Court seeking to expand a First Amendment right to refuse to join, pay fees to, or be represented by a union, they have dramatically increased the salience of the First Amendment in labor law.[89] Union opponents have relied on the First Amendment not only to restrict the content of collective bargaining agreements with respect to fees and dues but also to attack members-only voting on union leadership and contract ratification,[90]

85. Even then, the Court granted certiorari in a case that enjoined peaceful primary picketing (along with a secondary boycott) and simply vacated and remanded without an opinion, giving only a single citation to *Thornhill*. See Chauffeurs Local Union 795 v. Newell, 356 U.S. 341, 341 (1958) (per curiam) (mem.).

86. Bakery & Pastry Drivers Local 802 v. Wohl, 315 U.S. 769, 775 (1942). The Court did, on constitutional avoidance grounds, protect consumer picketing calling for a product boycott in 1964, but it expressly did not hold the picketing to be protected by the First Amendment. NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 62, 72 (1964).

87. Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765, 1782–83 (2004).

88. In *International Ass'n of Machinists v. Street*, the Court decided to avoid what it considered a difficult First Amendment question: whether the Railway Labor Act should be construed to prohibit an employer and a union from agreeing to require workers to pay dues to the union to the extent that the dues would fund ideological activities not germane to the union's role as bargaining agent. 367 U.S. 740, 749–50 (1961). Then, in *NLRB v. General Motors Corp.*, the Court held that the most a union and an employer could agree to require union-represented workers to do was to pay union dues and fees. 373 U.S. 734, 742 (1963) ("It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. 'Membership' as a condition of employment is whittled down to its financial core."). Then, in *Abood v. Detroit Board of Education*, the Court reached the First Amendment question it had avoided in *Street* and held that the First Amendment prohibits a public-sector employer and a union from requiring payment of fees unrelated to the union's work as the employee's bargaining representative. 431 U.S. 209, 234 (1977). The Court applied the rule of *Street* and *Abood* to the NLRA in Communications Workers v. Beck, 487 U.S. 735, 745 (1988). The Court overruled *Abood* in *Janus*. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018) ("*Abood* was wrongly decided and is now overruled."). The history of the litigation is told in Sophia Z. Lee, The Workplace Constitution from the New Deal to the New Right 175–237 (2014).

89. See, e.g., *Janus*, 138 S. Ct. 2448; Harris v. Quinn, 134 S. Ct. 2618 (2014); Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298 (2012); D'Agostino v. Baker, 812 F.3d 240 (1st Cir. 2016), cert. denied, 136 S. Ct. 2473 (2016) (mem.).

90. See, e.g., Bain v. Cal. Teachers Ass'n, 156 F. Supp. 3d 1142, 1150 (C.D. Cal. 2015).

state statutes proscribing injunctions in certain labor disputes,[91] and employer notice-posting requirements.[92]

By making labor law one of the most significant battlegrounds over the boundaries of the First Amendment,[93] the Supreme Court has opened the door to First Amendment challenges to a complex legal regime that comprehensively regulates labor speech in a variety of viewpoint- and content-discriminatory ways. For example, employers and unions cannot threaten but they can try to persuade employees to join or not join the union,[94] though there has been little effort to distinguish threats from persuasion in the labor field, unlike in the law of incitement or other areas in which the First Amendment is salient.[95] Labor law restricts picketing only by labor organizations and their agents, not by anybody else.[96] The workplace is rife with legally mandated disclosures and notices applicable to employers or unions.[97] The laws restricting and compelling speech discriminate on the basis of content, speaker, and viewpoint, and not all of the discriminations track the First Amendment categories about protected or unprotected speech.[98] The NLRB rules distinguishing protected speech from that which is unprotected or prohibited are vague—prohibiting "disparaging," "rude," or "inflammatory" remarks—and frequently over- or underinclusive.[99] Unions can leaflet but not picket to

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91. Ralphs Grocery Co. v. UFCW Local 8, 290 P.3d 1116, 1126–27 (Cal. 2012).

92. Chamber of Commerce v. NLRB, 721 F.3d 152, 160–67 (4th Cir. 2013); see also Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 23–28 (D.C. Cir. 2014) (en banc) (sustaining an agency rule requiring disclosure of the country of origin of commodities).

93. See supra note 89, in which all Supreme Court cases were divided 5-4 on ideological lines. A predecessor to those, Davenport v. Wash. Educ. Ass'n, 551 U.S. 177 (2007), was decided 6-3.

94. 29 U.S.C. § 158(c) (2012).

95. See, e.g., Holder v. Humanitarian Law Project, 561 U.S. 1, 43–45 (2010).

96. 29 U.S.C. § 158(b)(4), (7) (providing that "[i]t shall be an unfair labor practice for a labor organization or its agents . . . to induce or encourage any individual [to strike]" or "to picket or cause to be picketed [any employer]" to achieve specified prohibited objects).

97. Under the Fair Labor Standards Act, the Employee Retirement Income Security Act, and the Family and Medical Leave Act, for example, the employer is required to notify employees of their statutory rights. See id. §§ 218(b), 1166, 2619. Under *Chicago Teachers Union, Local No. 1 v. Hudson*, unions are required to notify employees they represent of their rights not to join or to pay full dues to the union. 475 U.S. 292, 306–07 (1986).

98. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) (distinguishing union access to a school's mail facilities based on the status of the unions rather than their views, explaining that those distinctions are "inescapable in the process of limiting a nonpublic forum to the activities compatible with the intended purpose of the property").

99. 29 U.S.C. § 157; see also NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956) (protecting the right of employees to hear from nonemployees regarding self-organization); NLRB v. Int'l Bhd. of Elec. Workers, 346 U.S. 464, 471 (1953) (finding "disparaging" speech to be unprotected); New York New York, LLC, 356 N.L.R.B. 907, 920 (2011) (finding appeals by employees of different employers working on the same premises to be protected), enf'd 676 F.3d 193 (D.C. Cir. 2012); Cellco P'ship, 349 N.L.R.B. 640, 646 (2007)

urge employees to join their organization, yet they can picket to urge employees not to join; they can picket to protest unfair labor practices but not to demand the employer to recognize the union.[100]

For decades, these and many other regulations of work-related speech were noncontroversial exercises of Congress's power to regulate commerce and the states' police powers to regulate for the general welfare. Since 1941, when the Court first rejected a First Amendment challenge to the NLRA's restriction on employer speech,[101] the Court has largely rejected invitations to apply the First Amendment to these various viewpoint and speaker regulations.[102] Content regulation of private speech in the workplace was considered an appropriate part of regulating employment relations and not to raise the issues that would be raised if the speech were to occur on a sidewalk or in the newspaper. The workplace is not a public forum, workers are generally a captive audience, and speech is integral to economic conduct. But even when the speech, like picketing, occurred in a public forum, the Court generally rejected First Amendment challenges.[103]

Yet even between 1940 and 1980, when the Court seemed most determined to refrain from injecting the Constitution into economic regulation, it created some exceptions. First, it outlawed certain aspects of race discrimination by unions[104] more than two decades before it held, following enactment of the Civil Rights Act of 1964, that the Reconstruction-era civil rights acts prohibited discrimination in the making and enforcement of employment contracts.[105] Second, it gave broad reach to the federal

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(holding that opprobrious or abusive speech or conduct is not protected); Universal Mfg. Co., 156 N.L.R.B. 1459, 1466–67 (1966) (setting aside a union election because of inappropriate pressure from community members); Sewell Mfg. Co., 138 N.L.R.B. 66, 71–72 (1962); Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948) (prohibiting inflammatory and racially charged messaging in a Board election).

100. 29 U.S.C. § 158(b)(7); see also Fisk & Rutter, supra note 17, at 287–88.

101. NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 477 (1941).

102. See, e.g., NLRB v. Gissel Packing Co., 395 U.S. 575, 616–19 (1969). On the controversy within the civil liberties community surrounding NLRB decisions restricting employer speech in the early years of the NLRA, see Weinrib, supra note 1, at 270–310.

103. See Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 284 (1957) (rejecting a First Amendment challenge to an injunction prohibiting picketing at the roadside entrance to a gravel pit); Hughes v. Superior Court, 339 U.S. 460, 461 (1950) (rejecting a First Amendment challenge to an injunction against picketing on a sidewalk in front of a grocery store); Carpenters & Joiners Union, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 723 (1942) (rejecting a First Amendment challenge to an injunction banning picketing on the sidewalk in front of a restaurant); Armstrong, supra note 47, at 11–34 (tracing the arc of the Supreme Court's picketing decisions).

104. See Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 203–04 (1944) (holding that unions must represent and act for all members, regardless of race).

105. Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (reaffirming prior cases holding that § 1981 prohibits discrimination in employment contracts between private entities); Runyon v. McCrary, 427 U.S. 160 (1976) (holding that § 1981, part of the Civil Rights Act of 1866, prohibits discrimination in contracts between private parties); Jones v.

statute allowing states to outlaw union security contracts, thus granting employees more rights than they might otherwise have had to resist union membership.[106] Third, it conferred a First Amendment right on government employees, a quasi-constitutional right on railroad and airline employees, and a statutory right on private sector employees to refuse to pay union fees for services not germane to the negotiation and enforcement of a labor contract.[107] Finally, a few labor speech rules reflect constitutional concerns about regulating workplace speech, even though the Court did not squarely hold that labor protest is constitutionally protected. To avoid what it termed "serious constitutional questions,"[108] the Court construed broad statutory prohibitions on picketing not to cover distributing leaflets[109] or picketing targeted only at a product,[110] except when the business is economically dependent on the product.[111]

In steadily expanding the role of the First Amendment in restricting public sector labor laws and contracts since 2012, the Court has eroded the line between political speech and economic conduct. The Court has created a doctrinal conundrum, because it has found a First Amendment problem with a compelled subsidy (fair share fees) when the First Amendment has never been held to protect the subsidized speech (collective bargaining). Under *Garcetti v. Ceballos*, which upheld discipline for a district attorney who wrote a memo protesting reliance on false police testimony in a criminal prosecution, it would appear that government employees have no federal constitutional right to protest working conditions individually or collectively.[112] Yet in *Janus*, the Court held that government employees have a right to refuse to subsidize collective bargaining because the cost of government employment is of concern to the taxpayers.[113] In other words, there is now a First Amendment right to refuse to engage in speech (paying union fees) when there is no First Amendment right to engage in the speech (about wages and benefits) that the person

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Alfred H. Mayer Co., 392 U.S. 409, 423–24 (1968) (holding that the Civil Rights Act of 1866 prohibits racial discrimination in the sale or rental of property).

106. Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 373 U.S. 746, 756–57 (1963); see also Catherine L. Fisk & Benjamin I. Sachs, Restoring Equity in Right-to-Work Law, 4 U.C. Irvine L. Rev. 857, 860–64 (2014).

107. See Fisk & Sachs, supra note 106, at 867 (arguing that the interaction between state right-to-work laws and the federal regime of exclusive representation has enabled nonpaying employees in right-to-work states to receive free representation).

108. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 588 (1988).

109. Id.; see also United Bhd. of Carpenters, Local Union No. 1506, 355 N.L.R.B. 797, 821 (2010) (finding that the display of a banner is more like distributing leaflets than like picketing).

110. NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 71–73 (1964).

111. NLRB v. Retail Store Emps. Union, Local 1001, 447 U.S. 607, 614–16 (1980).

112. 547 U.S. 410, 426 (2006); see also Borough of Duryea v. Guarnieri, 564 U.S. 379, 398–99 (2011).

113. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2475–76 (2018).

has a right not to subsidize. Moreover, in *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), decided the day before *Janus*, the Court struck down a disclosure requirement that is almost identical to the disclosure requirement that *Janus* rests on.[114] That is, *Janus* and the cases that came before it compel unions to notify all represented employees of their right not to join the union or to pay fees. But in *NIFLA* the Court held unconstitutional a requirement that crisis pregnancy centers disclose to customers that free or low-cost abortion services are offered elsewhere.[115] If pregnancy service providers have a right not "to inform women how they can obtain state-subsidized abortions—at the same time [they] try to dissuade women from choosing that option,"[116] why should unions have to notify their members of their right to quit the union "at the same time [unions] try to dissuade [workers] from choosing that option"?

The intellectual credibility of *Lochner*, such as it was, rested on the formal equality that it accorded the right to "both employers and employ[ee]s, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts."[117] Freedom of contract protected (in theory) the right of both labor and management to contract without legislative imposition of minimum terms, and this remains the defense of *Lochner*.[118] *Lochner* redux in First Amendment law would have to offer the same formal equality if it were to have any intellectual credibility at all. If anti-union government employees have a First Amendment right to resist paying money to the union to negotiate over working conditions, formal equality would suggest that pro-union government employees have a First Amendment right to discuss their working conditions collectively. Having reintroduced the First Amendment into the labor field, there is no intellectually respectable way that the Court can insist that the only First Amendment right workers enjoy is the right *not* to join a union or to pay dues.

Of course, many labor advocates would find it distasteful to seek First Amendment protection for labor protest relying on *Janus*, *NIFLA*, *Harris*, and their predecessors, as well as the Court's other decisions applying strict scrutiny to regulation of speech in a commercial context, because all of these decisions are damaging to the labor movement. But ignoring them will not make them go away. Whether progressives cite *Janus* or not, others will. The question is whether they can provide the basis to expand the right to engage in the kind of protest and organizing that might challenge the economic inequality that enables the neoliberal legal regime that harms progressive values, without jeopardizing the laws

114. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2377–78 (2018).

115. Id. at 2378.

116. Id. at 2371.

117. Lochner v. New York, 198 U.S. 45, 61 (1905).

118. See, e.g., Richard A. Epstein, In Defense of the Contract at Will, 51 U. Chi. L. Rev. 947, 951 (1984).

still on the books that protect progressive values. That is the issue addressed in Part III.

III. PROTECTING PROTEST AND REGULATING THE ECONOMY

The Court's venerable labor and civil rights protest cases offer a clear path forward. The Court never overruled and still cites seminal First Amendment decisions protecting advocacy of labor and civil rights through calls for boycotts, speeches, mass meetings, picketing, and the dissemination of literature in parks, on sidewalks, or door-to-door.[119] These cases provide three essential foundations of a progressive First Amendment right for worker agitation. First, labor protest is political speech on a matter of public concern in a public forum. Regulation of picketing is quite different from regulation of economic activity or speech inside the workplace. Second, labor picketing is persuasion, not coercion. A picket line may once have had coercive power when closed shops were legal and so workers who refused to honor one could be ejected from a union and thereby prevented from working. Those days are long gone; the Taft–Hartley Act outlawed closed shops in 1947,[120] and the Court subsequently extended the prohibition on requiring union membership at hiring to a broader prohibition on requiring employees to remain union members after starting work.[121] Third, moving labor protest into the category of protected political, noncoercive speech does not require rethinking all of commercial speech doctrine, all of antitrust law, or all of the law governing speech inside the workplace.

A. *Labor Protest Is Political Speech, Not Economic Activity*

Urging consumers not to patronize or workers not to go to work at a place because it sells products produced by another entity in deplorable conditions[122] or because the business owner has deprived workers of their

119. See, e.g., Citizens United v. FEC, 558 U.S. 310, 336 (2010) ("The ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated." (citing Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940))).

120. Labor Management Relations (Taft–Hartley) Act, Pub. L. No. 80-101, ch. 120, sec. 101, § 8(a)(3), 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 158(a)(3) (2012)).

121. See Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 37–38 (1998) (explaining the rules about union shops); Pattern Makers' League v. NLRB, 473 U.S. 95, 115–16 (1985) (deferring to the NLRB's decision that a union that imposed fines on its former members who had resigned during a strike and returned to work had violated the NLRA).

122. See, e.g., NLRB v. Retail Store Emps. Union, Local No. 1001, 447 U.S. 607, 609–11 (1980) (upholding the NLRA's prohibition on secondary picketing that encourages consumers to boycott a product because the "neutral" secondary was heavily dependent on sales of the struck product).

rights at another business[123] is meant to persuade by providing information. As the Court recognized in allowing sidewalk advocacy against abortion, absent intimidation or coercion, the government should not be in the business of protecting people in a public forum against exposure to information or ideas that the government considers loathsome.[124]

When the *Janus* Court invalidated all state laws and contracts requiring government employees to pay their fair share of the costs of union representation, the majority emphasized that the pay and terms on which those public employees work are matters of great "public importance."[125] The Court discussed at some length "the mounting costs of public-employee wages, benefits, and pensions," which it said "undoubtedly played a substantial role" in the increase in public spending since 1970, and "[u]nsustainable collective-bargaining agreements," which it "blamed for multiple municipal bankruptcies."[126] Moreover, even noneconomic issues that might be subject to bargaining reflect important policy judgments; using the example of teachers, the Court rattled off several: "Should teacher pay be based on seniority, the better to retain experienced teachers? Or should schools adopt merit-pay systems to encourage teachers to get the best results out of their students?"[127]

It cannot be that wages are a matter of public concern only if the public cares about the costs to the employer. As the Court recognized in *Hague*,[128] *Carlson*,[129] and *Thornhill*,[130] wages and conditions of employment are of great public concern both to workers and to those who pay for work. The wave of teacher strikes in half a dozen states in the spring of 2018 illustrates the political importance of protest.[131] Teachers used

123. See, e.g., Carpenters & Joiners Union, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 727 (1942) (upholding an injunction against picketing a cafe whose owner had hired a nonunion contractor paying substandard wages to work on a nearby building it owned).

124. McCullen v. Coakley, 134 S. Ct. 2518, 2541 (2014).

125. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2476 (2018); see also Harris v. Quinn, 134 S. Ct. 2618, 2643 (2014) (finding the "great public concern" in the cost of public sector employment to be the basis for invalidating fair share fees for home health aides).

126. *Janus*, 138 S. Ct. at 2483.

127. Id. at 2476.

128. Hague v. Comm. for Indus. Org., 307 U.S. 496, 504 (1939).

129. Carlson v. California, 310 U.S. 106, 113 (1940).

130. Thornhill v. Alabama, 310 U.S. 88, 103 (1940).

131. See, e.g., Dana Goldstein, Arizona Supreme Court Blocks a Ballot Measure, and Schools Miss Out on $690 Million, N.Y. Times (Aug. 30, 2018), https://www.nytimes.com/2018/08/30/us/arizona-teachers-tax-investined.html (on file with the *Columbia Law Review*) ("Teachers, unions and activists have shifted their focus to the ballot box in recent months, after educators in six states walked out of their schools this year."); Matt Pearce, Red-State Revolt Continues: Teachers Strike in Oklahoma and Protest in Kentucky, L.A. Times (Apr. 2, 2018), http://www.latimes.com/nation/la-na-teachers-spending-20180402-story.html (on file with the *Columbia Law Review*) ("Thousands of Oklahoma teachers went on strike Monday to demand higher pay and more education funding, digging in for a prolonged walkout as discontent spreads among public educators in conservative states."); Dale

massive rallies, marches, social media, and conventional media to get the public and elected officials to understand the high costs of low taxes.[132] In some of those states, teacher collective bargaining is not required or authorized by statute,[133] and public employee strikes are illegal in five of the six states.[134] In Texas, where teachers did not strike and failed to garner nearly the public attention to the plight of the schools that other states

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Russakoff, The Teachers' Movement: Arizona Lawmakers Cut Education Budgets. Then Teachers Got Angry, N.Y. Times Mag. (Sept. 5, 2018), https://www.nytimes.com/interactive/2018/09/05/magazine/arizona-teachers-facebook-group-doug-ducey.html (on file with the *Columbia Law Review*) ("[Arizona Educators United] held a vote to decide whether to walk out, and 78 percent of more than 50,000 participating teachers and support staff voted yes. . . . [T]he walkout would continue until lawmakers voted on the education budget.").

132. Dana Goldstein & Elizabeth Dias, Oklahoma Teachers End Walkout After Winning Raises and Additional Funding, N.Y. Times (Apr. 12, 2018), https://www.nytimes.com/2018/04/12/us/oklahoma-teachers-strike.html (on file with the *Columbia Law Review*) (explaining that in multiple states teachers pressured representatives to raise money for schools and salary increases, and "started the walkout movement by organizing on Facebook").

133. See N.C. Gen. Stat. § 95-98 (2018) (voiding all agreements between state or local government entities and representatives of employees of such entities); Okla. Stat. tit. 70, § 509.6 (2017) ("The board of education and the representatives of the organization must negotiate in good faith on wages, hours, fringe benefits, and other terms and conditions of employment."); City of Phoenix v. Phx. Emp't Relations Bd. ex rel. Am. Fed'n of State, Cty., & Mun. Emps. Ass'n, Local 2384, 699 P.2d 1323, 1326 (Ariz. Ct. App. 1985) ("It is anticipated that the negotiations [between city management and employee representatives] . . . will produce a memorandum of understanding . . . . Importantly, the final decision-making authority is expressly reserved to the Phoenix City Council because the memorandum of understanding is not to be effective until it is approved by the Council."); Littleton Educ. Ass'n v. Arapahoe Cty. Sch. Dist. No. 6, 553 P.2d 793, 797 (Colo. 1976) ("[A] school board, incidental to its statutory duties above enumerated, has the power and authority to collectively bargain with an agent selected by the employees, if the Board determines in its discretion that implementation of collective bargaining will more effectively and efficiently accomplish its objectives and purposes." (quoting La. Teachers' Ass'n v. New Orleans Par. Sch. Bd., 303 So. 2d 564, 567 (La. Ct. App. 1974))); Fayette Cty. Educ. Ass'n v. Hardy, 626 S.W.2d 217, 220 (Ky. Ct. App. 1980) ("[A] public agency may elect to negotiate with a representative of its employees, although it has no duty to do so."); Milla Sanes & John Schmitt, Ctr. for Econ. & Policy Research, Regulation of Public Sector Collective Bargaining in the States 5 (2014), http://cepr.net/documents/state-public-cb-2014-03.pdf [https://perma.cc/2J23-WTP6] (explaining that, for teachers in Arizona, "no set statutes or existing case law governs collective bargaining at the state level").

134. See N.C. Gen. Stat. § 95-98.1 ("Strikes by public employees are hereby declared illegal and against the public policy of this State."); Okla. Stat. tit. 70, § 509.8 ("It shall be illegal for the organization to strike or threaten as a means of resolving differences within the board of education."); Jefferson Cty. Teachers Ass'n v. Bd. of Educ., 463 S.W.2d 627, 629 (Ky. 1970) (holding that teachers are excluded from a statutory right to strike); Jefferson Cty. Bd. of Educ. v. Jefferson Cty. Educ. Ass'n, 393 S.E.2d 653, 659 (W. Va. 1990) ("Public employees have no right to strike in the absence of express legislation or, at the very least, appropriate statutory provisions for collective bargaining, mediation, and arbitration."); Op. Att'y Gen. No. I80-039 (Ariz. Mar. 18, 1980) (finding that "public school teachers do not have the right to strike"). Colorado is the one state that allows teacher strikes. Martin v. Montezuma-Cortez Sch. Dist. RE-1, 841 P.2d 237, 241 (Colo. 1992) ("We hold that, under the relevant statutes, employees in the public sector have a qualified right to strike subject to explicit executive and judicial controls.").

had, some speculated that teachers were intimidated not only by the statutory prohibition on strikes but also by the harsh remedies for striking.[135]

If wages and working conditions are a matter of public concern, then First Amendment protection turns on whether speech about them occurs in a public forum and in a reasonable time and manner. In a 2011 case involving picketing on public streets targeted at private individuals, the Court said that the permissibility of restrictions on picketing on public streets

> turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. "[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'" The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[136]

And in an earlier case involving anti-abortion picketing, the Court explained, citing *Hague*: "'[T]ime out of mind' public streets and sidewalks have been used for public assembly and debate . . . ."[137] Because the prohibitions on labor protest are content-based, speaker- and viewpoint-discriminatory flat prohibitions on speech on a matter of public concern in a public forum, they are unconstitutional.

B. *Labor Picketing and Boycotts Are Not Coercion*

The Court went astray only when it made a variation on the move that some progressives have made today: to accept that expression of some ideas is so threatening that peaceful advocacy of them renders the sidewalk not a safe space for business. When the Court first recognized labor protest as speech protected by the First Amendment, it perceived it to be part of a lively and fundamentally political debate about the equitable distribution of wealth and decent working conditions.[138] Similarly,

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135. Texas public employees who strike stand to forfeit their job, their seniority, and even their pension. Tex. Gov't Code § 617.003 (2017); see also Tex. Classroom Teachers Ass'n, What Happens if Texas Teachers Strike?, Classroom Teacher, Spring 2018, at 12, 23.

136. Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (alterations in original) (citations omitted) (first quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985); then quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); then quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964); then quoting Connick v. Myers, 461 U.S. 138, 145 (1983)).

137. Frisby v. Schultz, 487 U.S. 474, 480–81 (1988) (alteration in original) (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).

138. Thornhill v. Alabama, 310 U.S. 88, 103 (1940) ("Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the

when it struck down restrictions on civil rights boycotts, it emphasized the political character of public debate about fair working conditions.[139] In both situations, the Court rejected the argument that government can stop public protest because it harms business or might prompt public disorder.

When the Court upheld restrictions on picketing in the 1950s, it emphasized that picketing is a coercive signal, not speech, which could coerce reluctant employees to join a union. One aspect of that reasoning is that "picketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey."[140] The First Amendment, the Court said, "does not apply to a mere signal by a labor organization to its members," and a picket is "merely such a signal, tantamount to a direction to strike."[141] But the Court later abandoned the idea that a "mere signal" or a "locus in quo" is not persuasion when it extended First Amendment protection to acts that convey a message even without speech, such as symbolic burning.[142]

The second aspect of the reasoning was that the picket line was "more than the mere publication of the fact[s]" about the job, but rather, "coupled with established union policies and traditions,"[143] picketing induces action "quite irrespective of the nature of the ideas which are being disseminated."[144] What are the "policies and traditions" that cause action "irrespective of the nature of the ideas"? It could be a high degree of solidarity. Some people honor picket lines the way others fast on Good Friday or Yom Kippur, or others sing their college fight song with gusto: It's just an article of faith, it's what you do, even if you don't really believe the reasons underlying the practice. That's not a good First Amendment argument. A better argument for treating pickets as coercive rather than persuasive was the closed shop, which was legal until 1947, or compulsory

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effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.").

139. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982).

140. Bldg. Serv. Emps. Int'l Union, Local 262 v. Gazzam, 339 U.S. 532, 537 (1950).

141. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 690 (1951).

142. See Texas v. Johnson, 491 U.S. 397, 400 n.1, 416–17 (1989) (holding unconstitutional a law that prohibited any person to "deface, damage or otherwise physically mistreat" a flag in a way that the actor knows "will seriously offend one or more persons likely to observe or discover his action"); see also United States v. Eichman, 496 U.S. 310, 318–19 (1990) (declining to revisit the Court's holding in *Texas v. Johnson*); United States v. O'Brien, 391 U.S. 367, 376 (1968) (declaring, in upholding a law prohibiting draft card burning, that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms").

143. Local Union No. 10, United Ass'n of Journeymen Plumbers v. Graham, 345 U.S. 192, 200 (1953).

144. Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 289 (1957).

union membership, which was legal until 1963.[145] Crossing a picket line could result in a worker losing union membership and, consequently, the ability to work in a densely unionized industry.[146] So, picketing in the 1950s did not seem, to the Court and to labor union critics, to be an expression of political belief as much as a tool wielded by union leaders in their battle against corporate leaders. Civil rights picketing and boycotts, the Court thought, were different, for they were advocacy for equality of opportunity in work and civil society, and "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[147]

Much has changed. No worker can lawfully be prevented from working for crossing a picket line or refusing to serve picket duty.[148] Workers who picket today over labor issues frame their debate in civil rights terms about fairness, respect, and solidarity among all workers and between workers and those who rely on their work.[149] To the extent that the purpose of the First Amendment is to enable effective self-government by allowing people to express and to hear a range of ideas, picketing is core.

The Court and the NLRB have already recognized that most forms of labor advocacy other than picketing to encourage a full consumer and worker boycott are not coercive. Unions may picket to encourage consumers to boycott a product[150] (though not a store that sells the product,[151] and not even the product if a business is heavily dependent on the product[152]). Unions have the right to distribute leaflets and display banners to

145. See NLRB v. Gen. Motors Corp., 373 U.S. 734, 741 (1963) (explaining the evolution of the law regulating union security).

146. See Pattern Makers' League v. NLRB, 473 U.S. 95, 115–16 (1985) (deferring to the NLRB's determination that a union cannot fine union members who cross a picket line during a strike because the fine "restrains" employees in the exercise of their NLRA rights to resign from membership and thereafter defy a union rule requiring solidarity during a strike).

147. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982).

148. See *Pattern Makers' League*, 473 U.S. at 100 (upholding an NLRB ruling that invalidated a union rule prohibiting an employee from resigning membership during a strike so as to be able to cross the picket line without being subject to union discipline); cf. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 196 (1967) (holding that a union may impose fines on members who cross picket lines).

149. See, e.g., Susan Du, Allina Health, to Teachers Union: Stop Picketing Us. Teachers: No., City Pages (June 23, 2016), http://www.citypages.com/news/allina-health-to-teachers-union-stop-picketing-us-teachers-no-8380031 [https://perma.cc/XQY5-CYEL] (showing picketers with signs reading "Educators Support Nurses"); Day-by-Day Updates: 1245 Organizing Stewards Aid Teachers Strike in Oregon, IBEW 1245 (Feb. 21, 2014), http://ibew1245.com/2014/02/21/organizing-stewards-aid-teachers-strike-in-oregon/ [https://perma.cc/949Y-FQCK] (showing picketers with signs reading "Firefighters Support Teachers").

150. NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 71 (1964).

151. Id. at 70.

152. NLRB v. Retail Store Emps. Union, Local 1001, 447 U.S. 607, 614–15 (1980).

publicize labor abuses, and to communicate via social media.[153] Civil rights activists, immigrant rights activists, and all groups other than labor unions have the rights to picket and to urge secondary boycotts. While a labor picket line may convey a more forceful message than a labor banner or a civil rights picket line, now that labor unions lack the power to prevent those who cross from getting or keeping a job, a picket line has lost the power to coerce.

Declaring picketing to be constitutionally protected would not jeopardize legal restrictions on workplace speech that is genuinely coercive. The prohibitions on union or employer threats in section 8(c) of the NLRA would remain constitutional, as threats are unprotected speech under the First Amendment.[154] The NLRB's administrative rule banning electioneering within twenty-four hours of a union election serves the purpose of fair play and is presumably constitutional for the same reasons and to the same extent that electioneering can be prohibited in polling places in political elections.[155] The requirement that unions notify bargaining unit

153. See United Bhd. of Carpenters, Local 1506, 355 N.L.R.B. 159 (2010) (explaining that the display of banners is not "coercion" prohibited by section 8(b)(4)). However, the NLRB's General Counsel has announced an intention to overturn many Obama Board precedents, see Memorandum GC 18-02, "Mandatory Submissions to Advice" (Dec. 1, 2017). The General Counsel is prosecuting some conduct protected under *United Brotherhood of Carpenters, Local 1506* as unfair labor practices, and the Board has recently held section 8(b)(4) prohibits peaceful picketing protesting working conditions at office buildings with many tenants. Preferred Bldg. Servs., Inc., 366 N.L.R.B. No. 159 (2018). This change of enforcement practices may invite challenge in federal courts of appeals that have held some such conduct protected by the First Amendment. See Overstreet v. United Bhd. of Carpenters, Local 1506, 409 F.3d 1199, 1218–19 (9th Cir. 2005). And then the issue would make its way to the Supreme Court, which has not ruled on this question since holding that leafletting is not coercive in Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 582–83 (1988).

154. See NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (noting that statutory protection of employer rights to anti-union expression must be balanced against the equal rights of employees to associate and the disparity in power between employees who are economically dependent on their employers); NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 477 (1941) (holding that employer speech opposing a union is not an unfair labor practice under section 8(c) unless it is coercive). Drawing a dividing line between a threat and protected speech is not easy, but that is true throughout the constitutional law of true threats and incitement. See, e.g., Elonis v. United States, 135 S. Ct. 2001, 2005–06 (2015) (reversing the conviction of a man who made Facebook posts saying, among other things, that "it's illegal for me to say I want to kill my wife," and "[e]nough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined"); Virginia v. Black, 538 U.S. 343, 358–60 (2003) (holding that a ban on cross burning carried out with the intent to intimidate does not violate the First Amendment); Watts v. United States, 394 U.S. 705, 706–08 (1969) (holding that a statement that "if they ever make me carry a rifle the first man I want in my sights is L.B.J." was not a threat against the life of the President of the United States). Labor picketing, like all other speech, cannot be flatly prohibited because of difficult line-drawing problems.

155. See Burson v. Freeman, 504 U.S. 191, 211 (1992) (upholding a prohibition on electioneering near a polling place); Peerless Plywood Co., 107 N.L.R.B. 427, 429–30 (1953). But cf. Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1891–92 (2018) (striking down a law prohibiting wearing political apparel in a polling place).

members of their rights to pay less than full union dues[156] is justified for the same reason as all compelled disclosure requirements—it is necessary to inform workers of their rights. Concededly, a few NLRB rules might be vulnerable to First Amendment challenge. For example, some applications of the *Sewell* rule, which prohibits appeals to invidious prejudice in a union election campaign,[157] may no longer be justified as necessary to prevent coercion or fearmongering because appeals to racial prejudice in many cases may be more offensive than threatening.

Of course, some large public protests are intimidating; the 2017 march in Charlottesville, Virginia,[158] and the Nazis' threatened march in Skokie, Illinois, in 1977[159] are examples. Even when the marchers themselves do not clearly threaten violence, the police presence that is necessary to prevent acts of violence by protesters or counterprotesters can be terrifying, especially to black men and anyone else who fears a police officer will shoot a spectator.[160] Protests, especially the ones that are large enough to have a real political impact, impose costs on local governments to ensure public safety and to manage public spaces, clean up litter, and so forth.[161] They disrupt business as usual, and not always in a good way. They cause genuine psychic stress for those who disagree.[162] And sometimes

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156. Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 306–07 (1986).

157. See Sewell Mfg. Co., 138 N.L.R.B. 66, 72 (1962).

158. See Frances Robles, Two Men Arrested in Connection with Charlottesville Violence, N.Y. Times (Aug. 26, 2017), https://www.nytimes.com/2017/08/26/us/charlottesville-arrests.html (on file with the *Columbia Law Review*) (describing incidents of violence and intimidation at a "Unite the Right" rally attended by "hundreds of white supremacists," where an African American man was badly beaten and a young woman "was struck and killed by a car in what the authorities have called a terrorist attack").

159. Geoffrey R. Stone, Remembering the Nazis in Skokie, Huffington Post (May 20, 2009), https://www.huffingtonpost.com/geoffrey-r-stone/remembering-the-nazis-in_b_188739.html [https://perma.cc/NGS7-U6YR] (last updated May 25, 2011) (explaining that Jewish residents sought a court order to block a planned Nazi march through their town on the grounds that it was a "deliberate and willful attempt to inflict severe emotional harm on the Jewish population in Skokie," especially on the 5,000 residents who were Holocaust survivors).

160. The U.C. Berkeley Free Speech Commission, on which I served in 2018, heard testimony from several Berkeley students and staff members about the stress and educational disruption associated with the right-wing campus protests in 2016 and 2017. One was a Berkeley staff administrator who described walking across campus and down the street after work on the day right-wing speakers came to campus and a massive police presence was out to prevent a riot. He said he was terrified to reach into his pocket even to show his staff ID to the police for fear an officer would think he was reaching for a gun and shoot him. This is one of the many costs of massive free speech events. See U.C. Berkeley Comm'n on Free Speech, Report of the Chancellor's Commission on Free Speech 9–10 (2018), https://chancellor.berkeley.edu/sites/default/files/report_of_the_commission_on_free_speech.pdf [https://perma.cc/ZVC8-DPAD].

161. See, e.g., Susan Berfield, The High Cost of Free Speech, from Charlottesville to the Women's March, Bloomberg Businessweek (Jan. 25, 2018), https://www.bloomberg.com/news/features/2018-01-25/the-high-cost-of-free-speech-from-charlottesville-to-the-women-s-march (on file with the *Columbia Law Review*).

162. See U.C. Berkeley Comm'n on Free Speech, supra note 160, at 9–10.

even a police presence will not prevent acts of violence, as happened in Charlottesville when a counterprotester at a white supremacist rally was hit and killed by a car driven by a white supremacist.[163]

All of this is a reason to be careful in applying time, place, and manner restrictions. It is not a reason to ban picketing and protest entirely. Labor law has long dealt with the problems caused by large protests by following a settled rule: Even when the subject matter of picketing is protected by statute, mass picketing is unprotected by federal labor law and can therefore be regulated by state law under the usual rules governing marches, rallies, and picketing. To take an analogous example, the civil rights movement that grew out of the student sit-in movement of 1960 and 1961 carefully managed mass picketing and marches by having marchers proceed two-by-two, only on the sidewalk, obeying all traffic lights, and allowing pedestrians to continue on their way.[164] The Supreme Court held that the First Amendment protected picketing and marches conducted in this fashion.[165]

The cases that should be overruled, however, are the ones holding that a single picket or a group of two or three can be enjoined simply because their message is so persuasive to consumers or other workers that it effectively shuts a business down.

C. *Protecting Labor Protest Will Not Jeopardize Economic Regulation*

Labor agreements to engage in conduct to raise wages by restricting output or by refusing to work are exempt from federal antitrust liability, even though business agreements to raise prices are not.[166] Because the Clayton Act removed labor conspiracies from the prohibitions of antitrust law, concerted action by workers seeking to improve wages and working conditions is not a conspiracy in restraint of trade.[167] But when Congress made secondary labor boycotts unlawful, it made conduct that could not be punished under antitrust law punishable under labor law.[168] And, thus, the issue arose once again as to whether labor unions should have a

163. See Hawes Spencer, A Far-Right Gathering Bursts into Brawls, N.Y. Times (Aug. 13, 2017), https://www.nytimes.com/2017/08/13/us/charlottesville-protests-unite-the-right.html (on file with the *Columbia Law Review*).

164. Cox v. Louisiana, 379 U.S. 536, 539–41 (1965).

165. See id. at 555–58; Edwards v. South Carolina, 372 U.S. 229, 235–37 (1963).

166. See Hebert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice 966–67 (5th ed. 2016).

167. Antitrust (Clayton) Act, ch. 323, 38 Stat. 730, 738 (1914) (codified as amended in scattered sections of 15 and 29 U.S.C.); see also United States v. Hutcheson, 312 U.S. 219, 233 (1941).

168. Although an agreement among union supporters not to trade with or work for a nonunion company or not to work for less than what they consider a fair wage cannot be punished as a restraint of trade, it can be punished if it has one of the objects Congress prohibited in sections 8(b)(4) and 8(e) of the NLRA. This includes the object of getting a "neutral" employer to "cease doing business" with an employer whose labor practices the union supporters object to. 29 U.S.C. § 158(b)(4), 158(e) (2012).

First Amendment right to agree to withhold labor if that business does not have to agree to withhold production.

One aspect of the claim made here—that courts should extend to labor protest, including boycotts, the same constitutional protection enjoyed by political boycotts—presents a harder question than the claim that picketing is constitutionally protected because it is speech in a public forum on a matter of public concern. A boycott appears to involve more conduct, and more economic conduct, than standing on a sidewalk holding a sign on a stick. Yet strikes and boycotts are often simultaneously forms of political expression and economic conduct. Every political moment has its own examples; as of this writing, consider the desire of professional football players to kneel during the pregame national anthem to protest racism, the alleged blacklisting of Colin Kaepernick for instigating this protest, and the desire of the National Football League to prohibit such public protest.[169] Both players and owners are using their economic power to make a political statement, and their political statements have force because of the economic power of professional football. Whose conduct is political—either side, neither side, or both? Or, to take another example, is a boycott of a business because of wage theft, or because the business owner harassed or assaulted female employees, a political statement in the #metoo moment,[170] or is it the use of economic leverage?

There is a long history of distinguishing political boycotts from unlawful economic boycotts, though the difficulty of drawing the distinction has become greater as the goals and tactics of labor, political, civil rights, and business groups have become more similar. And the distinction between political and economic action and expression has been further complicated since the Court began to grant some First Amendment protection to advertising and other commercial speech.[171] The difficulty of drawing dividing lines between economic conduct (unprotected), commercial speech (protected, but subject only to intermediate scrutiny), and fully protected speech is illustrated by *Nike Inc. v. Kasky*, a case that invited the Court to eliminate the differential First Amendment protections for political and commercial speech when both Nike and its detractors

169. See, e.g., Benjamin Sachs & Noah Zatz, The Law Is on the N.F.L. Players' Side, N.Y. Times (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/opinion/law-nfl-protests.html (on file with the *Columbia Law Review*).

170. Grace Dobush, How a #MeToo Scandal Led to Calls for a Boycott of Topshop, Fortune (Oct. 26, 2018), http://fortune.com/2018/10/26/metoo-scandal-philip-green-topshop/ (on file with the *Columbia Law Review*) ("After its billionaire owner was named in a sexual harassment scandal, clothing chain Topshop is facing boycotts.").

171. See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976); see also Robert Post, The Constitutional Status of Commercial Speech, 48 UCLA L. Rev. 1, 3 (2000).

made competing claims about sweatshop labor in its supply chain.[172] The Court dodged the issue and decided the case was not justiciable.[173]

Even if the Court were to conclude that labor speech is only commercial speech, not political speech, that would be a major advance for labor, as intermediate scrutiny provides more protection than the sort of rational basis review the Court has usually applied to restrictions on labor protest since the mid-1940s. Alternatively, even if labor speech is no more political than employer speech on the same topic, the Supreme Court suggested in *Matal v. Tam*[174] and *Sorrel v. IMS Health*[175] that viewpoint discrimination within the category of commercial speech violates the First Amendment.

The Court has not seriously considered whether labor protest should be analogized to commercial speech and instead has treated most labor boycotts as "economic" and unprotected under *Giboney v. Empire Storage & Ice Co.*,[176] *International Longshoremen's Ass'n v. Allied International*,[177] and *FTC v. Superior Court Trial Lawyers Ass'n* (*SCTLA*).[178] That has been true even when what was being protested was political, such as the Soviet invasion of Afghanistan in *Allied International*[179] and the deleterious effect on the Sixth Amendment right to counsel of low fees and heavy caseloads of court-appointed indigent criminal defense counsel in *SCTLA*.[180] The Court has never clearly articulated a rule for distinguishing prohibited "economic" boycotts from constitutionally protected "political" ones (and it appears that the latter category consists of the single example of the NAACP's boycott against Jim Crow in *Claiborne*). The distinction has to do both with the goals (what the Court saw as the narrow self-interest of the criminal defense lawyers or the union workers versus the community uplifting goals of the civil rights movement) and with the means (a work stoppage as opposed to a consumer boycott). The power of the boycotter may matter too—the NAACP and the hundreds of civil rights activists charged in *Claiborne* were, by the time of the Court's opinion, widely acclaimed as heroic, freedom-fighting underdogs; the longshoremen

172. 539 U.S. 654, 656 (2003) (Stevens, J., concurring) (per curiam).

173. Id. at 664–65. I have explored that line-drawing problem elsewhere. See Erwin Chemerinsky & Catherine Fisk, What Is Commercial Speech? The Issue Not Decided in *Nike v. Kasky*, 54 Case W. Res. L. Rev. 1143, 1145 (2004).

174. 137 S. Ct. 1744, 1751 (2017) ("Speech may not be banned on the ground that it expresses ideas that offend.").

175. 564 U.S. 552, 566 (2011) (applying heightened scrutiny when evaluating government regulations that limit speech when there is disagreement with the message conveyed).

176. 336 U.S. 490, 503 (1949).

177. 456 U.S. 212, 218–19 (1982).

178. 493 U.S. 411, 422–23 (1990).

179. *Allied Int'l*, 456 U.S. at 214; see also Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 716–17 (1982) (explaining that politically motivated refusal to load Soviet ships is a labor dispute that may not be enjoined under the Norris–LaGuardia Act).

180. See *SCTLA*, 493 U.S. at 423 n.9.

and the criminal defense lawyers seemed powerful in comparison. If these are the lines between the protected and prohibited, perhaps labor is more on the political underdog side now.[181]

A successful First Amendment attack on labor boycott restrictions requires threading a narrow path between cases rejecting such protection for professionals who endeavor to fix prices by adopting ethics rules that restrict competitive bidding,[182] or by agreeing to refuse to undertake new matters until fees are raised,[183] and the constitutional protection for civil rights boycotts. All line-drawing between the political and the economic is somewhat subjective and vague. If the *Carolene Products* Footnote Four enterprise requires drawing a line between political and economic, the choice is between accepting the necessity of putting things in one category or another and blowing up the categories entirely. This case is no different.

Moreover, advocacy of a boycott could be protected by the First Amendment even if the boycott itself is not. As the Court recognized when it protected civil rights protest, picketing may be protected even if it advocates conduct that would be illegal, so long as it does not incite imminent illegal conduct.[184] The Supreme Court found it "clear" in *SCTLA* that "efforts to publicize [a] boycott, to explain the merits of its cause" are "fully protected by the First Amendment"—even though the boycott (the concerted refusal to provide services at the Criminal Justice Act (CJA) rates) was not.[185] Under the reasoning of *SCTLA*, the NLRB and courts cannot prohibit picketing that advocates a secondary boycott, because that is expressive activity "fully protected by the First Amendment," unless perhaps it incites imminent unlawful boycott conduct.[186] Thus picketing that seeks to "*encourage* any individual employed . . . in an industry affecting commerce"[187] to engage in a boycott would seem to be protected unless the picketing meets the standard for incitement of an

181. Louis Uchitelle, How the Loss of Union Power Has Hurt American Manufacturing, N.Y. Times (Apr. 20, 2018), https://www.nytimes.com/2018/04/20/business/unions-american-manufacturing.html (on file with the *Columbia Law Review*) ("As union membership declines, labor has less leverage to intervene in the management of a corporation, or to galvanize the public into boycotting the products of manufacturers who put too many factories overseas while exporting less from the United States.").

182. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 697 (1978).

183. *SCTLA*, 493 U.S. at 416.

184. See Cox v. Louisiana, 379 U.S. 536, 554 (1965) (reversing a conviction for advocating an illegal civil rights sit-in).

185. *SCTLA*, 493 U.S. at 426.

186. Id. Justice Stone's concurring opinion in *United States v. Hutcheson* also recognized that speech advocating a secondary boycott on the grounds that the entity is unfair to labor and requesting the public not to patronize is also "an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by act of Congress." 312 U.S. 219, 243 (1941) (Stone, J., concurring).

187. 29 U.S.C. § 158(b)(4)(i) (2012) (emphasis added).

illegal act, and incitement cannot be punished when it is just persuasion or advocacy.[188]

The Court has long struggled in incitement cases to draw the line between protected speech and unprotected incitement, but labor cases should be no different. As Justice Douglas complained about a 1942 opinion stating that picketing could not be enjoined when it had "slight, if any, repercussions upon the interests of strangers to the issue,"[189] the law cannot be that "a State can prohibit picketing when it is effective but may not prohibit it when it is ineffective."[190] Both civil rights and labor boycotts would be unprotected to the extent they actually constitute coercion,[191] or incite imminent violence,[192] or constitute a true threat of criminal action.[193] Similarly, engaging in peaceful boycotts must be protected equally. What must be unconstitutional is treating one category of labor-related speech as being outside the line-drawing enterprise entirely. One demanding an end to race subordination (protected political speech under *NAACP v. Claiborne Hardware Co.*[194]) and one calling for an end to labor subordination by employees protesting low wages at McDonald's or Walmart[195] are equally political. When students ask businesses to boycott

188. The test for incitement has not been entirely stable, but, in general, the more political the advocacy, the higher the tolerance for it seems to be, absent some connection to terrorism or violence. See Holder v. Humanitarian Law Project, 561 U.S. 1, 36–37 (2010) (holding that because the "particular speech plaintiffs propose to undertake" could constitute "part of a broader strategy to promote terrorism," Congress may ban that speech consistent with the First Amendment). Because a labor secondary boycott produces only economic harm—and even then only when workers and consumers are persuaded to inflict economic harm on themselves in the form of lost wages or lost purchases in order to advance the cause of justice as they see it—it would seem that contemporary labor boycotts are on the legal side of the incitement line.

189. Bakery & Pastry Drivers Local 802 v. Wohl, 315 U.S. 769, 775 (1942).

190. Id. (Douglas, J., concurring).

191. R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992) (describing the exclusion of "fighting words," or threatening speech, from the scope of First Amendment protections).

192. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) ("[T]he constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

193. See Virginia v. Black, 538 U.S. 343, 359 (2003) ("[T]he First Amendment also permits a State to ban a 'true threat' . . . [which] encompass[es] those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.").

194. 458 U.S. 886, 907, 912–13 (1982) (holding that boycotts by black residents against white merchants in response to local civic and business leaders' failure to comply with demands for equality and racial justice constituted protected speech).

195. Bob Chiarito, Hundreds Protest Over Minimum Wage at McDonald's Stockholder Meeting, Reuters (May 24, 2017), https://www.reuters.com/article/idUSKBN18K2EB [https://perma.cc/26WZ-6GA9] ("Hundreds of fast-food workers demanded wage increases as they marched outside McDonald's Corp headquarters during the company's annual shareholder meeting . . . [as] part of a nationwide protest organized by 'Fight for 15,' a labor group that has regularly targeted McDonald's . . . ."); Claire Zillman, Walmart Workers Plan Black Friday Protests for the Fourth Year in a Row, Fortune (Nov. 25, 2015), http://fortune.com/

the National Rifle Association in the wake of a Florida high school shooting,[196] their speech is as political or as economic as the NAACP's call for a boycott of whites-only businesses or a labor organization's call to boycott a business that hires exploitative labor contractors.

The harder question is why the expressive component of a labor boycott—the symbolic conduct of collectively refusing to perform certain services or to patronize certain businesses, or picketing that incites such conduct—is protected.[197] Here the crucial line is the one the Court drew between the constitutionally protected protest about racial injustices that the boycott expressed in *Claiborne Hardware* and the unprotected pursuit of economic self-interest that the Court condemned in *SCTLA*, which involved a boycott conducted by appointed indigent criminal defense counsel protesting low fees paid under the Criminal Justice Act.[198] The Court distinguished the lawyers from the civil rights activists, explaining the latter "sought no special advantage for themselves."[199] The civil rights boycotters "sought only the equal respect and equal treatment to which they were constitutionally entitled" and "struggled 'to change a social order that had consistently treated them as second class citizens.'"[200] Of course, ending Jim Crow was all about improving the economic, as well as the political, situation of blacks. The phase of the assault on Jim Crow that began with boycotts in the 1930s urging black consumers not to shop at stores that refused to hire black workers leveraged the economic power of the black community to change the social order and, by so doing, to create job opportunities that white-owned businesses had long denied to black people.[201] Whether this kind of boycott is economic

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2015/11/25/walmart-black-friday-protest/ [https://perma.cc/Y2AR-5A83] ("A group that calls itself Our Walmart and advocates for workers at the retail giant is planning demonstrations at a dozen locations nationwide as it continues to push for a $15 per hour minimum wage and full-time status for workers.").

196. Marwa Eltagouri, Publix Halts Donations to Self-Described 'NRA Sell-Out' Amid Boycott, 'Die-In' Protests by David Hogg, Wash. Post (May 25, 2018), http://www.washingtonpost.com/news/business/wp/2018/05/25/publix-suspends-contributions-to-adam-putnam-amid-david-hoggs-anti-nra-protests (on file with the *Columbia Law Review*); Tiffany Hsu, Big and Small, N.R.A. Boycott Efforts Come Together in Gun Debate, N.Y. Times (Feb. 27, 2018), http://www.nytimes.com/2018/02/27/business/nra-boycotts.html (on file with the *Columbia Law Review*).

197. A full-length analysis of the First Amendment and antitrust issues in expressive boycotts is found in Hillary Greene, Antitrust Censorship of Economic Protest, 59 Duke L.J. 1037, 1056–64 (2010). See also Sanjukta M. Paul, Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications, 38 Berkeley J. Emp. & Lab. L. 233, 248–53 (2017) (exploring the connection between the nature of the employment relationship between Uber and its drivers and the antitrust implications of price coordination of ride services).

198. FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 414–18 (1990).

199. Id. at 427.

200. Id. at 426 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982)).

201. See Paul D. Moreno, From Direct Action to Affirmative Action: Fair Employment Law and Policy in America, 1933–1972, at 30–65 (1997) (discussing how "Don't Buy Where

conduct or political mobilization, whether it is coercion or persuasion, depends on who is judging and who is persuaded by the call of the boycott. The same may be said about labor boycotts today: Are they about a political challenge to the distribution of wealth in a society with record levels of inequality, or about calls to respect or protect immigrant workers or victims of sexual harassment, or about protests of wage theft? Each is both economic and political.

The line between the political and the economic inevitably reflects a value judgment about which kinds of challenges to economic arrangements are political, as the Court saw the Civil Rights Movement, and which are economic, as the Court saw the CJA lawyers' protest. But as the Court has found more politics in what used to be regarded as economic regulation, it has undermined the basis for treating restrictions on labor picketing and boycotts as political. As the Court said in *Janus*, the wages and working conditions of public employees are matters of "great public concern."[202]

The Supreme Court backed away this Term from deciding whether a baker can refuse to bake a cake to be served at a party to celebrate a same-sex wedding, instead admonishing the state civil rights commission to decide the scope of the right to refuse service to LGBT customers without hostility to religion.[203] The Court at the same time sent back for a lower court to reconsider another case in which there was no similar evidence of alleged hostility to religion.[204] It remains unclear whether some symbolic refusals to work are protected free speech. If the bakers and others who resist doing business with LGBT people gain a First Amendment right to refuse to do some aspects of their work, the question will then become whether there are other First Amendment conscience-based rights to refuse to work. Is refusing to bake a cake because of the use to which it will be put more or less symbolic than refusing to handle goods because of the use to which they will be put or the circumstances under which they were made? Is the concerted refusal of indigent criminal defense counsel to take cases in protest of low fees more or less political than the refusal of Hollywood writers to write because of the low residuals?[205] Is the refusal of engineers to bid against each other for jobs

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You Can't Work" campaigns began in Chicago before 1929 and "spread to almost every major black area in American cities").

202. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2475 (2018).

203. See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729–30 (2018).

204. Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671, 2671 (2018) (mem.).

205. See generally Catherine L. Fisk, Writing for Hire: Unions, Hollywood, and Madison Avenue (2016) (describing the history of film and television writers' efforts to negotiate for some form of profit sharing, their unions' efforts to prohibit writers from working for less than the collectively bargained minimum terms, and periodic strikes over residuals and other terms of employment).

because they consider it unprofessional[206] more or less political than the refusal of workers to cross a picket line because they consider it disloyal? The more First Amendment content the Court pours into paying money or baking a cake or engaging in other occupational tasks, the more troubling the lines it has drawn in a series of labor and antitrust cases become. But however hard the boycott lines may be, cases denying workers the right to march in the streets with signs or to ask for solidarity seem difficult to defend.

In the end, a huge amount of American constitutional law—in the area of the First Amendment as well as in equal protection—turns on the fuzzy line between economic regulation and political action. From 1938 to the mid-1940s, labor boycotts and picketing were on the political side of the line. Civil rights boycotts and picketing were on the economic side (as in *Hughes*) until the Court moved them to the political side after the sit-ins began in 1960. American judges now have a choice. They can move labor protest to the political side, a modest change in law that will leave most of the post-1937 constitutional order in place. Alternatively, they can continue to tolerate egregious content and viewpoint discrimination involving only labor groups. Or they can abandon the line altogether and engage in ad hoc and unprincipled rulings that grant First Amendment protections only to the forms of protest the judges find acceptable. In this area of law, a progressive vision of the First Amendment happens to be the only one that will avoid the Court's contemporary jurisprudence being susceptible to the same withering criticisms that brought the Court into disrepute in 1937.

CONCLUSION

Labor protest is a pressing contemporary issue. The Trump Administration's appointee as the National Labor Relations Board's General Counsel has taken steps to prosecute peaceful labor protest, including the use of the inflatable rat to publicize the use of nonunion labor.[207] Growing ranks of independent contractors who do not enjoy federal statutory labor protection will lose the ability to engage in ordinary strike or boycott activities if business groups succeed in their quest to have federal antitrust law and secondary boycott law invalidate state and local protections.[208] Union efforts to organize across the boundaries of a

206. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 679–80 (1978) (holding that professional society's canon of ethics prohibiting competitive bidding violated federal antitrust law).

207. Those unfamiliar with the rat and some of the constitutional debate about it may wish to consult Construction & General Laborers' Local Union No. 330 v. Town of Grand Chute, 834 F.3d 745 (7th Cir. 2016).

208. National Right to Work has attacked a Seattle ordinance authorizing collective bargaining by independent contractor for-hire drivers on the grounds that the ordinance allows contracts that violate federal labor prohibitions on secondary boycotts. See Clark v. City of Seattle, No. 17-35693, 2018 WL 3763527, at *3 (9th Cir. Aug. 9, 2018); see also

single employer are often punished as secondary boycotts.[209] Labor unions are among the few civil society organizations with national reach and deep policy and political expertise at the local, state, and national levels. They are among the few that have the ability to inform and mobilize voters and activists on economic inequality issues and to be bulwarks against erosion of constitutional democracy.[210] Unions have a funding mechanism necessary to engage in nationwide organizing and political action, and they have structures of democratic accountability to members. No modern constitutional democracy fails to protect civil society organizations of workers and their right to mobilize by publicizing grievances.

Any progressive agenda for change, including in constitutional norms and in labor rights necessary to create such a progressive constitution, will require robust exercise of speech and associational rights that law currently restricts for labor unions. As in spring 2018, when tens of thousands of teachers struck, picketed, rallied, and protested over years of education funding cuts and their devastating consequences for teacher pay, the quality of teachers, and the quality of education, sometimes it takes a massive protest to counter the effects of political malfunction.[211] For years, legislators had thought that cutting taxes was the best way to get elected. Only the massive protests made people aware of the consequences of education funding cuts and prompted legislators to consider alternative policy.[212]

The experience of teachers in 2018 has been replicated elsewhere. Farmworkers and their allies managed to gain improved wages for South Florida tomato pickers only by conducting protests and consumer and merchant boycotts to create the Fair Food Program.[213] There is no path

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Chamber of Commerce v. City of Seattle, 890 F.3d 769, 779–80 (9th Cir. 2018) (rejecting a state action immunity defense to an antitrust suit against the city that enacted an ordinance allowing collective bargaining by unions representing independent-contractor drivers).

209. See, e.g., Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229, 365 N.L.R.B. No. 126, at 6 (2017) (ordering a union representing workers in a craft employed on a construction job to cease encouraging other workers on the same construction job to respect a picket line).

210. See Aziz Huq & Tom Ginsburg, How to Lose a Constitutional Democracy, 65 UCLA L. Rev. 78, 89 (2018).

211. See supra notes 134–135.

212. See, e.g., Rivka Galchen, The Teachers' Strike and the Democratic Revival in Oklahoma, New Yorker (June 4, 2018), http://www.newyorker.com/magazine/2018/06/04/the-teachers-strike-and-the-democratic-revival-in-oklahoma (on file with the *Columbia Law Review*) (explaining that, although the strike failed to achieve all the education funding increases teachers sought, it "spawned a movement of politically engaged Okies"); Dana Goldstein, Teachers in Oklahoma and Kentucky Walk Out: 'It Really Is a Wildfire,' N.Y. Times (Apr. 2, 2018), https://www.nytimes.com/2018/04/02/us/teacher-strikes-oklahoma-kentucky.html (on file with the *Columbia Law Review*).

213. See Michael Braun, Protest at Fort Myers Wendy's Urges Company to Join Fair Food Program, Fort Myers News-Press (July 8, 2018), http://www.news-press.com/story/news/2018/07/08/protest-fort-myers-wendys-urges-company-join-fair-food-program/765274002

to greater protection for workers and to reduced inequality that does not require protest targeted at every place on the supply chain. The fissured workplace has made restrictions on secondary boycotts even more devastating than they were when the Court upheld them from the 1950s to 1980s. Legal doctrine can liberate labor unions and their lawyers from the strictures that have prevented unions from supporting progressive activism and can do so without legitimating the invalidation of economic regulation. The alternative is a free speech jurisprudence that grants constitutional protections only for speech that serves business and conservative interests.[214] The Supreme Court is facing charges from dissenting Justices, scholars, and the media that the five conservative Justices are ideologically driven activists, "black-robed rulers overriding citizens' choices," who are "weaponizing the First Amendment, in a way that unleashes judges . . . to intervene in economic and regulatory policy."[215] If the Court wishes to avoid replicating the abuses of the *Lochner* era, it will have to be even-handed in applying the First Amendment to speech it dislikes as well as speech it likes. Treating labor under the same rules as capital is a good place to start.

[https://perma.cc/G74G-2GXV]; Kari Lydersen, Farmworkers Call Out Wendy's for Failure to Act on Sexual Abuse and Harassment, Huffington Post (Mar. 21, 2018), http://www.huffingtonpost.com/entry/wendys-farmworkers-times-up_us_5aafd0eee4b0697dfe18da99 [https://perma.cc/R3AG-SD5K]; Fair Food Program, www.fairfoodprogram.org [https://perma.cc/D8T7-CQA5] (last visited Aug. 22, 2018).

214. The idea that the Court's First Amendment doctrine on labor speech reflects anything other than the Justices' preferences for speech they like has, as Professor Robert Gordon said in another context, "been criticized so often and so effectively that it always surprises me to see the idea still walking around, hale and hearty, as if nobody had ever laid a glove on it." Robert W. Gordon, A New Role for Lawyers?: The Corporate Counselor After Enron, 35 Conn. L. Rev. 1185, 1204 (2003) (referring to the false equivalence of the roles of corporate and criminal defense lawyers).

215. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting).

ANOTHER FIRST AMENDMENT

*Leslie Kendrick**

What can the First Amendment accomplish in society? In particular, can it foster equality? This Essay, written for Columbia Law Review*'s 2018 Symposium on equality and the First Amendment, argues that, if the question is whether freedom of speech* could *serve equality, the answer is yes. Freedom of speech can serve nearly any value, including equality, because it has enormous normative flexibility. Any number of normative frameworks can generate reasons to protect "freedom of speech," and many frameworks have in fact embraced free speech over the years. But despite its normative capacity, it is not clear that the First Amendment has the cultural capacity to do what is being asked of it. Presumably the goal of seeking a more egalitarian First Amendment is to achieve a more egalitarian society. It is not clear that the First Amendment is the engine for that project. To suggest that a progressive First Amendment could significantly alter a nonprogressive society is to overstate greatly the importance of the First Amendment. Simply and intractably, the way to have a more progressive First Amendment is to have a more progressive society, not vice versa.*

INTRODUCTION

What can the First Amendment accomplish in society? Across the twentieth and twenty-first centuries, it has had an undeniable impact. It is why people can burn flags,[1] why schoolchildren can decline to say the Pledge of Allegiance,[2] and why state employees cannot be fired for

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1. See Texas v. Johnson, 491 U.S. 397, 399, 420 (1989).

2. See W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 628–29, 642 (1943).

unpopular political opinions.[3] It is why there is so much money in politics,[4] why the outsides of abortion clinics look the way they do,[5] why white supremacists can utilize a public park,[6] and why Nazis can march through a town of Holocaust survivors.[7] In each of these examples, the First Amendment intervened against political will, most often embodied in legislation or regulation. Other aspects of our society—including the right to criticize the government and the existence of a free press—would exist, one hopes, even in the absence of the First Amendment. But the First Amendment protects them and informs the political culture that has for some time, at least until recently, treated them as sacrosanct.

But can the First Amendment serve equality? One response to this question is to produce a wish list of remade First Amendment doctrines: less protection for corporate speakers, different campaign-finance law, more interest in listeners and the public, greater weight for equality in liberty–equality trade-offs. That is not the response offered here.[8]

Another response is skepticism. American free speech culture from the mid-twentieth century to the present has not adopted social or economic equality as a central goal. If anything, free speech often seems to

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3. See, e.g., Elrod v. Burns, 427 U.S. 347, 363 (1976) ("[I]f conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that . . . least restrict[s] . . . freedom of belief and association . . . , and the benefit . . . must outweigh the loss of constitutionally protected rights."); United States v. Robel, 389 U.S. 258, 265–66 (1967) (holding a statute unconstitutional because it "seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights").

4. See Citizens United v. FEC, 558 U.S. 310, 365 (2010) (holding unconstitutional statutory limits on independent political expenditures by corporations); Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam) (articulating the principle that restrictions on political spending limit the quantity and diversity of political speech); see also Chris Cillizza, How *Citizens United* Changed Politics, in 7 Charts, Wash. Post: The Fix (Jan. 22, 2014), http://www.washingtonpost.com/news/the-fix/how-citizens-united-changed-politics-in-6-charts (on file with the *Columbia Law Review*) (showing the impact of *Citizens United* on campaign spending).

5. See McCullen v. Coakley, 134 S. Ct. 2518, 2541 (2014) (holding that a Massachusetts statute criminalizing standing on a sidewalk within thirty-five feet of an abortion clinic violated the First Amendment).

6. See Kessler v. City of Charlottesville, No. 3:17CV00056, 2017 WL 3474071, at *1–3 (W.D. Va. Aug. 11, 2017); see also Jason Kessler, S. Poverty Law Ctr., http://www.splcenter.org/fighting-hate/extremist-files/individual/jason-kessler [http://perma.cc/JPR2-AYDB] (last visited Aug. 8, 2018) (describing Kessler as a "white nationalist").

7. See Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 43–44 (1977).

8. For consideration of some of these questions, see, e.g., Leslie Kendrick, The Answers and the Questions in First Amendment Law, *in* Charlottesville 2017: The Legacy of Race and Inequality 70, 74–75 (Louis P. Nelson & Claudrena N. Harold eds., 2018) (discussing the disproportionate impact of current law on non-Christians and people of color); Leslie Kendrick, Are Speech Rights for Speakers?, 103 Va. L. Rev. 1767, 1774 (2017) (arguing for recognition of speakers', and not just listeners', free speech rights); Leslie Kendrick, First Amendment Expansionism, 56 Wm. & Mary L. Rev. 1199, 1219 (2015) (explaining that novel uses of the First Amendment in ever more areas of law demonstrate the challenges in formulating a workable understanding of "the freedom of speech").

stand in tension with equality, whether political, social, or economic. One could reasonably ask whether an equality-based First Amendment is a contradiction in terms. To bring equality into the First Amendment, one could argue, is to demand of it something that it has not done.[9] This, too, is not this Essay's theme.

In fact, if the question is whether freedom of speech *could* serve equality, the answer is yes. Freedom of speech can serve nearly any value, including equality, because it has enormous normative flexibility.[10] Conceptual argument demonstrates this, and history confirms it. Any number of normative frameworks can generate reasons to protect "freedom of speech," and many frameworks have in fact embraced free speech over the years.

But while I shall contend that the ultimate answer here is a simple one, the question raises further questions. What kind of equality is the First Amendment being asked to advance? Why single out the First Amendment in particular? How does one "redesign" the First Amendment to advance equality? What are the goals of doing so? And given the goals, how likely is the project to succeed?

To address these questions, this Essay proceeds in three Parts. The first considers what it means to "redesign" the First Amendment and what "equality" means in the context of that endeavor. Each of these could mean different things, with important consequences for the project.

Second, although current First Amendment jurisprudence may seem hostile to various equality-related values, freedom of speech is a normatively capacious concept. Over time, it has found justification in many sources, some outlandish to us, some contradictory to one another. The great normative flexibility of freedom of speech makes it possible that it could relate (and has related) to social and economic equality in any number of ways.

Third, despite its normative capacity, I doubt whether the First Amendment has the cultural capacity to achieve what is being asked of it. Presumably the goal of seeking a more egalitarian First Amendment is to achieve a more egalitarian society. It is not clear that the First Amendment is the engine for that project. To suggest that a progressive First Amendment could significantly alter a nonprogressive society is to overstate greatly the importance of the First Amendment. Simply and intractably, the way to have a more progressive First Amendment is to have a more progressive society, not vice versa.

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9. See, e.g., Louis Michael Seidman, Can Free Speech Be Progressive?, 118 Colum. L. Rev. 2219, 2231 (2018) ("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.").

10. See infra Part II.

I. FRAMING THE QUESTIONS

Existing First Amendment doctrine has been variously regarded as an enemy to political, social, and economic equality. In the political arena, critics lament rulings such as *Buckley v. Valeo*[11] and *Citizens United v. FEC*[12] for exacerbating inequalities in political participation and influence.[13] Likewise, American doctrine on hate speech has been criticized from many directions for eroding the equal dignity and respect warranted to each individual as a matter of both political and social equality.[14] Meanwhile, deregulatory rulings regarding commercial actors, business interests, public sector unions, and the like arguably contribute to economic inequality or at the least do not take distributional consequences into account.[15]

At the same time, evaluating whether the First Amendment can embrace equality as a core value must begin with considering how much it has already done so. It is easy to say that the answer is "not at all." There

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11. 424 U.S. 1 (1976) (per curiam).

12. 558 U.S. 310 (2010).

13. See, e.g., Kathleen M. Sullivan, Two Concepts of Freedom of Speech, 124 Harv. L. Rev. 143, 144–46 (2010) (arguing that *Citizens United* represents "the triumph of the libertarian over the egalitarian vision of free speech" but that the best view of freedom of speech combines aspects of both visions); J. Skelly Wright, Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?, 82 Colum. L. Rev. 609, 609 (1982) (contending that the Court's campaign-finance decisions gave "protection to the polluting effect of money in election campaigns").

14. See, e.g., Jeremy Waldron, The Harm in Hate Speech 1– 6 (2012) (arguing that hate speech undermines both the "sense of security in the space we all inhabit" and the dignity of those it targets); Mary Ellen Gale, Reimagining the First Amendment: Racist Speech and Equal Liberty, 65 St. John's L. Rev. 119, 127–28 (1991) (highlighting the "problematic relationship between the governing ideals of free expression and the incidents of resurgent racist, sexist, and other prejudiced speech on the college campus"); Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431, 457–58 (arguing that many civil libertarians have failed to understand "both the nature and extent of the injury inflicted by racist speech"); Mari J. Matsuda, The Keynote Address: Progressive Civil Liberties, 3 Temp. Pol. & C.R. L. Rev. 9, 10–11 (1994) (noting the tension between "[t]raditional civil liberties" and the author's support of hate speech regulation).

15. See, e.g., Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2459–60 (2018) (invalidating mandatory contributions to public-sector unions by nonmembers); Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1151 (2017) (mandating First Amendment scrutiny for a consumer protection law); Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015) (invalidating certain securities-related disclosure requirements); Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 959 (D.C. Cir. 2013) (drawing on First Amendment principles to hold that an NLRB rule requiring employers to post a notice on their properties and websites violated section 8(c) of the National Labor Relations Act), overruled in part by Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014); see also Jeremy K. Kessler & David E. Pozen, The Search for an Egalitarian First Amendment, 118 Colum. L. Rev. 1953, 1959 (2018) (arguing that the First Amendment has been "used to thwart economic and social welfare regulation"); Jedediah Purdy, Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment, 118 Colum. L. Rev. 2161, 2169 (2018) (arguing that "the refusal of distributional judgments" is central to the Court's recent free speech jurisprudence).

is no better illustration of this view than the passage in *Buckley* in which the Supreme Court roundly rejected the "governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections."[16] The Court said, "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[17] Equalizing voices was, to the *Buckley* Court, not just an inadequate interest but an illegitimate one. Equality, a value written into the Constitution, was in this arena "wholly foreign."[18]

Yet arguably the central tenet of twentieth-century First Amendment jurisprudence was an equality principle: a political nondiscrimination principle succinctly stated when the Supreme Court said in *Police Department of Chicago v. Mosley*, "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[19] Justice Marshall wrote these words for the majority in a case that the Court regarded as implicating both the First Amendment and the Equal Protection Clause. In it, the Court also stated:

> [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard.[20]

The Court located its nondiscrimination principle within both the First Amendment and the Equal Protection Clause. In doing so, it took a view of political neutrality that had been circulating within First Amendment discourse for decades—through the opinions of Justices Holmes and Brandeis,[21] through Justice Jackson's words in *West Virginia State Board of Education v. Barnette*[22]—and expressly identified it as an

16. *Buckley*, 424 U.S. at 48–49.

17. Id.

18. Id. at 49.

19. 408 U.S. 92, 95 (1972).

20. Id. at 96 (footnote omitted) (quoting Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1948)).

21. See, e.g., Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring) ("[W]e must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence."); Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting) ("[T]he most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow . . . .").

22. See 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in

equality principle. Since then, some scholars have argued that equality is a core feature of the First Amendment.[23]

Not everyone views this version of equality as sufficient. It does not expressly encompass social and economic equality, though it is worth noting that those it has helped—speakers with marginalized views—have often turned out to be marginalized generally.[24] This version of equality may indeed find itself at odds with other versions. Most obviously, nondiscrimination in the realm of ideas protects racist, sexist, and other illiberal views that reject the fundamental equality of all people.[25] Protection of these views comports with one equality principle while imperiling another. For another example, in the realm of campaign-finance regulation, *Buckley* holds that regulation of political expenditures warrants as much scrutiny as regulation of political content,[26] while *Citizens United* holds that differential treatment of corporations is as suspect as differential treatment of topics.[27] These positions deploy what began as "equality of status in the field of ideas" in a way that exacerbates inequality of political participation.[28] In these instances, the tension is perhaps not so much between liberty and equality as between one version of equality and another.

Equality, then, is not all created equal. Certain types of equality may be "wholly foreign" to the contemporary First Amendment.[29] But it incorporates equality values in ways of some significance. Asking how the First

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politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

23. See, e.g., Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 21 (1975) (arguing that equality is central to the First Amendment); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 201–02 (1983) (identifying equality as one of a few important values for the First Amendment).

24. See, e.g., Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 557–58 (1963) (protecting the free association rights of members of an NAACP chapter falsely alleged to harbor Communists); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460–66 (1958) (protecting the free association rights of private individual members of the NAACP); Hague v. Comm. for Indus. Org., 307 U.S. 496, 516 (1939) (upholding the speech rights of labor organizers branded by the mayor as Communists); Vincent Blasi & Seana V. Shiffrin, The Story of *West Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought, *in* Constitutional Law Stories 409, 419–22 (Michael C. Dorf ed., 2d ed. 2009) (describing the persecution of Jehovah's Witnesses between Minersville School District v. Gobitis, 310 U.S. 586 (1940), and *Barnette*).

25. See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 444–45, 449 (1969) (protecting a Ku Klux Klan rally); Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324–25 (7th Cir. 1985) (protecting "pornography" as defined in a city ordinance).

26. Buckley v. Valeo, 424 U.S. 1, 44–45 (1976) (per curiam).

27. Citizens United v. FEC, 558 U.S. 310, 352–53 (2010).

28. See supra note 4; see also supra note 20 and accompanying text.

29. *Buckley*, 424 U.S. at 48–49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .").

Amendment might advance equality raises deeper questions about the relationship between different forms of equality.

In addition, the project at hand raises questions about the relationship of equality, however defined, to free speech values. Is "equality" extrinsic to free speech or intrinsic to it? The Supreme Court in *Mosley* suggested that its version of equality is intrinsic to the First Amendment, that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[30] If the First Amendment is being asked to pivot toward other versions of equality, are those versions inherent in it? Or are they extrinsic values that should weigh more heavily against it?

This question involves the structure of free speech rights.[31] The First Amendment is a particular articulation of a free speech right. Other free speech rights exist in other countries around the world.[32] They have a common structure. They are what some scholars have called special rights—that is, rights that pertain to certain activities and not to others.[33]

A free speech right has a particular scope of operation, with the implication that activities within the scope of the right are distinguishable from activities outside its scope.[34] Thus, only certain activities count as "speech" in the term "freedom of speech," and only certain government actions implicate freedom of speech. Also, as a general matter, the activities within the scope of the right are afforded more robust protection than activities outside its scope.[35] Thus, in American constitutional law,

30. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

31. See Leslie Kendrick, Free Speech as a Special Right, 45 Phil. & Pub. Aff. 87, 91–110 (2017) [hereinafter Kendrick, Special Right] (outlining a framework for free speech as a special right).

32. See, e.g., Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11, §§ 1, 2(b) (U.K.); Charter of Fundamental Rights of the European Union arts. 11, 52(1), 2000 O.J. (C 364) 1; Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221.

33. See, e.g., Ronald Dworkin, Religion Without God 131 (2013) ("Freedom of speech is a special right: government may not infringe that special freedom unless it has what American lawyers have come to call a '*compelling*' justification."); Kendrick, Special Right, supra note 31, at 89–91; see also Frederick Schauer, Must Speech Be Special?, 78 Nw. U. L. Rev. 1284, 1306 (1983).

34. See Kendrick, Special Right, supra note 31, at 91; Frederick Schauer, Free Speech on Tuesdays, 34 Law & Phil. 119, 124–25 (2015) [hereinafter Schauer, Tuesdays] ("[S]aying that there is a right to free speech presupposes something remarkable about speech.").

35. See, e.g., Kent Greenawalt, Speech, Crime, and the Uses of Language 10 (1992) ("As far as speech is concerned, the minimal principle of liberty establishes that the government should not interfere with communication that has no potential for harm. To be significant, a principle of freedom of speech must go beyond this, positing [more robust] constraints on the regulation of speech . . . ."); Thomas Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204, 204 (1972) (arguing that "[i]t is the existence of such cases [of immunity for harm-causing activities] which makes freedom of expression a significant doctrine"); Frederick Schauer, The Second-Best First Amendment, 31 Wm. & Mary L. Rev. 1, 2 (1989) [hereinafter Schauer, Second-Best] ("I start with the

certain forms of regulation trigger strict scrutiny if they target speech and rational basis review if they do not.[36]

Special rights, then, can be described in terms of their distinctiveness and their robustness. Distinctiveness relates to the substance of the right—the aspects that set it apart from other activities and thus define its scope. Robustness relates to the amount of protection afforded to activities that fall within the scope of the right.[37]

The project of remaking the First Amendment could target either its scope or its strength—either its distinctiveness or its robustness. If it targeted the scope, it would argue for reformulating the very values that make freedom of speech distinctive in the first place.[38] Those values should include political or social equality, and the scope of the right should be reframed accordingly. If it targeted the strength of the right, it would argue that the values advanced by free speech should stay more or less the same, but we should reconsider how those values trade off against equality. In this approach, the scope of the First Amendment's operation might change little, but it would provide less robust protection for activities within its scope.

So, for example, to say that campaign-finance regulation is outside the scope of the First Amendment is to reformulate what counts as a First Amendment issue in the first place. This would be to redefine the scope of the right by redefining the values served by it.[39] Alternatively, one could say that campaign-finance regulation is within the scope of the First Amendment, but speech protection in that arena must give way to concerns about corruption or political equality. This would reformulate

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premise . . . that the first amendment's protection of freedom of speech and press is interesting and important because, and only because, it immunizes from governmental control certain acts that would not be so immune were their regulation measured merely against a rational basis standard.").

36. Compare Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015) (applying strict scrutiny to a law targeting speech by subject matter), and Police Dep't of Chi. v. Mosley, 408 U.S. 92, 99–101 (1972) (same), with Williamson v. Lee Optical, Inc., 348 U.S. 483, 486–87 (1955) (applying rational basis review to a business regulation).

37. It is not necessary for a special right to convey additional protection in order for it to be properly classified as a special right. See Kendrick, Special Right, supra note 31, at 109. Nevertheless, even on such a view, the robustness of the right—the strength of its protection—is an important feature to define, even if the conclusion is that the right conveys no more protection than would exist in its absence.

38. Cf. Ronald Dworkin, Sovereign Virtue: The Theory and Practice of Equality 121 (2000) (arguing for a reassessment of liberty as "an aspect of equality rather than, as it is often thought to be, an independent political ideal potentially in conflict with it").

39. See, e.g., Deborah Hellman, Money Talks but It Isn't Speech, 95 Minn. L. Rev. 953, 956 (2011) ("[N]one of these connections between money and speech provide sufficient reason to treat restrictions on giving and spending money as restrictions on speech."); Wright, supra note 13, at 609 ("*Buckley* and *Bellotti* create an artificial opposition between liberty and equality. The first amendment tradition of leading cases and scholarly writings shows that the ideals of political equality and individual participation are essential to a proper understanding of the first amendment.").

the robustness of the protection afforded by the First Amendment, rather than its scope.[40]

Some might call this a distinction without a difference. Perhaps the scope of a free speech right is intrinsically connected to its strength. On this view, it is not a coincidence that the United States recognizes a broad free speech right that offers highly robust protection.[41] Meanwhile, Canada and the European Union are more likely to conclude that certain activities are simply not free speech issues, while at the same time constraining recognized free speech rights through proportionality and balancing.[42] Although these regimes are characterized by some correspondence between scope and robustness, it is not clear that this must be so. A right like Robert Bork's political speech right, for example, would have a narrow scope with strong protection within the scope.[43] A Blackstonian right against prior restraint would have a broad scope in that it would pertain to a wide array of subjects. But it would be relatively weak in protection: It would protect only against prior restraint and not against subsequent punishment.[44]

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40. See, e.g., Richard L. Hasen, Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform, 8 Harv. L. & Pol'y Rev. 21, 35 (2014) ("[S]cholars must do more work defining and defending governmental interests that justify reasonable (but only reasonable) campaign finance regulations.").

41. See Frederick Schauer, The Exceptional First Amendment 2–3 (Harvard Univ. John F. Kennedy Sch. of Gov't Faculty Research Working Paper Series, Paper No. RWP05-021, 2005), https://papers.ssrn.com/abstract=668543 (on file with the *Columbia Law Review*) (arguing that the "American protection of freedom of expression is generally stronger than that represented by an emerging multi-national consensus").

42. See sources cited supra note 32; see also James M. Boland, Is Free Speech Compatible with Human Dignity, Equality, and Democratic Government: America, a Free Speech Island in a Sea of Censorship?, 6 Drexel L. Rev. 1, 23 n.132 (2013) (noting that the guarantees in the Canadian Charter of Rights and Freedoms are expressly subject to balancing); Stephen Gardbaum, The Myth and the Reality of American Constitutional Exceptionalism, 107 Mich. L. Rev. 391, 401–02 & n.42 (2008) (noting that most Western countries, including Canada and Germany, permit regulation of hate speech); Sean P. Flanagan, Note, Up in Smoke? Commercial Free Speech in the United States and the European Union: Why Comprehensive Tobacco Advertising Bans Work in Europe, but Fail in the United States, 44 Suffolk U. L. Rev. 211, 222–23 (2011) (noting that European Union member nations must balance commercial speech restrictions against the speakers' rights).

43. See Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 27–28 (1971) ("The category of protected speech should consist of speech concerned with governmental behavior, policy or personnel . . . ."). For consideration of other narrow but robust conceptions of speech protections, see, e.g., Vincent Blasi, The Checking Value in First Amendment Theory, 1977 Am. B. Found. Res. J. 521, 526–27 [hereinafter Blasi, Checking Value] (analyzing the "value that free speech . . . can serve in checking the abuse of power by public officials" and its implications for the scope of First Amendment protection); Frederick Schauer, Categories and the First Amendment, A Play in Three Acts, 34 Vand. L. Rev. 265, 273–74 (1981) (describing "definitional-absolutist" theories that limit protection to certain categories of speech but call for absolute protection within those categories).

44. 4 William Blackstone, Commentaries *151–153 ("Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the

One might also think that the distinction between the scope and the strength of the right does not matter because both lead to the same result. Whether campaign finance were excised from the First Amendment or balanced away, the result would be a First Amendment jurisprudence more amenable to equality values. But the difference in structure matters. It matters because, one way or another, a society must articulate the values that define freedom of speech. Those values will determine when freedom of speech is implicated and when it is not. To say that equality is one of those values is quite different from saying that free speech values trade off against equality. It is the difference between saying that equality is intrinsic to free speech or extrinsic to it. It is the difference between saying that free speech stands for equality or gives way to it.

Ultimately, discussions of the First Amendment and equality can encompass both approaches: scrutiny of the scope of the First Amendment and its robustness. But the former is more intriguing than the latter. A free speech right that incorporates equality as a matter of first principles is more radical than recalculating yet again the balancing that came out one way in *Austin v. Michigan Chamber of Commerce* and another in *Citizens United*.[45] Can the First Amendment incorporate equality values—different equality values from those it has embraced over the last half century?

II. EQUALITY AS A FREE SPEECH VALUE

Although First Amendment law has not prioritized social or economic equality over the last decades, freedom of speech is accommodating enough that it could. The structure of free speech rights shows why this is so. Because freedom of speech is a special right, the activities to which it applies are distinctive as compared with those to which it does not. There are both descriptive and normative aspects to this distinctiveness.[46] On the descriptive side, the very term "freedom of speech" suggests that the right pertains in some way to what we would call "speech" as a matter of everyday language. This descriptive distinctiveness is important: If "freedom of speech" is completely unrelated to the phenomenon we call "speech," then we should really call it something else.[47]

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freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.").

45. Compare Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 654–56 (1990) (upholding a Michigan statute regulating independent expenditures by corporations against a First Amendment challenge), with Citizens United v. FEC, 558 U.S. 310, 365 (2010) (overruling *Austin* and striking down such a regulation).

46. Leslie Kendrick, Use Your Words: On the "Speech" in "Freedom of Speech," 116 Mich. L. Rev. 667, 687 (2018) [hereinafter Kendrick, Use Your Words].

47. Kendrick, Special Right, supra note 31, at 89; Kendrick, Use Your Words, supra note 46, at 697; see also Schauer, Tuesdays, supra note 34, at 122–25 ("[U]nless there existed something qualitatively or quantitatively distinct about the regulation of speech, talking about a right to free speech . . . would be an error."). Some will argue that the United States is constrained by a constitutional text that privileges "freedom of speech"

At the same time, descriptive distinctiveness, if necessary, is not sufficient. One might identify a distinctive class of phenomena, but it would not be worth singling out for a special right unless it had some normative significance. For instance, "sports" might be distinctive phenomena in the world, but "freedom of sports" would require some sort of normative justification.[48] Similarly, "speech" is a category of phenomena in the world, but one cannot postulate "freedom of speech" from that fact. One must explain why "freedom of speech" is important, and that requires some value that it serves.[49] The term "freedom of speech" suggests some category of speech-related activities that has distinctive normative significance. It is this normative significance that provides the justification for recognizing something called "freedom of speech."

The justifications offered, however, have varied. In our own place and time, a few have predominated: democratic self-governance, autonomy, truth-seeking.[50] Even among and within these three, palpable differences

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and that principles of constitutional interpretation, such as originalism, dictate how to understand it. See Matthew D. Bunker, Originalism 2.0 Meets the First Amendment: The "New Originalism," Interpretive Methodology, and Freedom of Expression, 17 Comm. L. & Pol'y 329, 342–53 (2012) (analyzing a number of Supreme Court First Amendment opinions reflecting originalist thinking). This project considers free speech rights as a normative matter, rather than as a matter of constitutional interpretation. Nevertheless, the speech clause is notoriously impervious to originalist and textualist tools, and many who view themselves as engaging in constitutional interpretation invoke values of the kind discussed here. See Ashutosh Bhagwat, Posner, Blackstone, and Prior Restraints on Speech, 2015 BYU L. Rev. 1151, 1180 ("What is clear—indeed the only thing that is clear—is that any firm statements about the original intent of the First Amendment should be met with extreme skepticism . . . ."); Leo E. Strine, Jr. & Nicholas Walter, Originalist or Original: The Difficulties of Reconciling *Citizens United* with Corporate Law History, 91 Notre Dame L. Rev. 877, 888 n.82 (2016) ("[O]riginalists of all stripes tend to agree . . . that the First Amendment is resistant to historical inquiry."). Indeed, just as a free speech right is a normatively capacious concept, the American "freedom of speech" has shown itself to be equally versatile, as illustrated below. See infra notes 70–86 and accompanying text.

48. The Brazilian Constitution states that "[i]t is the duty of the State to foster the practice of formal and informal sports, as a right of each individual." See Constituição Federal [C.F.] [Constitution] art. 217 (Braz.), translated in Constitution of the Federative Republic of Brazil 147 (Istvan Vajda et al. trans., 3d ed. 2010). I thank Fred Schauer for the reference.

49. Schauer, Second-Best, supra note 35, at 5 ("A theory of free speech is thus a theory that posits a rationale, or justification, or goal, in terms other than free speaking, and then maintains that freedom to speak, or write, or communicate, will promote that posited rationale, justification, or goal.").

50. See, e.g., Frederick Schauer, Free Speech: A Philosophical Enquiry 15–86 (1982) [hereinafter Schauer, Philosophical Enquiry] (identifying major rationales for freedom of speech); Kathleen M. Sullivan & Noah Feldman, First Amendment Law 5–10 (6th ed. 2016) (describing the major justifications for freedom of speech); Robert Post, Reconciling Theory and Doctrine in First Amendment Jurisprudence, 88 Calif. L. Rev. 2353, 2356 (2000) (identifying the marketplace-of-ideas and self-government rationales for free speech); Seana Valentine Shiffrin, A Thinker-Based Approach to Freedom of Speech, 27 Const. Comment. 283, 283 (2011) (discussing autonomy-based theories of free speech and offering a thinker-based approach).

of emphasis lead to divergent conceptions. A narrow democratic-self-governance right, for example, looks quite different from a broad democratic-self-governance right,[51] which in turn looks different from an autonomy right or a truth-seeking right.[52] Modern jurisprudence, which tends to draw on all these justifications, has primed us to think of them as an ecumenical and undifferentiated whole.[53] But the reasons they offer are quite different, and the scope of each, if taken seriously, would be different as well.

Beyond these three, the current age has offered many other justifications for freedom of speech.[54] Some have suggested that it serves as a safety valve for social unrest.[55] Some have said that it helps to build civic courage.[56] Some have argued that it serves a checking function on abuses of power by the government,[57] that it fosters imagination,[58] or that it is necessary for participation in the making of culture or meaning.[59] These are all quite different claims for the normative value of freedom of speech.

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51. Compare Bork, supra note 43, at 25–29 (arguing for a narrow right that would not protect art or literature), with Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245, 255–57 (arguing for a much broader political speech right including protection for literature and the arts).

52. See, e.g., Schauer, Philosophical Enquiry, supra note 50, at 45 ("The argument from democracy does not dissolve completely into the argument from truth. The self-government model reminds us that when we are dealing with governmental policies, . . . we are playing for higher stakes."); David S. Han, Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech, 87 N.Y.U. L. Rev. 70, 73 (2012) (arguing that an autonomy-based First Amendment protects autobiographical lies). For a powerful critique of the protection of lies from an autonomy perspective, including a nuanced account of autobiographical lies, see Seana Valentine Shiffrin, Speech Matters 116–27 (2014) [hereinafter Shiffrin, Speech Matters].

53. See Sullivan & Feldman, supra note 50, at 5 ("These values have animated much of the Court's reasoning in free speech cases, though not always articulately and not always consistently.").

54. See generally Kent Greenawalt, Free Speech Justifications, 89 Colum. L. Rev. 119 (1989) (providing a comprehensive survey of free speech justifications).

55. See Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[T]he path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies . . . ."); Thomas I. Emerson, The System of Freedom of Expression 106–08 (1970) (framing Brandeis's concurrence as a precursor to recognizing the "functions of freedom of expression in mediating between stability and change").

56. See *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring) ("[The Founders] believed liberty to be the secret of happiness and courage to be the secret of liberty."); Vincent Blasi, The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney v. California*, 29 Wm. & Mary L. Rev. 653, 682–83 (1988) (discussing the influence of Brandeis's civic-courage language on the development of the modern First Amendment).

57. See Blasi, Checking Value, supra note 43, at 527.

58. See Jed Rubenfeld, The Freedom of Imagination: Copyright's Constitutionality, 112 Yale L.J. 1, 30–48 (2002) (describing how the First Amendment "protects the freedom of imagination").

59. See John Fiske, Television Culture 236–39 (1987); Jack M. Balkin, Commentary, Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society, 79 N.Y.U. L. Rev. 1, 3 (2004) ("The purpose of freedom of speech . . .

If one widens the lens and considers freedom of speech over time, the justifications become even more diverse. John Milton's defense of a free press in *Areopagitica* is the most significant articulation of a freedom of speech from the early modern era and remains a touchstone of free speech discourse today.[60] The justifications he offers, however, are bound up in his theology, which was idiosyncratic for its own time and is essentially alien today.[61] Concerned with ensuring access to knowledge for those capable of spiritual enlightenment and fatalistic about the dangers of knowledge for those incapable of redemption,[62] Milton's view may strike contemporary readers as deeply inaccessible and wholly foreign to free speech principles—and that is before considering how famously intolerant he was of Catholics.[63] If this view has anything in common with contemporary speech theories growing out of political liberalism, that is a product of convergence on shared conclusions from wildly divergent starting points, an illustration of overlapping consensus at work.

This is not surprising. Freedom of speech has great normative flexibility. The communicative power that makes "speech" distinctive as a phenomenon makes freedom of speech extremely useful to any number of normative frameworks.[64] It is not infinitely flexible: A person who above all things values maintaining peak physical shape would be unlikely to recognize a special role for free speech in this normative framework. But any normative framework in which communication could play a distinctive role has the raw materials for something that could plausibly be called "freedom of speech." A society could place the highest premium on insult and intimidation and find that freedom of speech

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is to promote . . . a culture in which individuals have a fair opportunity to participate in the forms of meaning making that constitute them as individuals.").

60. See John Milton, Areopagitica 13–14 (Grolier Club 1890) (1644) (urging Parliament to reconsider its order requiring printing licenses). For an important view on Milton's relationship to the First Amendment, see Vincent Blasi, A Reader's Guide to John Milton's *Areopagitica*, the Foundational Essay of the First Amendment Tradition, 2017 Sup. Ct. Rev. 273, 298–312 (describing the continuing relevance of some aspects of *Areopagitica*); see also Vincent Blasi, John Milton's *Areopagitica* and the Modern First Amendment, Comm. Law., Winter 1996, at 1, 12–19.

61. See Milton, supra note 60, at 56 ("He that can apprehend and consider vice with all her baits and seeming pleasures, and yet abstain, and yet distinguish, and yet prefer that which is truly better, he is the true wayfaring Christian.").

62. See, e.g., id. at 68–69 ("[T]o all men such books are not temptations, nor vanities; but usefull drugs and materialls wherewith to temper and compose effective and strong med'cins, which mans life cannot want. The rest, as children and childish men, . . . well may be exhorted to forbear, but hinder'd forcibly they cannot be . . . ."); id. at 84 ("And were I the chooser, a dram of well-doing should be preferr'd before many times as much the forcible hindrance of evill-doing. For God sure esteems the growth and compleating of one vertuous person, more then the restraint of ten vitious.").

63. See, e.g., id. at 174 ("I mean not tolerated Popery, and open superstition, which as it extirpats all religions and civill supremacies, so it self should be extirpat, provided first that all charitable and compassionat means be us'd to win and regain the weak and the misled . . . .").

64. Kendrick, Use Your Words, supra note 46, at 696–97.

has a special role to play within that normative framework.[65] A society could commit itself to the circulation of information on the price of shampoo, and recognition of a freedom of speech would facilitate that goal.[66] More plausibly, a society could care about deliberative democracy,[67] development of moral agency,[68] or many other values and determine that freedom of speech has something special to offer. Because the label "freedom of speech," as a conceptual matter, plausibly describes any number of communication-related values that could arise in any number of systems, a "free speech right" is a normatively capacious concept.

None of this is to say that all free speech rights are equally good. Their value and plausibility will depend largely on the value and plausibility of the normative frameworks of which they are a part. But free speech rights are more versatile than we might assume. Thus, although the First Amendment has not prioritized political or social equality over the last few decades,[69] it is normatively capacious enough that it could. We might remember this when our own set of free speech justifications seems, for better or worse, timeless and immovable.

Because free speech rights are normatively versatile, justifications for free speech rights have changed over time, even within our own society's immediate past. To note just one example, in the late nineteenth and early twentieth centuries, classical liberals who embraced robust liberty of contract valued free speech as one facet of individual liberty.[70] The relationship between free speech and economic power posited by these thinkers was quite different from what current reformers have in mind.

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65. Id. at 699.

66. See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976) ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."); id. at 765 ("[T]he allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable."). For questioning of this normative framework, see id. at 787 (Rehnquist, J., dissenting) ("I had understood this view [of the First Amendment] to relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo.").

67. See, e.g., Jürgen Habermas, Three Normative Models of Democracy, *in* The Inclusion of the Other 239, 239–52 (Ciaran Cronin et al. trans., Ciaran Cronin & Pablo De Grieff eds., 1998) (1996) ("[T]he procedures and communicative presuppositions of democratic opinion- and will-formation function as the most important sluices for the discursive rationalization of the decisions of a government and an administration bound by law and statute.").

68. See, e.g., Shiffrin, Speech Matters, supra note 52, at 85–88.

69. See supra note 15 and accompanying text.

70. See generally Stephen M. Feldman, Free Speech and Democracy in America: A History 153–290 (2008) (providing a historical treatment of these thinkers); Mark A. Graber, Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism 18–49 (1991) (same).

Herbert Spencer equated interference with speech with interference with the free market: "[A]s interference with the supply and demand of commodities is mischievous, so is interference with the supply and demand of cultured faculty."[71] Political scientist John W. Burgess regarded economic and expressive freedom as aspects of liberty. Indeed, for Burgess, economic freedom was a prerequisite to expressive freedom. This meant, among other things, that corporations should be unregulated:

> [Modern political science] absolutely demands that all institutions, through which new truth is discovered and the ideals of advancing civilization are brought to light and moulded into forms for application, shall be so far free from governmental action as to secure and preserve, at least, perfect freedom of scientific thought and expression.[72]

Similarly, Yale sociologist William Graham Sumner argued that a "society based on contract . . . gives the utmost room and chance for individual development."[73] On views like Burgess's and Sumner's, economic deregulation fosters—and is indeed a necessary precursor to—free inquiry, free expression, and the development of the individual.

Not only did this formulation link freedom of speech with a libertarian economic view, but it also expressly dismissed intellectual equality along with economic equality as desirable goals. Sumner argued that the "work of civilization" was to expand opportunity and that "[e]very improvement in education, science, art, or government expands the chances of man on earth."[74] He went on, however:

> Such expansion is no guarantee of equality. On the contrary, if there be liberty, some will profit by the chances eagerly and some will neglect them altogether. Therefore, the greater the chances the more unequal will be the fortune of these two sets of men. So it ought to be, in all justice and right reason. The yearning after equality is the offspring of envy and covetousness, and there is no possible plan for satisfying that yearning which can do aught else than rob A to give to B; consequently all such plans nourish some of the meanest vices of human nature, waste capital, and overthrow civilization.[75]

Freedom of contract, then, created opportunities of the mind, which would be utilized in an uneven fashion, which would then exacerbate inequality. This was acceptable, however, because "if we can expand the chances we can count on a general and steady growth of civilization and advancement of society by and through its best members."[76]

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71. Herbert Spencer, Facts and Comments 83 (1902).

72. John W. Burgess, Private Corporations from the Point of View of Political Science, 13 Pol. Sci. Q. 201, 211 (1898).

73. William Graham Sumner, What Social Classes Owe to Each Other 26 (1883).

74. Id. at 168.

75. Id.

76. Id.

I mention these thinkers simply to make the point that not only *can* freedom of speech incorporate economic and social goals, but it *has* done so—in ways hostile to the project in mind today. These thinkers are just examples in the long and complex history of economically informed conceptions of free speech. Professor Laura Weinrib, for instance, has compellingly shown how the ACLU first embraced and then abandoned a conception of free speech centered around labor interests.[77] In the mid-twentieth century, some economists argued that the marketplace of ideas is just another market and that all markets should be equally free.[78] Some contemporary libertarians have expressly endorsed the First Amendment as a means of achieving the same legal ends that were once accomplished through liberty of contract.[79]

Nor is the relationship between free speech and economic goals always skewed in one direction. Certain aspects of First Amendment doctrine incorporate economic equality values. *Marsh v. Alabama* and traditional public forum doctrine are instances in which the Court reshaped property and speech rights to provide rights of access and basic speech opportunities.[80] While some decisions in this vein—such as *Logan Valley*

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77. See Laura Weinrib, The Taming of Free Speech: America's Civil Liberties Compromise 1–13 (2016); see also Jerold S. Auerbach, The La Follette Committee: Labor and Civil Liberties in the New Deal, 51 J. Am. Hist. 435, 435–36, 458–59 (1964) ("Throughout the twenties [the ACLU] resolutely defended the rights of labor . . . . Before long, however, the New Deal reawakened their fear of a leviathan state which would manipulate the national emergency to justify repression.").

78. See, e.g., R.H. Coase, The Market for Goods and the Market for Ideas, 64 Am. Econ. Rev. (Papers & Proc.) 384, 389 (1974); Aaron Director, The Parity of the Economic Market Place, 7 J.L. & Econ. 1, 6–9 (1964) (critiquing the dichotomy between "the liberty of owning property and freedom of discussion" and arguing that "the political economists have shown better insight into the basis of all freedom than the proponents of the priority of the market place for ideas"); Ideas v. Goods, Time, Jan. 14, 1974, at 32, 32–33 (describing Professor Ronald Coase's criticism of the distinction between the market for goods and the market for ideas).

79. See, e.g., Janice Rogers Brown, Lecture, The Once and Future First Amendment, 2007–2008 Cato Sup. Ct. Rev. 9, 18–22 ("[T]he more familiar argument made for intellectual freedom applies with equal potency to economic freedom. . . . Like the path to hell, the way is broad and paved with good intentions. You can begin by undermining property, or objective moral value, or the family, or by attempting to control ideas directly."); cf. Richard A. Epstein, Lecture, The Monopolistic Vices of Progressive Constitutionalism, 2004–2005 Cato Sup. Ct. Rev. 11, 14–18, 29–32 (critiquing the Progressives' twofold project of narrowing the Court's broad definition of liberty and increasing the Court's deference to state police power).

80. See Marsh v. Alabama, 326 U.S. 501, 509 (1946) ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position."); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

Plaza,[81] *Red Lion*,[82] or *Austin*[83]—have been overruled or cabined, their existence illustrates that the relationship between speech and property has been multidimensional. Meanwhile, certain decisions during the civil rights era reshaped speech and property rules to address social equality.[84] Some of these decisions have had lasting impact: It is no accident that *New York Times Co. v. Sullivan*, which defines defamation standards for public figures,[85] and *NAACP v. Alabama*, which sets the standard for burdens on free association,[86] both responded to Alabama's punitive treatment of civil rights organizers.

Despite surface inattention to social and economic equality, then, the First Amendment has been deeply entangled with these questions, as a matter of both theory and doctrine. This means the project of incorporating equality into the First Amendment begins not with a clean slate but with a long history, much of which pulls in the opposite direction. Yet past variations suggest that new variations are possible. The variety of relationships

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81. Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 324–25 (1968) (recognizing a First Amendment right of access to picket at a privately owned shopping center), overruled by Hudgens v. NLRB, 424 U.S. 507 (1976).

82. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390–92, 400–01 (1969) (upholding FCC rules regulating broadcasters' treatment of public issues in part because of "the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views"); see also Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637–41 (1994) (declining to extend the holding of *Red Lion* to cable television).

83. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990) (upholding a corporate general funds ban in elections because of the distortive nature of corporate resources), overruled by Citizens United v. FEC, 558 U.S. 310 (2010).

84. See, e.g., Bouie v. City of Columbia, 378 U.S. 347, 361–62 (1964) (reversing the convictions of African American "sit-in" demonstrators on grounds of statutory construction); Robinson v. Florida, 378 U.S. 153, 155–57 (1964) (concluding that the appellants' trespass convictions reflected a state policy encouraging restaurant segregation and therefore violated the Fourteenth Amendment); Barr v. City of Columbia, 378 U.S. 146, 150–51 (1964) (reversing the breach of peace convictions of several African American "sit-in" demonstrators because their actions were "polite, quiet, and peaceful"); Griffin v. Maryland, 378 U.S. 130, 135–37 (1964) (holding that the arrest for trespass of African American demonstrators by a deputy sheriff constituted state enforcement of a private policy of racial segregation, thus violating the Fourteenth Amendment); see also Beauharnais v. Illinois, 343 U.S. 250, 258–59 (1952) ("Illinois did not have to . . . await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community." (footnote omitted)). See generally Risa Goluboff, Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s (2016) (discussing the Supreme Court's contemporaneous shift in attitude toward the speech, property, and due process values implicated by vagrancy laws).

85. 376 U.S. 254, 271, 279–80 (1964) (describing the advertisement at issue as "an expression of grievance and protest on one of the major public issues of our time").

86. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 451– 54, 460–63 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . .").

already posited between free speech and economic and social structure is a testament to the normative capaciousness of free speech rights.

III. FREE SPEECH AS AN ENGINE OF EQUALITY

The question remains, however, what is to be gained by refashioning the First Amendment in the name of equality. One might simply believe that an ideal free speech right ought to incorporate equality values. If so, the questions identified earlier will arise: what version of equality applies and whether equality is itself a component of free speech or an independent value that overrides it—whether freedom of speech stands for equality or gives way to it.[87] Whatever structure the right takes, it must fit within a larger normative framework that others could endorse and must plausibly describe something called "freedom of speech."[88] And while freedom of speech is a normatively capacious concept, proponents of reform may meet with resistance arising from the fact that, of the many relationships free speech could have with equality, a particular relationship has prevailed in our society over generations.[89]

I take it, however, that the primary motivation for reconsidering the First Amendment is not a matter of ideal theory. The goal of seeking a more egalitarian First Amendment is, first and foremost, to achieve a more egalitarian society. I doubt whether this tail can wag that dog.

I register this doubt at both a conceptual level and a more pragmatic one. Conceptually, I have said that free speech rights are normatively capacious—they have found justification within any number of normative frameworks, including those prioritizing autonomy, democratic governance, truth-seeking, economic equality, economic liberty, social equality, social Darwinism, early modern Protestant theology, and so on.[90] I have argued that the freedom of speech is a plausible special right within so many different normative frameworks because it offers something that many frameworks are likely to find useful—heightened protection for whichever communicative functions facilitate their particular priorities.[91] In this regard, free speech is likely to be special enough to warrant singling out within any number of normative frameworks. It serves the normative value in question in a distinctive way, and that makes it worth talking about on its own and prevents its collapsing entirely into the larger value.[92]

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87. See supra text accompanying notes 38–40.

88. See supra notes 46–49 and accompanying text.

89. See Seidman, supra note 9, at 2231 ("[T]hroughout American history, the speech right has, at best, provided uncertain protection for progressives.").

90. See supra Part II.

91. See supra text accompanying notes 64–68; see also Kendrick, Use Your Words, supra note 46, at 697.

92. See Kendrick, Use Your Words, supra note 46, at 697–98 ("Various activities may be important [within a larger normative framework], just as different systems of the human

But the freedom of speech is unlikely to *define* what larger value or values a society embraces. It can adapt to a variety of normative frameworks, but when up against a strong preference for a different framework, a particular conception of free speech seems unlikely to matter much. Speech is special, but it is not that special.

Over the twentieth century, the First Amendment demonstrated little ability to influence dominant political and economic views, rather than be influenced by them.[93] Protection for Socialist dissidents came after the Red Scare.[94] The Supreme Court did not oppose McCarthyism until long after McCarthy's demise, and when it did so, it mostly "nibbled at the fringes of the loyalty-security program."[95] The Court's most robust pronouncements on content neutrality were not made in crisis—"the Court protected the free expression rights of the Ku Klux Klan after the defeat of massive resistance to *Brown*, not before, and certainly not during the Klan's heyday in the 1920s when the organization's membership peaked at over four million."[96] One counterexample, protection for flag burning, contradicted majority preferences on that particular issue but was—reluctantly—embraced by the Supreme Court as the necessary by-product of a larger content-neutrality doctrine that was generally uncontroversial.[97]

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body are important . . . . The cardiovascular system serves the body in a particular way. Likewise, one may claim that the communicative mechanism of speech serves a larger value in a particular way.").

93. See, e.g., Scott L. Cummings, The Social Movement Turn in Law, 43 Law & Soc. Inquiry 360, 371 (2018) (noting an "impressive body of court impact studies" showing that "court decisions generally, and Supreme Court decisions in particular, failed to translate into robust social change on the ground"); Frank H. Easterbrook, Abstraction and Authority, 59 U. Chi. L. Rev. 349, 370 (1992) ("The Court's role in civil liberties (with the exception of its holdings about race relations) has been that of a follower, not a leader. It extirpates in the name of the Constitution practices that have already disappeared or dwindled among the states."); Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. 1, 6 (1996) (arguing that, on both civil rights and civil liberties such as free speech, the Supreme Court largely either follows national consensus or resolves issues on which the populace is fairly divided but rarely takes a truly countermajoritarian position); cf. Jack M. Balkin & Reva B. Siegel, Principles, Practices, and Social Movements, 154 U. Pa. L. Rev. 927, 947 (2006) ("Courts play an important and creative role in [the development of public opinion], but it is largely a reactive role. Courts respond to social disruption by social movements rather than initiate it themselves . . . .").

94. See Klarman, supra note 93, at 12–13 ("The Court began to extend serious First Amendment protection to political radicals only in the 1930s—that is, *after* the first Red Scare had safely passed. . . . [Later decisions protecting Jehovah's Witnesses and labor unions] hardly qualified as [countermajoritarian] by the time of the Second World War.").

95. L.A. Powe, Jr., Does Footnote Four Describe?, 11 Const. Comment. 197, 203 (1994).

96. Klarman, supra note 93, at 36.

97. For an illustration of how long the Supreme Court wrestled with flag desecration before Texas v. Johnson, 491 U.S. 397 (1989), see John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1482 (1975) ("On three occasions . . . the Supreme Court, on one narrow ground or another, has avoided definitively ruling on the constitutionality of convictions for politically inspired destruction or alteration of the American flag.").

The First Amendment has mostly stayed within the bounds of what larger political preferences made possible. Thus Judge Learned Hand worried about the propensities of "Tomdickandharry, D.J.,"[98] while Justice Cardozo observed, "The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by."[99] Much later, Professor Vincent Blasi argued for a pathological perspective on the First Amendment precisely because of its susceptibility to larger political forces.[100] In a 2017 Cato Institute poll, fifty-three percent of Republicans said they favored stripping U.S. citizenship from people who burn the American flag.[101] Sixty-three percent of Republicans agreed with the statement that journalists today are an "enemy of the American people."[102] These are still minority positions within our society, but their appearance now suggests that changes in our political culture affect understandings of the First Amendment, and not vice versa.

This is not to argue that conceptions of the First Amendment do no work at all. As one critic said in another context, "The Court may be able to catalyze, to unlock, tendencies that are immanent in the public mind."[103]

One genuine counterexample may be Citizens United v. FEC, 558 U.S. 310 (2010), which many polls show to be disfavored by a majority of respondents. See, e.g., Dan Eggen, Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing, Wash. Post (Feb. 17, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html [https://perma.cc/35PW-C4EC]; Cristian Farias, Americans Agree on One Thing: *Citizens United* Is Terrible, HuffPost (Sept. 29, 2015), https://www.huffingtonpost.com/entry/citizens-united-john-roberts_us_560acd0ce4b0af3706de129d [https://perma.cc/W62M-H43V]. Some polls purport to show otherwise. See Jordan Fabian, Poll: Public Agrees with Principles of Campaign Finance Decision, Hill (Jan. 23, 2010), http://thehill.com/blogs/blog-briefing-room/news/77629-poll-public-agrees-with-principles-of-campaign-finance-decision [https://perma.cc/4ULG-K48K]. If this is an example of a countermajoritarian First Amendment decision, it is not clear how much it is driven by First Amendment commitments rather than larger political commitments on which a narrow majority of the Supreme Court happens to be out of step with the rest of the country.

98. Letter from Judge Learned Hand to Zechariah Chafee, Jr., Professor, Harvard Law School (Jan. 2, 1921), *in* Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan. L. Rev. 719, 770 (1975) ("I am not wholly in love with Holmesy's [clear and present danger] test . . . . Once you admit that the matter is one of degree . . . you so obviously make it a matter of administration, i.e. you give to Tomdickandharry, D.J., so much latitude . . . that the jig is at once up.").

99. Benjamin N. Cardozo, The Nature of the Judicial Process 168 (1921).

100. Vincent A. Blasi, The Pathological Perspective and the First Amendment, 85 Colum. L. Rev. 449, 449–50 (1985) ("My thesis is that in adjudicating first amendment disputes and fashioning first amendment doctrines, courts ought to adopt what might be termed the pathological perspective. . . . The first amendment, in other words, should be targeted for the worst of times.").

101. Emily Ekins, The State of Free Speech and Tolerance in America, Cato Inst. (Oct. 31, 2017), http://www.cato.org/survey-reports/state-free-speech-tolerance-america [https://perma.cc/H89G-D2KZ].

102. Id.

103. Robert G. McCloskey, Reflections on the Warren Court, 51 Va. L. Rev. 1229, 1269 (1965).

But occasional catalyzation "does not mean that opinion is infinitely malleable, that the Court can drag the nation to goals that it is not already disposed to accept."[104] The First Amendment is like a set of gears. It can run more or less smoothly. It can inject resistance or grease the way. But it is not the engine.

Nevertheless, on a more pragmatic level, some argue that the First Amendment should at least foster equality or impede inequality when it can, and that lawyers and scholars should invest in framing arguments toward this end.[105] This position essentially acknowledges the First Amendment's role as a set of gears that makes a difference at the margins. It also acknowledges that free speech rights exist against the backdrop of larger values. The argument is that it is worthwhile to put the gearwork of the First Amendment to work for the larger value of equality.

This is a matter of pragmatism and second-best strategy, on which views will inevitably differ. As just described, however, it is unclear how much work this strategy can achieve if it takes place in a society resistant to the larger project. Moreover, in recent years, the First Amendment has been efficiently employed by many parties and courts in a deregulatory project.[106] One might desire a progressive First Amendment to neutralize this trend. Or one might conclude that this recent history makes the First Amendment a particularly unpromising and unpersuasive avenue for addressing what is in any case really a matter of higher-level values.

CONCLUSION

Professor Fred Schauer once likened the First Amendment to a pipe wrench. Commenting on the use of the First Amendment to advance a variety of ends that, descriptively speaking, would not historically have been recognized as related to free speech, Schauer said,

> Suppose you need to drive a nail into a board but have no hammer. You do, however, have a pipe wrench. What do you do? . . . Especially if the task is genuinely important, we will whack away at the nail with the pipe wrench. This will take longer than it otherwise would take with a hammer, the nail will probably not go all the way into the board, and the wrench will likely be damaged in the process. But it would be better than nothing.

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104. Id.

105. See, e.g., Catherine L. Fisk, A Progressive Labor Vision of the First Amendment: Past as Prologue, 118 Colum. L. Rev. 2057, 2059–60 (2018); Genevieve Lakier, Imagining an Antisubordinating First Amendment, 118 Colum. L. Rev. 2117, 2120–21 (2018); Bertrall Ross, Partisan Gerrymandering, the First Amendment, and the Political Outsider, 118 Colum. L. Rev. 2187, 2194 (2018).

106. See, e.g., John C. Coates IV, Corporate Speech & the First Amendment: History, Data, and Implications, 30 Const. Comment. 223, 248–65 (2015) (analyzing court decisions empirically to show "how pervasively and systematically corporations have been using the First Amendment to achieve de- or re-regulatory goals").

> . . . Like the pipe wrench, the First Amendment is frequently called on to do a job for which it is poorly designed. The job frequently gets done but, as with driving a nail with a pipe wrench, the job gets done poorly and the tool is damaged in the process.[107]

For some, using the First Amendment to advance equality may look like Schauer's pipe wrench: using the First Amendment for a job to which it is not accustomed, for reasons extrinsic to what makes it significant in the first place.

I invoke the metaphor for a different point: It presupposes the job. If a person wants to pull a nail out of a board, that person will use whatever tool is available. If a dominant segment of society, or of judges, is interested in deregulation, they will use whatever tool is available, be it the First Amendment or something else. Providing someone with a tool even more ill-suited than a pipe wrench may slow down the job, but it will not alter it. Nor will making the First Amendment slightly better at fostering equality do much in a society that does not value that goal.

Professor Zechariah Chafee said that "in the long run the public gets just as much freedom of speech as it really wants."[108] Likewise, the public gets the kind of freedom of speech it really wants. A more progressive First Amendment would incorporate equality values into the right itself, or it would give way to those values more readily. But doing either of these successfully requires endorsing equality values in the first place. No First Amendment, not even the best First Amendment, can do that on its own.

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107. Frederick Schauer, First Amendment Opportunism, *in* Eternally Vigilant: Free Speech in the Modern Era 175, 175 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

108. Zechariah Chafee, Jr., Free Speech in the United States 564 (1941).

IMAGINING AN ANTISUBORDINATING FIRST AMENDMENT

*Genevieve Lakier**

Over the past four decades, the political economy of the First Amendment has undergone a significant shift. If in the early twentieth century winners in First Amendment cases tended to be representatives of the marginalized and the disenfranchised, these days, they are much more likely to be corporations and other powerful actors. This Essay excavates the causes of that change and suggests how it might be remedied. It argues that the shift in First Amendment political economy is not primarily a consequence of the overly expansive scope of current free speech law—as some have argued. Nor is it a product of the Court's free speech libertarianism. What it reflects instead is the Court's embrace over the past several decades of a highly formal conception of the First Amendment equality guarantee. If the Court once interpreted the First Amendment to require, or at least permit, substantive equality of expressive opportunity, today the Court insists that the First Amendment guarantees—and guarantees only—formally equal treatment at the government's hands. It is this shift, this Essay argues, that has produced a free speech jurisprudence that tends to favor the powerful and the propertied. By examining its causes and excavating areas of free speech law in which the Court has attempted to vindicate a more substantive conception of expressive equality, this Essay begins the work of charting out an alternative, more antisubordinating First Amendment.

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INTRODUCTION

Over the past forty years, the political economy of the First Amendment has undergone a significant shift. In the early and mid-twentieth century, litigants that won First Amendment cases tended to be civil rights groups like the NAACP,[1] proponents of minority religions,[2] and other representatives of the marginalized and the disenfranchised.[3] These days, the winners in First Amendment cases are much more likely to be corporations and other economically and politically powerful actors.[4] The result is that today the First Amendment often serves as the "primary guarantor of the privileged" rather than the champion of the powerless it used to be.[5]

Scholars have provided two explanations for the change. Some have argued that it is a consequence of the decision to extend constitutional protection to commercial speech and corporate speakers.[6] By interpreting the guarantee of freedom of speech too expansively, they argue, the Court has allowed the First Amendment to be "hijacked" by corporations and other business groups and to be turned into a tool of economic deregulation and corporate power.[7] Others attribute the shift in the demographics of the

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1. See, e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460, 466 (1958) (holding that disclosure of the names of NAACP members to the state of Alabama would violate the organization's "freedom to engage in association for the advancement of beliefs and ideas").

2. See, e.g., W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that a policy compelling Jehovah's Witnesses to recite the pledge of allegiance violated their First Amendment rights).

3. See, e.g., De Jonge v. Oregon, 299 U.S. 353, 365–66 (1937) (holding that Oregon's Criminal Syndicalism Act was unconstitutional as applied to a member of the Communist Party who was convicted for conducting a peaceful meeting under the auspices of the party).

4. See John C. Coates IV, Corporate Speech & the First Amendment: History, Data, and Implications, 30 Const. Comment. 223, 248 (2015) (analyzing "data from Supreme Court and Circuit Court decisions to illustrate how recently the corporate takeover of the First Amendment has occurred, and how pervasively and systematically corporations have been using the First Amendment to achieve de- or re-regulatory goals").

5. Mark Tushnet, An Essay on Rights, 62 Tex. L. Rev. 1363, 1386–92 (1984).

6. See, e.g., Daniel J.H. Greenwood, First Amendment Imperialism, 1999 Utah L. Rev. 659, 659 ("The First Amendment threatens to swallow up all politics. . . . Increasingly, it acts as a bar to governmental action not just with regard to the issues of conscience and religious practice with which it began, but far into the realm of economic regulation . . . ."); Jedediah Purdy, Neoliberal Constitutionalism: Lochnerism for a New Economy, 77 Law & Contemp. Probs., no. 4, 2014, at 195, 203 (arguing that decisions like Citizens United v. FEC, 558 U.S. 310 (2010), demonstrate "the Court's march away from a principle that it accepted with the New Deal: Buying and selling enjoy no special constitutional status").

7. Tim Wu, The Right to Evade Regulation: How Corporations Hijacked the First Amendment, New Republic (June 3, 2013), https://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation [https://perma.cc/8TX4-CE8S].

First Amendment's beneficiaries to the excessive libertarianism of the contemporary Court. They argue that the Court's tendency to treat free speech interests as more important than almost any other competing interest has produced a First Amendment jurisprudence that is favorable for corporations, relative to everyone else.[8]

This Essay suggests a third explanation. It argues that the shift in the First Amendment's political economy is not entirely—or even primarily—a consequence of the process Professor Daniel Greenwood has called "First Amendment imperialism," which he describes as the "rapid expansion [of the First Amendment] into areas long thought impervious to constitutional law," particularly areas of "economic regulation . . . the courts had abandoned to the legislatures after the *Lochner* disaster."[9] Nor is it a product of the Court's excessive libertarianism. Indeed, this Essay challenges the idea that the contemporary Court *is* particularly libertarian when it comes to freedom of speech.

What this shift reflects instead is the Court's embrace over the past several decades of a highly formal conception of the First Amendment equality guarantee. Since the New Deal period, the Court has recognized that implicit in the First Amendment guarantee of expressive liberty is a guarantee of expressive equality—that freedom of speech means not only the right to speak but the right to speak on equal terms as other speakers.[10] Over time, however, the Court has significantly changed its understanding of what this means.

For much of the twentieth century, the Court interpreted the guarantee of expressive equality in a manner that was sensitive to the economic, political, and social inequalities that inhibited or enhanced expression.[11] It interpreted the First Amendment, for example, to require that those who lacked other means of expressing themselves be granted access to publicly important spaces (including privately owned public spaces) to do so.[12] It also struck down laws that, although in principle

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8. See, e.g., Tabatha Abu El-Haj, "Live Free or Die"—Liberty and the First Amendment, 78 Ohio St. L.J. 917, 922–23 (2017) (arguing that the "libertarian First Amendment" that has emerged in recent years poses a real threat to the ability of the regulatory state to perform its core functions); Kathleen M. Sullivan, Two Concepts of Freedom of Speech, 124 Harv. L. Rev 143, 145 (2010) (arguing that decisions such as *Citizens United* represent the "triumph of the libertarian over the egalitarian vision of free speech"); Morgan N. Weiland, Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition, 69 Stan. L. Rev. 1389, 1397 (2017) (arguing that contemporary First Amendment law relies on a libertarian vision of the First Amendment that "represents a radical break from the republican and liberal traditions on which it draws" by "subordinating [listener rights] to corporate speech rights and eventually nullifying them altogether").

9. Greenwood, supra note 6, at 659–60 (footnote omitted).

10. See Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 21 (1975).

11. Id.

12. See infra notes 121–134 and accompanying text.

applicable to all, had a disparate impact on the ability of the poor and the powerless to communicate.[13] And it refused to invalidate on First Amendment grounds laws that restricted the speech of the powerful in an effort to enhance the speech of the powerless.[14] It interpreted the First Amendment, in other words, to guarantee—or at least permit—a rough kind of substantive equality in expressive opportunity.

Since the 1970s, however, the Court has moved increasingly far away from this context-sensitive, substantive-equality-promoting view of the First Amendment. It has rejected the idea that courts should take into account inequalities in economic and political power when interpreting the First Amendment command.[15] It has also, for the most part, rejected the idea that the First Amendment permits the government to limit the speech of wealthy or powerful speakers in order to enhance the speech of others.[16] Instead, it has interpreted the guarantee of expressive equality to require—and to require only—formally equal treatment at the government's hands.

It is this change in the Court's conception of what it means to guarantee expressive equality that is largely responsible, this Essay argues, for the "corporate takeover" of the First Amendment.[17] And it is a problem, not only because it means in practice that the First Amendment frequently fails to protect the expressive freedom of those who lack the economic resources to communicate effectively in our highly commodified public sphere. Indeed, this shift is so troubling because it undermines as a result the robust and inclusive public debate that the First Amendment is supposed to make possible.

Taking stock of the present state of free speech jurisprudence thus requires taking stock of this change in the Court's understanding of expressive equality. Doing so also obviously has normative implications. If the problem posed by the contemporary free speech doctrine is simply that it renders too much ordinary economic regulation subject to judicial scrutiny and that it makes that judicial scrutiny too demanding when it applies, then the obvious response is to narrow the scope of the First Amendment (to decolonize the empire, in other words) and to weaken the intensity of its protections. But if the problem with contemporary free speech doctrine is an egalitarianism that tends to favor *both* government and private power, what is needed is not a weaker and a narrower First Amendment but a different First Amendment—one that functions better to protect the expressive freedom of the powerless. What needs to change, in other words, is not the strength of the speech right but its meaning.

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13. See infra notes 39–42 and accompanying text.

14. See infra notes 43–44 and accompanying text.

15. See, e.g., Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam).

16. Id.; see also Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 736–40 (2011); Davis v. FEC, 554 U.S. 724, 742 (2008).

17. Coates, supra note 4, at 265.

This Essay begins the work of charting out that alternative—an "antisubordinating" First Amendment—by pointing to the areas of case law in which the Court has attempted to vindicate a more substantive conception of expressive equality. It proceeds in three parts. Part I describes the recent shift in free speech jurisprudence toward a more formal conception of expressive equality. Part II canvasses some of the doctrinal areas in which the Court once sought to vindicate substantive equality. Part III addresses some of the arguments that might be made against an antisubordinating approach.

I. TWO VISIONS OF EQUALITY

It is by now well known that, when it comes to the Equal Protection Clause, there has been significant and enduring disagreement about what it means to guarantee equal protection of the law.[18] On one view—a view that is, at present, embraced by a majority of the members of the Supreme Court—what the Equal Protection Clause guarantees is formal equality.[19] On this view, the government violates its obligation to provide equal protection when it treats people differently because of their race, gender, or a limited number of other morally irrelevant and historically freighted "suspect" categories—at least absent an extremely good reason for doing so.[20] The government lives up to its equality obligations, in contrast, when it treats individuals of different races or genders the same; that is, when it adopts, in relation to its citizens, "color-blind"[21] or "gender-blind"[22] goggles.

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18. See Jack M. Balkin & Reva B. Siegel, The American Civil Rights Tradition: Anticlassification or Antisubordination?, 58 U. Miami L. Rev. 9, 10 (2003) (describing the "antisubordination" and "anticlassification" approaches, as well as the Supreme Court's adoption of the latter).

19. See Kimberly Jenkins Robinson, The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools, 50 B.C. L. Rev. 277, 315 (2009) ("The Court's current approach to equal protection, which has been labeled an antidiscrimination, anticlassification, or color-blind approach, emphasizes the impropriety of government use of racial classifications.").

20. See Balkin & Siegel, supra note 18, at 10 ("Roughly speaking, [the anticlassification] principle holds that the government may not classify people either overtly or surreptitiously on the basis of a forbidden category: for example, their race.").

21. See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion) (Roberts, C.J.) (asserting that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (plurality opinion) (Powell, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

22. See, e.g., United States v. Virginia, 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979))).

On another view—one articulated in earlier cases such as *Strauder v. West Virginia*[23] and *Shelley v. Kraemer*,[24] and embraced today by a minority of Justices on the Court[25]—what equal protection requires is something more substantive. On this view, the government fails to provide equal protection of the law when it allows its institutions to be used to perpetuate the de facto, even if not de jure, second-class status of some members of society.[26] What determines, on this view, whether a law equally protects is not the form it takes or the purposes that motivate it but its effects on a complex social environment. As a result, formally identical treatment does not necessarily satisfy equal protection, nor does formally dissimilar treatment necessarily violate it. In fact, some proponents of this more context-sensitive conception of equal protection have argued that not only does the Fourteenth Amendment not *prohibit* the government from making suspect distinctions; in some cases, it may *mandate* them—when, for example, there is no other way the government can avoid perpetuating the second-class status of members of historically disenfranchised groups.[27]

As should be obvious from these thumbnail descriptions, whether a court adopts one or the other view of the Equal Protection Clause will affect the outcome it reaches in a wide variety of cases. In cases involving challenges to race-based affirmative action laws and policies, as well as in cases involving constitutional challenges to formally neutral laws that have a significantly disparate impact on one group or another, the difference between the formal and substantive—or what sometimes get called the "anticlassificatory"[28] and "antisubordinating"[29]—conceptions of equal

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23. 100 U.S. 303 (1879).

24. 334 U.S. 1 (1948).

25. See Reva B. Siegel, From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases, 120 Yale L.J. 1278, 1305 (2011) ("The four dissenting Justices in *Parents Involved* express key tenets of the antisubordination understanding of *Brown*.").

26. *Kraemer*, 334 U.S. at 19–21 (holding that judicial enforcement of racially restrictive covenants violates the Equal Protection Clause by using "the full coercive power of government to deny [to some] . . . rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color"); *Strauder*, 100 U.S. at 308 (asserting that the purpose of the Equal Protection Clause is to protect ex-slaves and their descendants from "legal discriminations [that] . . . lessen[] the security of their enjoyment of the rights which others enjoy" and from "discriminations which are steps towards reducing them to the condition of a subject race").

27. David A. Strauss, The Myth of Colorblindness, 1986 Sup. Ct. Rev. 99, 128 ("It [is] plausible [to conclude] . . . that affirmative action is constitutionally required [because] it is divisive and harmful to society to exclude nearly all blacks from important social institutions and benefits, even when that exclusion is the product of race-neutral criteria.").

28. Genevieve Lakier, *Reed v. Town of Gilbert*, *Arizona*, and the Rise of the Anticlassificatory First Amendment, 2016 Sup. Ct. Rev. 233, 236.

29. Ruth Colker, Anti-Subordination Above All: Sex, Race, and Equal Protection, 61 N.Y.U. L. Rev. 1003, 1010 n.18 (1986).

protection really matters.[30] Indeed, scholars have convincingly argued that the Court's embrace of a highly formal interpretation of the Equal Protection Clause has significantly undermined its effectiveness as a safeguard of substantive equality.[31] One could put the point more strongly: that the Court's embrace of a formal rather than a substantive conception of equality has turned the Equal Protection Clause into a powerful mechanism of *disequalization*: a tool that can be, and frequently is, used to defend entrenched social hierarchies rather than to challenge them.[32]

A similar story can be told about the First Amendment. Although the text of the First Amendment speaks only of liberty, not equality, since the early twentieth century, the Court has recognized that implicit in the guarantee of freedom of speech is a guarantee of expressive equality. It has insisted, in other words, that freedom of speech means not only that one possesses some quantum of liberty to speak but that one has the same liberty to speak as do others. It has concluded, as a result, that the government may not restrict speech unequally *even* when it might be able to do so equally.[33]

The Court has interpreted the First Amendment to guarantee expressive equality because it has recognized that laws that treat speakers unequally threaten one of the First Amendment's central purposes: namely, ensuring that public debate on public matters is "uninhibited, robust, and wide-open."[34] This is because when the government uses its coercive power to advantage or disadvantage certain ideas or certain speakers, the effect may be to drive some ideas out of the public realm altogether, thereby diminishing the "uninhibited" and "wide-open" nature of the public debate.[35]

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30. See Balkin & Siegel, supra note 18, at 11 (explaining that "depending on how the Court dealt with . . . facially neutral practices with a disparate impact on racial minorities, the Constitution would either rationalize or destabilize the practices that sustained the racial stratification of American society").

31. For a strong articulation of this point, see Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 Stan. L. Rev. 1111, 1129 (1997); see also Ian Haney-López, Intentional Blindness, 87 N.Y.U. L. Rev. 1779, 1877 (2012) ("Intentional blindness, as both doctrine and justificatory rhetoric, stands today as a prelude to even more unjust racial politics.").

32. This is obviously true of the affirmative action cases, but the same can also be said of cases such as McCleskey v. Kemp, 481 U.S. 279 (1987), which validate the "equality" provided by facially neutral laws. For a full account of this argument, see Randall L. Kennedy, *McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court, 101 Harv. L. Rev. 1388, 1389 (1988).

33. This is the lesson from decisions such as Niemotko v. Maryland, 340 U.S. 268, 272 (1951), and Cantwell v. Connecticut, 310 U.S. 296, 310 (1940), which struck down overly discretionary licensing laws not because they restricted too much speech but because they could be too easily used to discriminate.

34. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

35. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (noting that discriminatory laws "raise[] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace").

Laws that deprive some speakers of expressive opportunities that others possess, the Court has suggested, also insult the dignity of those they target by implying—and sometimes outright declaring—that some ideas and opinions are more valuable than others.[36] Consequently, the Court has insisted for decades now that the First Amendment guarantees not only freedom of speech but also what Justice Marshall described in *Police Department of Chicago v. Mosley* as "equality of status in the field of ideas."[37]

Like the guarantee of equal protection, the guarantee of "equality of status in the field of ideas" could obviously be interpreted in multiple ways. It could be interpreted as a guarantee of substantive equality. That is to say, it could be interpreted to mean that differently positioned members of the public enjoy roughly equal opportunity to express themselves publicly. Alternatively, it could be interpreted more formally, to require—but to require only—that the government not treat speakers differently because of who they are or what they have to say.

For much of the twentieth century, the Court tended to employ the first, more substantive, conception of expressive equality. This is not to say that the early- and mid-twentieth-century Court had no objection to laws that subjected different speakers to different rules based on the content of their speech. To the contrary: In case after case, it made clear that the government could not treat speakers unequally because it disliked their message or their viewpoint. In most of these cases, however, the groups targeted by the discriminatory speech laws were those at the bottom of the political and social hierarchies: Jehovah's Witnesses, for example, or Communists.[38] By prohibiting formally unequal treatment, the Court also promoted substantive equality.

In other cases, the Court struck down laws that satisfied formal equality (that is, they applied equally to all and were not motivated by discriminatory animus) but nevertheless imposed a much greater burden on the expressive freedom of the poor and powerless than they imposed on others. In *Martin v. City of Struthers*, for example, the Court struck down a

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36. Id. (asserting that "[t]he constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests" (second alteration in original) (internal quotation marks omitted) (quoting Leathers v. Medlock, 499 U.S. 439, 448–49 (1991))); see also Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 511 (1996) (arguing by analogy to equal protection jurisprudence that discriminatory regulations of speech are impermissible because the government's treatment of some speakers as "less intrinsically worthy . . . register[s] a kind of disrespect that . . . renders [the regulations] improper").

37. 408 U.S. 92, 96 (1972) (internal quotation marks omitted) (quoting Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1948)).

38. See, e.g., Saia v. New York, 334 U.S. 558, 559 (1948); Cantwell v. Connecticut, 310 U.S. 296, 300 (1940); Herndon v. Lowry, 301 U.S. 242, 245 (1937); Stromberg v. California, 283 U.S. 359, 362 (1931).

local ordinance that prohibited distributors of handbills and circulars from ringing the doorbell or knocking on the door of any house in town with the purpose of distributing their materials.[39] It did so because it found that the ordinance prohibited a mode of communication that played a vital role in democratic politics—that was, in particular, "essential to the poorly financed causes of the little people"—without adequate justification.[40] In its heckler veto cases, meanwhile, the Court held that otherwise-constitutional breach of peace laws could not be used to penalize those whose speech incited a hostile audience reaction, except when doing so was absolutely necessary to preserve the peace.[41] It did so because it believed that any other rule would allow "standardization of ideas either by legislatures, courts, *or dominant political or community groups*"—it would allow those who possessed the power of the crowd (those who belonged to locally "dominant . . . groups") to use the instrumentalities of the government to silence those who lacked this power.[42]

In these and other cases, the Court recognized that even when the government did not treat speakers differently because it disliked their viewpoint or their identity, its actions could have a disparate impact on the ability of some to communicate, given underlying inequalities in access to expressive resources or social capital. It recognized, furthermore, that this disparate impact, if sufficiently substantial, could violate the constitutional guarantee of freedom of speech. This is a vision of the First Amendment as the safeguard of more—and in some cases less—than formal equality.

Indeed, not only did the Court strike down formally neutral laws that had a disparate effect on the ability of the "little people" to express themselves; it also upheld formally unequal laws that, by treating different speakers differently, attempted to compensate for differences in economic

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39. 319 U.S. 141, 146 (1943).

40. Id.

41. See, e.g., Cox v. Louisiana, 379 U.S. 536, 551 (1965); Edwards v. South Carolina, 372 U.S. 229, 238 (1963); Terminiello v. Chicago, 337 U.S. 1, 37 (1949).

42. *Terminiello*, 337 U.S. at 4–5 (emphasis added). The Court deviated from this rule once, in Feiner v. New York, 340 U.S. 315 (1951), in an opinion that relied, ultimately, on a formal equality argument. Indeed, the primary justification the majority provided for why the arrest and conviction of the unpopular speaker could be sustained in that case was that "there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions." Id. at 319–20. Because there was no evidence that the government intended to discriminate against the speaker because of his views, the Court concluded that the First Amendment was not offended. Justice Black wrote a blistering dissent, in which he warned of the danger that the majority's analysis posed to the freedom of speech of unpopular speakers. See id. at 328–29 (Black, J., dissenting) ("[T]oday's holding means . . . minority speakers can be silenced . . . . Criticism of public officials will be too dangerous for all but the most courageous. . . . [W]hile previous restraints probably cannot be imposed on an unpopular speaker, the police have discretion to silence him as . . . the customary hostility to his views develops."). In later years, the Court largely heeded Black's warnings and returned to the approach employed several years before *Feiner* in *Terminiello*. See, e.g., *Cox*, 379 U.S. at 552; *Edwards*, 372 U.S. at 238.

and political power. Perhaps the most famous instance of this is the decision in *Red Lion Broadcasting Co. v. FCC* in 1967, about which I will say more later.[43] But also notable in this regard is the 1957 decision in *United States v. UAW-CIO*, in which the Court refused to invalidate on First Amendment grounds a section of the Taft–Hartley Act that prohibited unions—but only unions—from spending money on election-related speech in order to "protect the political process from . . . the corroding effect of money employed in elections by aggregated power."[44]

Here and elsewhere, the Court adopted what we might call, borrowing from the equal protection scholarship, an "antisubordinating" view of the First Amendment. It did not always do so self-confidently or with great clarity. In fact, at times, the Court appeared entirely unable to explain *why* it was interpreting the First Amendment as it did. In *UAW-CIO*, for example, Justice Frankfurter's majority opinion elaborated at great length on the history of campaign finance regulation in the United States but was entirely unable to explain why the ban on union spending did not violate the First Amendment.[45] It is not hard to understand, however. If the purpose of the First Amendment is to foster "the widest possible dissemination of information from diverse and antagonistic sources"—as the Court declared it to be in *Associated Press v. United States* in 1945[46] and would reiterate on many occasions subsequently—then laws that restrict the expressive activity of powerful actors in order to foster participation from less powerful, but potentially more numerous, more diverse, and more antagonistic others do not necessarily threaten First Amendment values; instead, they may help promote them.[47] This is certainly what the opinion in *Associated Press* suggested.[48]

That Frankfurter was unwilling to endorse this view of the First Amendment, explicitly at least, suggests how difficult at least some members

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43. 395 U.S. 367 (1969); see also infra notes 150–159 and accompanying text.

44. 352 U.S. 567, 582 (1957).

45. Instead, after a lengthy discussion of the pressing concerns that motivated Congress to regulate campaign spending, Frankfurter argued that the Court neither needed to nor should analyze the constitutional issues raised by the case and noted some of the questions that it might address on future occasions. Id. at 591–92. The questions Frankfurter listed strongly suggested, however, that he believed that the ban could be profitably challenged only as applied, rather than facially, though he did not explain why this might be. See id. at 592 (noting as questions that might profitably be explored on future occasions: "Did it constitute active electioneering or simply state the record of particular candidates on economic issues? Did the union sponsor the broadcast with the intent to affect the results of the election?").

46. 326 U.S. 1, 20 (1945).

47. For later iterations of the claim made in *Associated Press*, see CBS. v. Democratic Nat'l Comm., 412 U.S. 94, 183 (1973); Citizen Publ'g Co. v. United States, 394 U.S. 131, 139 (1969); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

48. *Associated Press*, 326 U.S. at 20 ("Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.").

of the Court found the antisubordinating approach when what it entailed were constraints on *private* speech. It was well and good to say that the government could not regulate speech when doing so had a disparate impact on the expressive freedom of the "little people." It was quite another thing, however, to say that the expressive freedom of powerful private actors could be curtailed when doing so made it easier for other, less powerful speakers to express themselves. Taken to its logical extreme, this principle called into question the distinction between public and private power that is a constitutive feature of the modern First Amendment tradition.[49]

Yet, notwithstanding the evident discomfort that some members of the Court demonstrated toward the broader implications of the antisubordinating view, in the decades after *UAW-CIO* was handed down, the Court repeatedly upheld laws that compensated for inequalities in social, political, and economic power by limiting the expressive freedom of powerful private speakers.[50] More generally, it crafted a free speech jurisprudence that was sensitive to economic and political inequality—that assessed the constitutionality of state action by examining the context in which it operated, and its effects, as well as its motivations and its form.

Beginning in the 1970s, however, the Court turned away from this power- and context-sensitive approach to the interpretation of freedom of speech. In many different areas of law, it began to insist—in contrast to the earlier cases—that the First Amendment poses little bar to well-intentioned government actions that have a disparate impact on the ability of some to communicate.[51] It has instead interpreted the First Amendment to prohibit—and, for the most part, to prohibit only—government actions that treat some speakers differently because of the viewpoint or subject matter of their speech, or because of other "suspect" characteristics, such as their institutional identity or their wealth.[52]

The result has been to limit the effectiveness of the First Amendment as a tool for protecting the expressive freedom of those at the bottom of the economic and social hierarchies—those whose speech is most likely to be constrained by forces other than the discriminatory animus of government actors. It has also turned the First Amendment into a barrier to legislative efforts to protect the expressive freedom of the (relatively) poor and (relatively) powerless by limiting the expressive freedom of the richer and more powerful.

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49. See infra notes 138–140 and accompanying text.

50. One can include on this list, besides *Red Lion* and *UAW-CIO*, NRLB v. Gissel Packing Co., 395 U.S. 575, 616 (1969), which I discuss below. See infra notes 183–186 and accompanying text.

51. See infra notes 57–60 and accompanying text.

52. See infra notes 68–74 and accompanying text.

A. *Campaign Finance Regulation*

This is most obviously true when it comes to the Court's campaign finance jurisprudence. Campaign finance regulation in the United States has always been justified, in whole or in part, by a desire to promote a rough kind of substantive equality in the market for political influence.[53] By limiting the amount of money that can be spent on election-related speech, campaign finance laws attempt to ensure that the wealthy and the not so wealthy have at least somewhat equal opportunity to use money to influence both who is elected and how they govern once elected. Campaign finance has tended to promote this goal, however, by restricting the spending of only certain kinds of political actors—corporations, for example, and unions. Even when they apply a formally neutral rule, campaign finance laws uniquely burden the wealthy and are intended to do so.

For decades now, critics have argued that the fact that they intentionally burden only some speakers and not others means that campaign finance laws violate the First Amendment. Justice Douglas wrote a vigorous dissent in *UAW-CIO* in which he argued that the majority should have struck down the ban on union campaign spending on First Amendment grounds.[54] Douglas adamantly rejected the argument that the ban could be justified by the need to prevent unions from using their considerable economic power to exert an "undue and disproportionate influence upon federal elections."[55] Douglas argued that the fact that "one group or another . . . is too powerful," like the fact that one group or another "advocates unpopular ideas," cannot constitutionally justify preventing it from speaking or expending money on speech.[56]

Until the early 2000s, this argument utterly failed to convince the Court that campaign finance laws necessarily violated the First Amendment—or even that that they did so in most cases. Although the Court acknowledged that constitutional interests were implicated when the government limited how much corporations or unions could spend on election-related speech, it insisted that "considerable deference" be given to the legislative

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53. As early as the late nineteenth century, reformers argued that legislation was necessary to prevent wealth—particularly corporate wealth—from undermining the ability of the nonwealthy to influence politics. This sentiment was vigorously expressed by statesman Elihu Root in a 1894 speech that proved influential to the Court's mid-twentieth-century campaign finance jurisprudence. See United States v. UAW-CIO, 352 U.S. 567, 571 (1957) ("The idea [behind campaign finance restrictions] is to prevent . . . the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds . . . to send members of the legislature . . . to vote for their protection and the advancement of their interests . . . ." (second alteration in original) (internal quotation marks omitted) (quoting Elihu Root, Addresses on Government and Citizenship 143 (Robert Bacon & James Brown Scott eds., 1916))).

54. See *UAW-CIO*, 352 U.S. at 597 (Douglas, J., dissenting).

55. Brief for the United States at 51, 52–57, *UAW-CIO*, 352 U.S. 567 (No. 44), 1956 WL 89052.

56. See *UAW-CIO*, 352 U.S. at 597 (Douglas, J., dissenting).

judgment that "the particular legal and economic attributes of corporations and labor organizations" justify their "particularly careful regulation."[57]

This deference was not unlimited. In *Buckley v. Valeo*, the Court held that the government could not enact campaign finance laws in order to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections."[58] "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others," the Court asserted, "is wholly foreign to the First Amendment."[59] Instead, the government had to demonstrate that campaign finance laws furthered some other, more *compelling* interest, such as the interest in preventing corruption or the appearance of corruption.[60] It also had to show that the laws were "closely drawn" to advance those ends.[61]

In later cases the Court interpreted this standard relatively loosely.[62] And notwithstanding *Buckley*'s evident discomfort with the substantive-equality-promoting aspects of campaign finance law, the Court subsequently interpreted the government's interest in preventing political corruption broadly, to include efforts to prevent the "corrosive and distorting effects of immense aggregations of wealth . . . accumulated with the help of the corporate form" from undermining the integrity of the democratic political process.[63] In effect, the Court defined the anticorruption interest to include an interest in promoting equality.[64] One can well understand why. As Professor David Strauss has argued, corruption is a serious concern in the campaign finance context largely *because* of the significant economic inequality that characterizes American society.[65] It is only in a context in which economic resources are unevenly distributed that the ability of some voters to use those resources to buy political influence poses a serious

57. FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 209–10 (1982).

58. 424 U.S. 1, 48 (1976) (per curiam).

59. Id. at 48–49.

60. See id. at 25–27.

61. Id. at 25.

62. See Richard L. Hasen, Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns, 78 S. Cal. L. Rev. 885, 891 (2005) (discussing the four post-*Buckley* cases—which he called the "New Deference Quartet"—in which the Court "markedly lowered the bar for upholding the constitutionality of campaign finance regulations in candidate campaigns").

63. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990), overruled by Citizens United v. FEC, 558 U.S. 310 (2010); see also FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986) (describing the desire to "regulate the 'substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization'" as an anticorruption interest (quoting FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 207 (1982))).

64. David A. Strauss, Corruption, Equality, and Campaign Finance Reform, 94 Colum. L. Rev. 1369, 1369 n.1 (1994).

65. Id. at 1370 (arguing that corruption in the campaign finance context "is a derivative problem" and that "[i]f somehow an appropriate level of equality were achieved, much of the reason to be concerned about corruption would no longer exist").

threat to the representativeness of the system writ large. This means that a constitutional rule that recognizes, as *Buckley* did, that the government has a compelling interest in combating corruption because of the threat that corruption poses to "the integrity of our system of representative democracy" can easily be interpreted to mean that the government also has a compelling interest in combatting the influence of money on politics.[66] Certainly this is how the Court in later cases interpreted the *Buckley* rule. The result was that, notwithstanding its strict language, in practice *Buckley* was not interpreted as an insurmountable constraint on the government's ability to limit the campaign spending of the very wealthy.[67]

And then *Citizens United v. FEC* came along.[68] In that decision, the Court famously—perhaps infamously—held that the government's interest in safeguarding elections from the corrupting and "distorting" effects of corporate wealth not only wasn't compelling; it wasn't even legitimate.[69] Instead, the Court held that the government had a compelling interest in preventing only quid pro quo corruption—the exchange of money for specific favors—and its appearance.[70] "The fact that speakers may have influence over or access to elected officials does not mean that th[o]se officials are corrupt," Justice Kennedy asserted for the Court.[71] The Court also held that the government could not impose greater restrictions on corporate speech than on the speech of natural individuals.[72] This is because, the Court explained, when the government "tak[es] the right to speak from some and giv[es] it to others, [it] deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."[73] It deprives the disadvantaged speakers, in other words, of "equality of status in the field of ideas."[74]

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66. Buckley v. Valeo, 424 U.S. 1, 26–27 (1976) (per curiam).

67. See, e.g., McConnell v. FEC, 540 U.S. 93, 203 (2003) ("Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law."), overruled by *Citizens United*, 558 U.S. 310; Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 391–92 (2000) ("While *Buckley*'s evidentiary showing exemplifies a sufficient justification for contribution limits, it does not speak to what may be necessary as a minimum.").

68. 558 U.S. 310.

69. Id. at 348–50.

70. Id. at 359 ("The hallmark of corruption is the financial *quid pro quo:* dollars for political favors[.]" (internal quotation marks omitted) (quoting FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985))).

71. Id.

72. Id. at 356 (overruling Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990), on the grounds that the First Amendment prevents "the Government [from] suppress[ing] political speech on the basis of the speaker's corporate identity").

73. Id. at 340–41.

74. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972) (internal quotation marks omitted) (quoting Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1948)).

In an article published shortly after the decision was handed down, Professor Kathleen Sullivan argued that the majority opinion in *Citizens United* reflected the triumph of a libertarian, as opposed to an egalitarian, conception of the First Amendment guarantee of freedom of speech.[75] But in fact the central value the opinion vindicated was equality, not liberty. As Justice Stevens pointed out in his dissent, the "basic premise underlying the Court's ruling [was] its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity."[76] Indeed, the Court did *not* hold that the government could never restrict election-related speech. It merely held that the government could not restrict election-related speech in order to promote certain voices over others. It could not enact campaign-finance laws, in other words, to advance what the Court clearly considered to be a discriminatory aim (that is, reducing the political influence of the wealthy). Nor could it use discriminatory—that is, speaker-based—means of advancing its legitimate aims.[77] Indeed, the Court insisted that the government could employ speaker distinctions only when doing so was necessary to the functioning of government institutions.[78]

What *Citizens United* demonstrates, therefore, is less a shift toward a libertarian conception of freedom of speech than a shift in the Court's understanding of what an egalitarian First Amendment requires. In lieu of the more contextual approach it had previously taken, the Court now insisted on a much more formal equality rule: one that not only prevented the government from employing speaker-based distinctions when it regulated political spending but also defined the government's anticorruption interest so narrowly as to prevent the enforcement of even many non-speaker-based laws that were intended to limit the influence of wealth on politics.[79] The result was a significant increase in spending on election campaigns—much of it coming from wealthy donors.[80]

The Court's recent campaign finance jurisprudence thus provides a stark illustration of how the insistence on formal equality can actively

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75. Sullivan, supra note 8, at 145.

76. *Citizens United*, 558 U.S. at 394 (Stevens, J., dissenting).

77. Id. at 340 ("Premised on mistrust of governmental power, the First Amendment . . . [p]rohibit[s] . . . restrictions distinguishing among different speakers, allowing speech by some but not others.").

78. Id. at 341 ("The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform . . . functions . . . [that] cannot operate without some restrictions on particular kinds of speech.").

79. See Michael S. Kang, The End of Campaign Finance Law, 98 Va. L. Rev. 1, 5 (2012).

80. See, e.g., Bob Biersack, 8 Years Later: How *Citizens United* Changed Campaign Finance, Open Secrets (Feb. 7, 2018), https://www.opensecrets.org/news/2018/02/how-citizens-united-changed-campaign-finance/ [https://perma.cc/V955-EVE7] (documenting the growing influence of outside spending relative to total federal campaign spending).

interfere with the government's ability to promote substantive equality—in this case, substantive equality of opportunity in the market for political influence. The law of campaign finance is not, however, the only area of First Amendment law in which the Court has embraced a much more formal conception of expressive equality than was previously the case, with similarly problematic consequences. Instead, the shift evident in *Citizens United* can be espied in many different areas of free speech doctrine.

B. *Time, Place, and Manner Cases*

Consider, for example, the body of First Amendment cases dealing with laws that regulate the time, place, or manner of speech. For over seventy years, the Court has recognized that the government may restrict when, where, and how individuals express themselves publicly, so long as the restrictions it imposes serve a legitimate—that is, noncensorial—purpose, are reasonably limited, and do not "unfair[ly] discriminat[e]" against any particular group or individual.[81] Over time, however, the Court has interpreted the prohibition against discriminatory time, place, and manner laws in markedly different ways.

Originally, the Court interpreted the antidiscrimination principle to mean that the government could not enact a time, place, or manner law if doing so made it significantly harder for a particular subset of speakers to express themselves publicly. In *Martin v. Struthers*, the Court struck down a ban on the door-to-door distribution of pamphlets because it found that being able to distribute pamphlets door-to-door was crucial to the "poorly financed causes of little people."[82] In the hotly contested license-tax cases it decided around the same time, members of the Court bitterly divided over whether the government could ever impose license taxes on expressive activity; however, all nine Justices agreed that the Court could not impose license fees that were too steep for some to pay.[83]

In these and other cases, the Court made clear that laws that regulated the time, place, or manner of speech were constitutional only if they left open what it later described as "ample alternative channels" for affected parties to communicate.[84] The Court also insisted that the government's

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81. Cox v. New Hampshire, 312 U.S. 569, 576 (1941) ("If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets.").

82. 319 U.S. 141, 146 (1943).

83. See, e.g., Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943) ("Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."); Jones v. City of Opelika, 319 U.S. 103, 134–35 (1943) (Frankfurter, J., dissenting) (arguing that license taxes should be considered constitutional unless so large as to be "oppressive in their effect upon [expressive] activities").

84. See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) ("Whatever may be the proper bounds of time, place, and manner

justifications for regulating the time, place, and manner of speech had to be closely scrutinized to ensure that the real motivations for the law were not, in fact, a desire to suppress disfavored messages or—equally problematic—unsubstantiated stereotypes about those they regulated.[85]

The Court did not always enforce these requirements very rigorously.[86] And by the 1980s, it had almost entirely stopped enforcing them.[87] Although in theory, the government continued to have to demonstrate that its regulations left open ample alternative channels of communication and represented a narrowly tailored response to an empirically verifiable problem, in practice, the Court tended to be "extraordinarily lenient" when determining whether these requirements were satisfied.[88] It focused its analysis of the constitutionality of time, place, and manner laws instead on an orthogonal question: Namely, was the law in question "content-based" or "content-neutral"? In other words, did the law restrict speech because of its content or because of some other characteristic (for example, its location or its volume)? If the former, the Court struck the law down unless the government was able to show that it served a compelling interest by the least restrictive means possible.[89] If the latter, the Court often applied very deferential scrutiny.[90]

In effect, the Court redefined what it means to say that a time, place, or manner law discriminates. No longer did the discrimination inquiry turn on an analysis of the law's effects or the substantiality of its justifications; what mattered instead were the formal distinctions the government

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restrictions on commercial speech, they are plainly exceeded by this Virginia statute, which singles out speech of a particular content and seeks to prevent its dissemination completely.").

85. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 100–01 (1972) (striking down a picketing law that prohibited nonlabor pickets after finding no evidence that nonlabor speech was, as the government claimed, categorically more likely to result in disruption than labor speech). For more discussion of this point, see Lakier, supra note 28, at 287–89.

86. See Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 50 (1987) ("The Court does not seriously inquire into the substantiality of the governmental interest, and it does not seriously examine the alternative means by which the government could achieve its objectives. As a result, when the Court applies this standard, it invariably upholds the challenged restriction.").

87. The one, notable exception to this general rule is the 1994 decision in *Ladue v. Gilleo*, which struck down a local ordinance that banned lawn signs because it provided insufficient alternatives for impacted citizens to communicate, particularly when they were "persons of modest means or limited mobility." 512 U.S. 43, 57 (1994). The fact that the ordinance threatened the rights of homeowners—that is, property owners—may help explain the unusual rigor of the Court's analysis.

88. Robert Post, Recuperating First Amendment Doctrine, 47 Stan. L. Rev. 1249, 1263 (1995).

89. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000).

90. Leslie Kendrick, Content Discrimination Revisited, 98 Va. L. Rev. 231, 237 (2012) ("[C]ontent-neutral laws receive what the Court calls 'intermediate scrutiny,' in practice a highly deferential form of review which virtually all laws pass." (quoting Turner Broad. Sys., Inc. (*Turner II*) v. FCC, 520 U.S. 180, 189 (1997))).

employed and the legislative purposes that motivated the law. The consequence was, as in the campaign finance cases, to transform the guarantee of expressive equality into a guarantee of formal equality rather than something more substantive. So long as the government did not intend to suppress speech because of its content or employ an explicitly content-based distinction, the Court found that it could constitutionally deprive those it regulated of any realistic opportunity to express themselves.[91] It also could regulate on the basis of largely unsubstantiated apprehensions of harm.[92]

The result was in some respects the opposite of the result in the campaign finance cases: It made it *easier* for the government to justify regulations that had the effect of limiting certain speakers' speech but not others'. But the mechanism was the same. Just as was true of its campaign finance cases, in its time, place, and manner cases, the Court now focused its analysis of the constitutionality of a given law almost entirely on the nature of the relationship it established between the government and the speaker rather than the context in which it operated or its effects.

The consequence of this transformation in the time, place, and manner cases was to make it significantly more difficult for litigants to use the First Amendment to challenge regulations that imposed a disparate burden on their ability to communicate publicly—at least when those regulations did not happen to take a content-based form. Consider in this respect the 1984 decision in *Members of the City Council v. Taxpayers for Vincent*.[93] The case involved a Los Angeles ordinance that absolutely prohibited the posting of signs on public property anywhere in the city.[94] The plaintiffs—a group who wanted to put up signs to support an (ultimately unsuccessful) candidate for City Council—argued that the ordinance was unconstitutional because it restricted too much speech and did so to further an insufficiently weighty purpose: namely, the elimination of "visual clutter" in

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91. See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54 (1986) (concluding that a zoning law that applied to adult movie theatres left open ample channels of communication even though it left only five percent of city territory zoned for the theatres, none of which included—according to the Court of Appeals—any "commercially viable" land).

92. For example, in *Clark v. Community for Creative Non-Violence*, the Court upheld a Park Service regulation that prevented protestors from sleeping in two national parks because the regulation reasonably advanced the government's interest in administrative efficiency and would "limit the wear and tear on park properties." 468 U.S. 288, 297–99 (1984). The majority reached this conclusion notwithstanding the fact that the government provided no evidence that allowing protestors to sleep in the park would present administrative problems or meaningfully increase wear and tear. Id. at 310–11 (Marshall, J., dissenting).

93. 466 U.S. 789 (1984).

94. Id. at 791–92.

the city.[95] The Ninth Circuit agreed and struck the ordinance down, but the Supreme Court reversed. The Court acknowledged that in the past it "ha[d] shown special solicitude for forms of expression [such as signs] that are much less expensive than feasible alternatives and hence may be important to a large segment of the citizenry."[96] It nevertheless upheld the ordinance because it found there to be "not even a hint of bias or censorship in [its] enactment or enforcement" and that those affected by the ordinance could still communicate their messages by other means—for example, by posting signs on private property or by using handbills.[97] In fact, though, as Justice Brennan pointed out in dissent, the alternative channels of communication the Court pointed to were far from "ample" and far from adequate as alternatives.[98] After all, not everyone has access to private property on which to post.[99] Meanwhile, handbilling is a far more labor-intensive and expensive form of communication than the posting of signs.[100] The result of the Court's holding was therefore to make it much more difficult for poorly funded political groups like the plaintiffs to make use of a "critical [and inexpensive] . . . means of communication."[101]

Vincent demonstrates the danger to expressive interests posed by the formalism of the Court's approach to the discrimination inquiry in its time, place, and manner cases. It makes clear how a First Amendment analysis that focuses—to the exclusion of almost all else—on the question of whether state action is motivated by discriminatory animus, or takes a content-based form, can end up rubberstamping what are in fact highly repressive speech policies. In fact, this type of analysis prevents courts from taking seriously the possibility that government officials might have "strong incentives to overregulate even in the absence of an intent to censor particular views."[102]

C. *Public Employee Speech*

Consider one final example of the Court's formalist shift: the public-employee speech cases. Until 2006, courts faced with First Amendment challenges involving the speech of government employees resolved these

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95. Id. at 795–96.

96. Id. at 812 n.30. The Court noted, however, that "this solicitude has practical boundaries." Id.

97. Id. at 804, 812.

98. Id. at 819–20 (Brennan, J., dissenting).

99. Id. at 820.

100. Id.

101. Id. at 819.

102. This is the case, Justice Marshall argued, because of the political realities of government. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 315 (1984) (Marshall, J., dissenting) (arguing that the "incentive [to overregulate] stems from the fact that . . . the political power of [the general public] is likely to be far greater than that [of those who seek to use a particular forum for First Amendment activity]").

challenges by applying the *Pickering* balancing test—so named for the Warren Court decision in which the test was first applied.[103] The test allowed the government to discipline employee speech when its interest "in promoting the efficiency of . . . public services" outweighed the employee's constitutionally protected interest "in commenting upon matters of public concern."[104] Although the *Pickering* test allowed the government, when acting as employer, to restrict significantly more speech than it could when acting as sovereign, it prohibited the government from sanctioning employee speech merely because it disliked it or believed that it cast the government into disrepute. Private employers, of course, were not so limited. Nevertheless, because the Court recognized that a major purpose of the First Amendment is to "protect the free discussion of governmental affairs"—including the free discussion of "the manner in which government is operated or should be operated"—the *Pickering* test did not grant government employers the same freedom.[105] The doctrine recognized, in other words, the important institutional differences that distinguished government employers from private employers.

It did so, that is, until 2006, when, in *Garcetti v. Ceballos*, the Court significantly limited the reach of the *Pickering* test.[106] In that case, a majority of Justices on the Court—in fact, the same Justices who signed on to Justice Kennedy's opinion in *Citizens United*—held that *Pickering* does not apply when employees speak pursuant to their official duties because such speech is categorically beyond the scope of First Amendment concern.[107]

The arguments the Court provided to explain why such speech is not entitled to constitutional protection are not very persuasive. Justice Kennedy, who wrote the opinion for the Court, just as he did in *Citizens United*, argued that the exemption of such speech from constitutional protection was necessary to promote the efficiency of government services.[108] But of course, *Pickering* already required courts to consider the government's interest in the efficient provision of services and to honor it when that interest outweighed the free speech interests at stake.[109]

Justice Kennedy also argued that limiting constitutional protection for employee speech made pursuant to official duties was necessary to prevent excessive judicial intervention into the inner workings of the government.[110] In theory, perhaps. And yet judges had had nearly forty years

103. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

104. Id. at 568.

105. Mills v. Alabama, 384 U.S. 214, 218 (1966).

106. 547 U.S. 410 (2006).

107. Id. at 421.

108. Id. at 418 ("Government employers, like private employers, need a significant degree of control over their employees' words and actions [because] without it, there would be little chance for the efficient provision of public services.").

109. *Pickering*, 391 U.S. at 568.

110. *Garcetti*, 547 U.S. at 423.

between the articulation of the *Pickering* balancing test and its constriction in *Garcetti* to intrusively intervene into the government workplace if they wanted to. There was no evidence that they had taken the opportunity to do so. Instead, by all accounts, judicial review of government-employee cases, including on-the-job speech cases, tended to be quite deferential.[111]

Finally, Justice Kennedy argued that *Pickering* need not apply to speech made pursuant to an employee's official duties because when the employer disciplines the employee for that speech, the employer "does not infringe any liberties the employee might have enjoyed as a private citizen" but simply "exercise[s] . . . control over what the employer itself has commissioned or created."[112] This, too, is unpersuasive as an explanation for the change. After all, as the Court acknowledged, the *Pickering* test was not intended to protect only the individual employee's rights. It was also intended to protect "the public's interest in receiving the well-informed views of government employees engaging in civic discussion."[113] For the public, it should make no difference if the employee's speech occurs pursuant to a job-related duty; the only thing that should matter is whether it touches on a genuine matter of public concern.

The only persuasive explanation for the change *Garcetti* wrought to public-employee speech doctrine is one that is not explicit in the text but suggested throughout it: namely, that in limiting the scope of the *Pickering* test, the Court sought to place government employers on a roughly equal footing with private employers vis-à-vis their employees. As Professor Kermit Roosevelt notes, public-employee speech doctrine has always "attempt[ed] to promote two different kinds of equality simultaneously":[114]

> First, the Court wants to promote equality between government and private employers with respect to control over the workplace and employee performance: The government employer should have managerial authority that at least resembles that of the private employer. Second, it wants to maintain equality between government employees and other citizens: Government employees should not be worse off in constitutional terms, namely, they should not be required to surrender their First Amendment rights as a condition of public employment.[115]

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111. See, e.g., Eugene Volokh, Freedom of Speech and Workplace Harassment, 39 UCLA L. Rev. 1791, 1820 n.130 (1992) (noting that "[t]he government as employer can ban even political discussions by its employees if they 'disrupt[] the work of the office,' or 'discredit[] the office' before the public, or 'demonstrate[] a character trait that [makes the speakers] unfit to perform [their] work'" (quoting Rankin v. McPherson, 483 U.S. 378, 389 (1987))).

112. *Garcetti*, 547 U.S. at 421–22.

113. Id. at 419.

114. Kermit Roosevelt III, Not as Bad as You Think: Why *Garcetti v. Ceballos* Makes Sense, 14 U. Pa. J. Const. L. 631, 633 (2012).

115. Id.

Pickering reconciled these competing interests by means of a balancing test. *Garcetti* does so by establishing a bright-line rule that grants government employers the same total authority to discipline employees for their job-related speech that private employers have traditionally possessed.

The opinion thus articulates what we might think of as an equality principle—albeit one that is in many respects the inverse of the equality principle articulated in *Citizens United*. If *Citizens United* stands for the proposition that the government has no right to distinguish between private actors when it regulates the public sphere,[116] *Garcetti* stands for the proposition that the government enjoys the same right as private employers to control what occurs in the (now quasi-private) institutions it operates. These propositions are complementary. Indeed, the logic of *Garcetti* explains the Court's conclusion in *Citizens United* that, although speaker-based distinctions are not permitted when the government regulates the public forum, they are permitted when it regulates its own institutions. But if the one rule empowers private actors, the other does the reverse.

In both cases, however, the principle operates by ignoring important economic, political, or—in this case—institutional differences between the groups it equates for purposes of First Amendment analysis. Here, as elsewhere, the consequence has been to limit litigants' ability to use the First Amendment as a tool for challenging entrenched power. Indeed, in the ten or so years since *Garcetti* was handed down, courts have routinely denied protection to whistleblowing employees who bring governmental misconduct to light.[117]

Garcetti and *Citizens United* demonstrate the problem with conceiving of the Court's recent free speech jurisprudence as libertarian. In both opinions, the interest that informs the analysis is not liberty but equality. Further, the Court conceptualizes that interest formally rather than substantively—that is to say, by focusing almost exclusively on the nature of the relationship between the government and the speaker rather than the context in which the speech occurs or the effects of the government's actions on the broader speech environment. What both opinions make visible, in other words, is a commitment to formal equality that in practice frequently redounds to the benefit of those with power. This is not surprising. After all, a conception of equality that requires the government

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116. Citizens United v. FEC, 558 U.S. 310, 394 (2010) (Stevens, J., concurring in part and dissenting in part) ("The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its 'identity' as a corporation.").

117. Helen Norton has documented the effects of *Garcetti* on whistleblowers in a number of recent articles. See, e.g., Helen Norton, Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression, 59 Duke L.J. 1, 4–5 (2009) ("Courts' unblinking deference . . . allows government officials to punish, and thus deter, whistleblowing."); Helen Norton, Shining a Light on Democracy's Dark Lagoon, 61 S.C. L. Rev. 535, 546 (2010).

to treat the powerful and the powerless alike provides powerful speakers (including powerful government speakers) tremendous opportunity to use their economic and political resources not only to promote their own views but also to limit the ability of others to express theirs. For those committed to a view of the First Amendment as a check on—rather than a handmaiden to—power, this state of affairs is deeply troubling.

II. THE ANTISUBORDINATING FIRST AMENDMENT THAT WAS

The good news is that things have been, and therefore could again be, different. As the previous Part suggests, the tendency of contemporary free speech law to reinforce rather than combat existing inequalities in wealth and power is the product of a relatively recent shift in the Court's conception of what it means to guarantee "equality of status in the field of ideas,"[118] not an inevitable feature of the modern First Amendment tradition. Earlier cases—even the relatively restricted sample of cases resolved by the Supreme Court—sometimes applied a substantially different approach to the First Amendment analysis than the approach courts take today. This is true not only of the three areas of free speech law canvassed in the previous Part, although it is certainly true of those areas. But in other areas of First Amendment jurisprudence, as well, one can discern in the older cases an often significantly different understanding of what it means to guarantee freedom of speech: one much more willing to take into account inequalities in economic and political power and much more sensitive to the disparate effects that formally neutral and well-intentioned laws can have on the ability of the "little people" to communicate.

These earlier cases suggest what an antisubordinating First Amendment might look like. They also make clear what the previous Part already hinted at: namely, that the regressive tendencies of contemporary First Amendment law cannot solely, or even primarily, be blamed on the "imperial" or libertarian tendencies of the Roberts Court—that is to say, on its tendency to interpret the guarantee of freedom of speech too expansively and rigorously. This is because, as they show, our contemporary First Amendment is in many respects *not* very expansive and not always very rigorous. It is in many respects much narrower and much weaker than the First Amendment that existed fifty years ago—at least with respect to certain kinds of free speech claims (those that push against, rather than reinforce, property rights). What this suggests is that the answer to the ills that beset contemporary free speech law is not less constitutional protection for speech but a different kind of constitutional protection: one that reduces, rather than reinforces, the inequalities in expressive

118. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972) (internal quotation marks omitted) (quoting Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1948)).

opportunity that are a consequence of the highly, and increasingly, unequal distribution of economic and political power in the United States.

A. *Speech on Private Property*

To see the far-from-imperial nature of contemporary free speech jurisprudence, one need only look at the cases involving First Amendment rights of access to private property. Today, speakers have virtually no federal constitutional right of access to privately owned spaces, like shopping malls.[119] The only exception to this general rule is when the private property owner exercises "powers traditionally exclusively reserved to the State."[120] This was not always the rule, however. In *Marsh v. Alabama*, the Court held that a state trespass law could not constitutionally be used to exclude a Jehovah's Witness who wished to distribute religious literature on the sidewalks of a company-owned town.[121] Two decades later, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, the Court similarly concluded that state courts could not constitutionally enjoin members of a union from picketing a store located in a privately owned shopping mall.[122]

Today, these cases are usually celebrated—or derided—for establishing (in the case of *Marsh*) or extending (in the case of *Logan Valley*) the principle that when a private actor performs a sufficiently important governmental function, it occupies the role of a state actor for constitutional purposes.[123] The Court has repeatedly encouraged this framing.[124] However, it represents a significant distortion of what the opinions actually say.

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119. See Hudgens v. NLRB, 424 U.S. 507, 521 (1976) (holding that the "constitutional guarantee of free expression has no part to play" in cases involving rights of access to private property).

120. Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974).

121. 326 U.S. 501, 509–10 (1946).

122. 391 U.S. 308, 319–20 (1968), overruled by Hudgens v. NLRB, 424 U.S. 507 (1976). During this period, lower courts also found that speakers possessed a First Amendment right of access to migrant labor camps, as well as to certain portions of their employer's property. See, e.g., NLRB v. Lake Superior Lumber Corp., 167 F.2d 147, 150–51 (6th Cir. 1948); Folgueras v. Hassle, 331 F. Supp. 615, 623 (W.D. Mich. 1971); People v. Rewald, 318 N.Y.S.2d 40, 45–46 (Cty. Ct. 1971).

123. See, e.g., Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543, 578 n.131 (2000) (noting *Marsh* as the first application of the public-function test for state action); Frederick F. Schauer, *Hudgens v. NLRB* and the Problem of State Action in First Amendment Adjudication, 61 Minn. L. Rev. 433, 453–55 (1977) (criticizing *Logan Valley* for extending the governmental-function test too far).

124. When citing *Marsh*, this is invariably how the Court describes its holding. See, e.g., Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621–22 (1991) (describing *Marsh* as standing for the proposition that state action applies when "the actor is performing a traditional governmental function"); Lloyd Corp. v. Tanner, 407 U.S. 551, 562 (1972) (finding that *Marsh* "simply held that where private interests were substituting for and performing the customary functions of government, First Amendment freedoms could not be denied where exercised in the customary manner on the town's sidewalks and streets").

In fact, neither decision depended on the conclusion that the private property owner occupied the role of state actor. To the contrary, the Court assumed in both cases that it was the judicial enforcement of a state property law that satisfied the First Amendment's state action requirement, *not* the actions of the private property owner.[125] What both decisions depended on instead was finding that the private property at issue served an important "public function"—and did so for the economic benefit of its owner.[126] What this meant, the Court concluded in both cases, was that the owner's property rights had "become circumscribed by the statutory and constitutional rights of those who use[d its property]."[127]

In holding as much, the Court in some senses merely extended a principle it developed in a series of early-twentieth-century cases dealing with speech on publicly owned streets, parks, and sidewalks: namely, that when it comes to spaces that serve as important sites of public expression (what would come to be known as "public forums"), the public's right of access outweighs the right of the property owner to exclude.[128] But it also pushed strongly against a formalist conception of the First Amendment equality guarantee. After all, in neither case was there any suggestion that

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125. In his majority opinion in *Marsh*, Justice Black framed the issue raised by the case as "whether a State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management." *Marsh*, 326 U.S. at 502. In his dissenting opinion, Justice Reed framed the issue as whether the First Amendment required a state to "commandeer, without compensation, the private property of other citizens" to "furnish[] the opportunity for information, education and religious enlightenment." Id. at 515 (Reed, J., dissenting). Despite important differences between the two framings, both assumed that the state court, not the private company, constituted the state actor to whom the First Amendment applied. A similar assumption informed the majority and Justice Black's dissent in *Logan Valley*. Indeed, neither opinion even raised the possibility that the state court's decision to enjoin picketing in the mall failed to satisfy the First Amendment's state action requirement. See *Logan Valley*, 391 U.S. at 309 (framing the issue as whether "the decisions of the state courts [to enjoin the petitioners'] picketing as a trespass [were] violative of their rights under the First and Fourteenth Amendments"); id. at 329 (Black, J., dissenting) (arguing that "the lower court's injunction [was] valid under the First Amendment").

126. See *Logan Valley*, 391 U.S. at 318 ("The general public has unrestricted access to the mall property. The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*."); *Marsh*, 326 U.S. at 507–08 ("Whether a corporation or a municipality owns or possesses the town the public . . . has an identical interest in the functioning of the community [such] that the channels of communication remain free. . . . The 'business block' serves as the community shopping center and is freely accessible and open . . . .").

127. *Logan Valley*, 391 U.S. at 325 (citing *Marsh*, 326 U.S. at 506).

128. See, e.g., Jamison v. Texas, 318 U.S. 413, 413–14 (1943); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939); Schneider v. State, 308 U.S. 147, 164–65 (1939). Professor Harry Kalven first coined the term "public forum." See Harry Kalven, Jr., The Concept of the Public Forum: *Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 11–12 ("[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer . . . .").

the state courts charged with enforcing the private owner's property rights did so in a discriminatory manner or that the laws themselves were content based. Nevertheless, in both cases, the Court held that the courts' actions violated the First Amendment because its *effect* was to make some members of the public—those who because of geography or economic circumstances patronized privately owned, as opposed to government-owned, public spaces—second-class citizens when it came to their First Amendment rights.

Indeed, both opinions were very explicit about the fact that the constitutional problem with the government's actions in both cases was its impact on the substantive equality of those it affected. "Many people," Justice Black noted in his opinion in *Marsh*, "live in company towns."[129] Were it the case that the principles that governed the public forum cases did not protect them merely because they spoke on privately owned streets, he argued, it would be much more difficult for these "free citizens" to access the uncensored information necessary to "make decisions [about] the welfare of [their] community and nation."[130] It would block up the "channels of communication" in those spaces in which residents of company towns happened to live and work, thereby depriving them of access to the same information that those who happened to patronize publicly owned spaces enjoyed—and this the Court refused to allow.[131] "There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments," Black insisted, "than there is for curtailing these freedoms with respect to any other citizen."[132]

Justice Marshall, who wrote the opinion for the Court in *Logan Valley*, similarly noted that denying speakers a constitutional right of access to privately owned shopping malls would make it much more difficult "for workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies" at a mall shop to do so than it was for those who wished to communicate the exact same message about a shop located on a public street.[133] "Neither precedent nor policy," Marshall concluded, "compels a result so at variance with the goal of free expression and communication that is the heart of the First Amendment."[134]

By reconceiving *Marsh* as a state action case, the Court significantly limited its reach and transformed its meaning. It rendered it simply another illustration of the well-established formal-equality rule that content-

129. *Marsh*, 326 U.S. at 508.

130. Id.

131. Id. at 507.

132. Id. at 508–09.

133. Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 324–25 (1968), overruled by Hudgens v. NLRB, 424 U.S. 507 (1976).

134. Id. at 325.

based discrimination at the hands of a state actor violates the First Amendment guarantee, except in the most exceptional circumstances. Transforming *Marsh* into a state action case also made it easy to explain why *Logan Valley* was incorrect and had to be overruled—which it was, just eight years after it was handed down.[135] After all, running a shopping mall is not an important state function, let alone something that has tended to be exclusively (if ever) performed by the government. Read on their own terms, however, *Marsh* and *Logan Valley* point to a much more expansive conception of the guarantee of expressive equality: one that prohibits the enforcement of even well-intentioned laws that have a disparate effect on the ability of some members of the public to access the "channels of communication" or otherwise participate in public debate.

Scholars have criticized both decisions, but particularly *Logan Valley*, for defining the scope of the First Amendment's application too elastically. Professor Frederick Schauer, for example, has argued that the *Logan Valley* Court erred by extending First Amendment access rights to speakers on private property even when the owner of that property does not possess "powers equivalent to those of the state."[136] This is a mistake, Schauer argues, because it threatens the vitality of the marketplace of ideas by depriving private property owners of a right the First Amendment permits them: namely, the right to discriminate against speech because they dislike it, fear it, or for any other reason.[137]

It is certainly true that a central assumption of modern free speech law is that the First Amendment is not intended to prohibit private discrimination. Quite the contrary: By prohibiting the government from discriminating when it comes to speech, the First Amendment is supposed to *encourage* private discrimination by protecting speakers against retaliation from the government for the expressive choices they make and the stances they choose to embrace or reject. As Schauer notes: "[T]he ideals of free public debate and a marketplace of ideas presume that there will be partisanship and preference for some ideas over others"—that private persons can and will discriminate, even though the government won't and shouldn't.[138]

But nothing in either *Marsh* or *Logan Valley* contradicts this general principle. Because neither decision presumed that the private property owner was a state actor, neither decision requires that the same constitutional constraints that apply to the government as owner of public property apply to those who own company towns or shopping malls. In fact, in

135. See *Hudgens*, 424 U.S. at 520–21.

136. Schauer, supra note 123, at 454.

137. Id. at 450.

138. Id.

Logan Valley, the Court explicitly acknowledged as much.[139] The Court reaffirmed this point several years later when it held that, even if mall owners could not be compelled by the First Amendment to grant access to their property, they might be compelled to do so by their state constitutions.[140] The Court made clear, however, that this could be true only in cases in which the grant of access did not undermine property owners' expressive freedom by forcing the owners to associate with views they reject.[141] It recognized that private property owners enjoy a degree of constitutional protection that the government, when it regulates the public forum, absolutely does not possess.[142]

Marsh and *Logan Valley* do not, in other words, obliterate the distinction between state and private action upon which the First Amendment depends. What they suggest instead is that the scope of First Amendment application need not be coterminous with state property rules and that facially neutral and well-intentioned laws might violate the First Amendment because of their disparate effects.

Properly understood, both cases represent in this respect what we might describe with not too much overstatement as a radical—and much more speech-protective—alternative to the current approach to constitutional claims of access to private property. It is an approach, nonetheless, that emerges out of, and is entirely compatible with, the foundational assumptions of modern free speech law—chief among these being that the purpose of the First Amendment is to create an "uninhibited, robust, and wide-open"[143] public sphere in which all kinds of viewpoints, and classes of people, can participate.

B. *Media-Access Cases*

A similarly substantive vision of the First Amendment's equality guarantee—and a similar willingness to prioritize the expressive rights of the public over private property rights—characterizes the sequence of cases,

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139. *Logan Valley*, 391 U.S. at 319 ("[I]t may well be that respondents' ownership of the property here in question gives them various rights, under the laws of Pennsylvania, to limit the use of that property by members of the public in a manner that would not be permissible were the property owned by a municipality.").

140. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) ("Our reasoning in *Lloyd* . . . does not *ex proprio vigore* limit the authority of [a] State . . . to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.").

141. Id. at 87.

142. Indeed, if anything can be said to be a core principle of modern free speech law, it is that the government may not exclude speech from the public forum to promote its own ideas. See, e.g., W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

143. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

beginning with *Red Lion Broadcasting Co. v. FCC* in 1969[144] and ending with the decision in *Turner Broadcasting System, Inc. v. FCC* in 1997,[145] in which the Court held that Congress could require media companies to transmit speech not of their choosing when doing so promoted an "uninhibited," as opposed to a "monopoliz[ed]," marketplace of ideas.[146] These are amazing cases to read today, given the Court's renewed insistence that "[t]he concept that government may restrict the speech of some . . . in order to enhance the relative voice of others" is one that "is wholly foreign to the First Amendment."[147] In fact, all of these cases endorse, to one degree or another, this supposedly foreign concept.

This is obviously true of *Red Lion*. In that case, the Court upheld against constitutional challenge a series of FCC regulations that required broadcasters to give those they criticized, or the opponents of political candidates they endorsed, a right of reply.[148] A Pennsylvania radio station and its president argued that the rules violated the First Amendment by denying them rights that other speakers enjoyed: namely, the right to "refus[e] in [its] speech or other utterances to give equal weight to the views of [its] opponents."[149] Their claim, in other words, was that the rules undermined the constitutionally protected right of broadcasters to privately discriminate, thus violating their formal equality. The Court rejected this argument. It concluded that the rules "enhance[d] rather than abridge[d] the freedoms of speech and press protected by the First Amendment."[150] It justified this conclusion on a number of grounds.

First, it argued that radio licenses were scarce and the privilege of owning one was not constitutionally guaranteed. The fact that only relatively few people could exercise the right to speak in this manner, the Court argued, meant that those who did could be required to "share [their] frequency with others and to conduct [themselves] as a proxy or fiduciary with obligations to present those views and voices which are representative of [the] community and which would otherwise, by necessity, be barred from the airwaves."[151] The Court concluded, in other words, that under conditions of scarcity, the voices of some *could* be restricted in

144. 395 U.S. 367 (1969).

145. 520 U.S. 180 (1997).

146. *Red Lion*, 395 U.S. at 388–90; see also Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996); Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622 (1994); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

147. Citizens United v. FEC, 558 U.S. 310, 349–50 (2010) (internal quotation marks omitted) (quoting Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam)); see also Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 741 (2011).

148. *Red Lion*, 395 U.S. at 373–74.

149. Id. at 386 ("No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they say, applies equally to broadcasters.").

150. Id. at 375.

151. Id. at 388–89.

order to enhance the voices of others. It reached this conclusion because it believed—not implausibly—that any other conclusion would threaten the vitality of the marketplace of ideas by allowing it to be dominated by a few powerful voices.

This is a tenable argument—and it was certainly one that, at the time *Red Lion* was handed down, had been made before. Twenty-five years earlier, Justice Frankfurter had relied on a similar scarcity rationale to sustain another set of FCC rules against First Amendment challenge.[152]

The problem with the argument was that, at the time *Red Lion* was decided, it was no longer true that radio licenses were scarce—or, at least, that the scarcity of radio licenses made radio any different than other media of communication. As the radio station noted in its brief to the Court, by 1967, there were over three times as many commercial radio and television stations in the United States as there were daily newspapers.[153] The Court's insistence that, notwithstanding these facts, radio remained a scarce resource produced significant criticism, both at the time and in the years to follow.[154]

In fact, the scarcity of radio licenses was not the only reason the Court provided to justify its conclusion that the FCC rules enhanced, rather than abridged, freedom of speech, although it was certainly the one the Court emphasized the most. The opinion also noted that "[e]ven where there are gaps in spectrum utilization"—and therefore, licenses that were *not* scarce—"the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses."[155] It continued:

> Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility

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152. See Nat'l Broad. Co. v. United States, 319 U.S. 190, 226–27 (1943) ("Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why . . . it is subject to governmental regulation. . . . The right of free speech does not include, however, the right to use the facilities of radio without a license.").

153. Brief for Petitioners at 35, *Red Lion*, 395 U.S. 367 (No. 2), 1968 WL 129369 (reporting census findings that, as of 1967, there were "6253 commercial radio and television stations in the United States, compared to only 1754 daily newspapers, a ratio of better than 3½ to 1").

154. See, e.g., Lee C. Bollinger, Jr., Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media, 75 Mich. L. Rev. 1, 10 (1976); Thomas W. Hazlett, Physical Scarcity, Rent Seeking, and the First Amendment, 97 Colum. L. Rev. 905, 913 (1997); L.A. Powe, Jr., "Or of the [Broadcast] Press," 55 Tex. L. Rev. 39, 55–57 (1976).

155. *Red Lion*, 395 U.S. at 400.

> for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.[156]

As this passage makes clear, the purported scarcity of radio licenses was not crucial to the Court's holding in the case. What was crucial was the Court's belief that inequalities produced by both technological and historical factors had given the established networks significant power to decide what the public heard when it turned on the radio. The Court recognized that, given barriers of entry, this disparity in power was hard to redress by means of market competition. And the Court acknowledged that the government itself had played an important role in fostering inequalities in the industry through its initial conferral of licenses. It was in this context that the Court concluded that the First Amendment not only allowed the FCC to mandate a right of reply but might even *require* it. As Justice White wrote in his majority opinion:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.[157]

This is an unabashedly antisubordinating conception of the First Amendment—one that adamantly rejects the idea that what freedom of speech requires is formally equal treatment of all speakers. To the contrary: Like the most radical voices in the affirmative action debate, this conception suggests that vindicating the constitutional guarantee of equality might *require* policies designed to ameliorate significant inequalities in access to valuable resources—at least in cases where the government, in its initial conferral of property rights, helped create those inequalities. It certainly makes clear that, in cases where inequalities in power and resources undermine the vibrancy and diversity of public debate, the government can restrict the speech of some in order to enhance the speech of others.

It is also, of course, a vision of the First Amendment that the Court soon renounced—not only in *Buckley* but also two years prior to that, in *Miami Herald Publishing Co. v. Tornillo*, when it struck down a Florida law that imposed a right-of-reply requirement on newspapers.[158] As Justice Burger made clear in his opinion in that case, the dysfunctions in the newspaper industry that the Florida right-of-reply law was designed to

156. Id.

157. Id. at 390 (citations omitted).

158. 418 U.S. 241, 258 (1974).

ameliorate were remarkably similar to the dysfunctions in the radio business that led the FCC to enact the rules challenged in *Red Lion*. Just like the radio industry, the newspaper industry was also highly concentrated.[159] As a result, here too "the power to inform the American people and shape public opinion" had been "place[d] in a few hands."[160] And just as was true of radio, the problem of concentration in the newspaper industry was not easily solved by the ordinary practices of market competition, given the steep barriers to entry into the industry.[161] Nevertheless, in *Tornillo*, the Court concluded that the First Amendment prevented Florida from doing virtually anything to correct those problems and insisted that in this context, it was the right of the speaker, not the listener, that was paramount. "A newspaper," Burger wrote, "is more than a passive receptacle or conduit for news, comment, and advertising."[162] It instead is the product of "editorial control and judgment."[163] What this meant was that, just as the First Amendment forbade the government from telling individual persons what they could say, so too it prevented the government from limiting the ability of newspaper editors (companies, really) to determine what the newspaper would say.

It is hard to imagine a more dramatic rejection of the logic of *Red Lion*. In place of that opinion's concern with inequalities in access and power, Burger's opinion in *Tornillo* articulated a strict formal-equality rule. Indeed, Burger made clear that even if Florida's right-of-reply law imposed *no costs* on newspaper editors—and therefore did not chill expression by forcing editors to choose between publishing critical opinions and having to give up valuable space to replies (as the Florida law was said to do)—a right-of-reply requirement would offend the First Amendment by infringing on the editorial freedom of newspapers.[164]

As such, *Tornillo* appeared to provide newspapers a powerful shield against not only right-of-reply laws but all kinds of access requirements.[165] And not only newspapers. Nothing in its logic depended on the fact that the media corporation involved in the case was a newspaper. What mattered instead was that the corporation performed an editorial function.[166]

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159. Id. at 249–50 ("The elimination of competing newspapers in most of our large cities . . . [is an] important component[] of this trend toward concentration of control of outlets to inform the public."). Moreover, Burger noted that the same interests that owned radio and television stations also frequently owned newspapers too—the industries were not merely parallel, they were tightly interlinked. Id.

160. Id.

161. See id. at 251.

162. Id. at 258.

163. Id.

164. Id.

165. See, e.g., Passaic Daily News v. NLRB, 736 F.2d 1543, 1557 (D.C. Cir. 1984) (relying on *Tornillo* to deny the NLRB the power to order a company to reinstate a newspaper columnist whose column was taken away in retaliation against his union activities).

166. See *Tornillo*, 418 U.S. at 256–58.

And indeed, in subsequent years, courts relied on the decision to invalidate access laws that applied to other kinds of media, as well as nonmedia corporations.[167]

Tornillo's reach remained limited in two important respects, however. First, the opinion did not overrule (or in fact mention) *Red Lion*. In subsequent cases, the Court affirmed that *Red Lion* remained good law.[168] This meant that the FCC retained authority to regulate broadcast media in order to vindicate the right of the public to "an uninhibited marketplace of ideas."[169] Second, in subsequent years, the Court proved unwilling to extend *Tornillo* as far as its logic suggested.

Consider in this respect the Court's 1994 and 1997 decisions in *Turner Broadcasting System, Inc. v. FCC*.[170] In that case, the Court was confronted with a First Amendment challenge to a federal law that required cable companies to devote a portion of their channels to local broadcast networks.[171] The government argued that *Red Lion* should control the analysis and that the law was therefore constitutionally unproblematic because, although it constricted the freedom of cable providers, it promoted a vibrant marketplace of ideas by preventing cable companies from using their market power to drive broadcast competitors out of business.[172] The cable companies argued instead that *Tornillo* should control and that the law was therefore unconstitutional.[173]

The Court rejected both arguments. It noted that technological advances meant that soon there "may be no practical limitation on the number of speakers who may use the cable medium," and concluded that *Red Lion* was therefore "inapt."[174] It argued, meanwhile, that *Tornillo* did not control, due to the "important technological difference between newspapers and cable television," specifically noting that "[a]lthough a daily newspaper and a cable operator both may enjoy monopoly status in a given locale, the cable operator exercises far greater control over access to the relevant medium."[175] This was the case, the Court explained, because "[w]hen an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television

167. See, e.g., Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 11–12 (1986) (electric utility); Zhang v. Baidu.com Inc., 10 F. Supp. 3d 433, 436–37 (S.D.N.Y. 2014) (search engine).

168. See FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 794–95 (1978).

169. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

170. *Turner II*, 520 U.S. 180 (1997); *Turner I*, 512 U.S. 622 (1994).

171. See *Turner I*, 512 U.S. at 633–34.

172. See id. at 637.

173. Id. at 653.

174. Id. at 639.

175. Id. at 656.

programming that is channeled into the subscriber's home."[176] Instead, the Court upheld the law as a reasonable means by which Congress attempted to further what it described as "a governmental purpose of the highest order": namely, ensuring "the widest possible dissemination of information from diverse and antagonistic sources."[177]

The arguments the *Turner* Court made to distinguish the case from *Tornillo* are, to put it mildly, unconvincing. As Professor Yochai Benkler has pointed out, it is not the fact that they use physical cables to communicate to their subscribers that vests cable companies with what the Court called "gatekeeper . . . control" of a "critical pathway of communication."[178] After all, competitors could simply install their own cables in potential subscribers' houses, thereby making it much easier for customers to switch providers. What gives cable companies such power are instead the economic conditions of the industry—specifically, the "large fixed costs of wiring a city, and the relatively low incremental costs of distributing information once a city is wired."[179] And certainly Justice Burger would have been surprised to learn that the very serious problems of concentration in the newspaper industry he documented in his opinion in *Tornillo* were not so serious because they did not have a physical cause.

In fact, the opinion represents an approach to First Amendment media-access questions that is strikingly similar to the reasoning of *Red Lion*—and one that is quite difficult to reconcile with the analysis in *Tornillo*. Even as it denied that the deferential approach the Court took in *Red Lion* to regulations aimed at fostering diversity in the broadcast media could be applied to regulations of cable, the Court employed essentially the same argument as that made in *Red Lion* to uphold the cable law against constitutional challenge. "The potential for abuse of [the cable companies'] private power over a central avenue of communication cannot be overlooked," Justice Kennedy asserted in his majority opinion in *Turner*.[180] "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict . . . the free flow of information and ideas."[181]

As in *Red Lion*, the Court recognized that the government could limit the expressive freedom of some, when they possessed disproportionate gatekeeping power, in order to promote the interests of the public

176. Id.

177. *Turner II*, 520 U.S. 180, 190–92 (1997).

178. See Yochai Benkler, Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, 74 N.Y.U. L. Rev. 354, 374 (1999).

179. Id.

180. *Turner I*, 512 U.S. at 657.

181. Id.

writ large.[182] As in *Red Lion*, it attempted to cabin the reach of its holding by linking it to the unique physical characteristics of the medium in question. And, as in *Red Lion*, its attempt to do so proved far from persuasive. Just as was true of *Red Lion*, however, the fact that the *Turner* Court misidentified the cause of the inequality it recognized takes away nothing from its legal argument. It merely suggests that the principle on which it relied should apply more broadly than the *Turner* Court was willing to acknowledge.

Like *Red Lion*, the decision in *Turner* is best understood as expressing a principle that is not easily cabined: namely, that constraints on the expressive freedom of individual speakers may be permissible when those speakers possess significant power to dominate the channels of communication and the regulations reasonably can be expected to promote (rather than hinder) a diverse marketplace of ideas. Construed as such, the decision—like the decision in *Red Lion*—echoes the approach to the First Amendment analysis applied by the Court in *Marsh* and *Logan Valley*. Like those decisions, it forgoes formal equality to promote a more egalitarian and therefore more vibrant public sphere.

C. *Employer Speech*

Consider one last example of the antisubordinating tradition in First Amendment law—this time, a case that is far less beloved by progressives than *Marsh* and *Red Lion*. This is the decision in *NLRB v. Gissel Packing Co.*, in which the Court upheld NLRB regulations that prohibited employers, during the course of union elections, from communicating to employees either a "threat of reprisal or force or promise of benefit."[183]

In upholding the regulation, the Court departed quite significantly from the principles that ordinarily govern the regulation of political speech. Although First Amendment doctrine has recognized since the early twentieth century that "true threats" may be punished without violating the freedom of speech, by the time *Gissel Packing* was handed down, it was clear that the category of "true threats" was much narrower than the relatively broad category of threatening communications the NLRB regulations prohibited.[184] Meanwhile, nothing in the cases held that the

182. See id. at 656 ("[S]imply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude.").

183. 395 U.S. 575, 617 (1969) (internal quotation marks omitted) (quoting National Labor Relations Act, Pub. L. No. 74-189, 49 Stat. 449 (codified as amended at 29 U.S.C. § 158(c) (2012))).

184. By 1969, the Court had made clear that the low-value category of "true threats" did not extend to even "vituperative [and] abusive" speech that was "expressly conditional." Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam). However, the employer's speech in *Gissel Packing* was expressly conditional. As Professor Julius Getman notes, "[A]t no point did the employer directly threaten to close the plant or take economic

government could prohibit litigants involved in electoral speech from seeking to persuade voters to choose one option over another. Thus, if the regulation were to be applied beyond the context of a union election, it would have undoubtedly been deemed unconstitutional.

The Court nevertheless concluded that the regulation did not unconstitutionally abridge the employer's expressive freedom, given the context in which it applied. Chief Justice Warren explained:

> Any assessment of the precise scope of employer expression . . . must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, . . . [a]nd any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.[185]

What is so interesting about this passage is its recognition of the possibility that, given the hierarchical and economically dependent nature of the relationship between the employer and the employee, the same words might mean something different (and be intended to mean something different) than they would mean in another context. This fact led the Court to conclude that rules developed to govern political speech outside the workplace—that is to say, in a context in which "the independent voter may be freer to listen more objectively and employers as a class freer to talk"—were not appropriate to apply in the workplace.[186]

Gissel Packing represents in this respect something like the anti-*Garcetti*: Like *Garcetti*, it acknowledges that the hierarchical nature of the workplace requires the application of different constitutional principles than apply in the public sphere, where individuals confront one another as citizens and equals. But rather than interpreting this to mean that employers should enjoy almost unbounded freedom to dictate the terms and conditions of employment, it reaches the opposite conclusion. It construes the First Amendment to allow a *greater* imposition on the employer's freedom than would otherwise be the case. It recognizes, in other words, the serious problem to expressive freedom that economic inequality may represent and, like *Marsh* and *Logan Valley* and *Red Lion*, shapes the First Amendment rules that apply to respond to this problem. The result is, once again, a free speech jurisprudence that does not treat all speakers alike but rather allows legislators and courts to take into

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reprisals in retaliation for the employees' voting for representation. Indeed, his comments were all premised upon the likelihood of a union-called strike." Julius Getman, Labor Law and Free Speech: The Curious Policy of Limited Expression, 43 Md. L. Rev. 4, 6 (1984).

185. *Gissel Packing*, 395 U.S. at 617.

186. Id. at 617–18.

account the economic and political attributes that constrain, or empower, their expression.

III. THE ANTISUBORDINATING FIRST AMENDMENT THAT COULD BE

The discussion in the preceding Part is not meant to be taken as a comprehensive cataloging of the cases in which the Court has interpreted the First Amendment to promote substantive, as opposed to formal, equality. To the contrary: There likely are other areas of free speech doctrine in which the Court has at times departed from a strict rule of formal equality.

What the discussion in the preceding Part *is* meant to do is to make clear that the anticlassificatory approach that currently dominates has not always been so hegemonic. Even today, the formal-equality principles that the Court claims have always guided the First Amendment—for example, the principle forbidding the government from "restrict[ing] the speech of some . . . in order to enhance the . . . voice of others"[187]—cannot fully explain the unruly and capacious body of law that gives effect to the constitutional guarantee of expressive freedom. After all, *Marsh*, *Red Lion*, *Turner*, and *Gissel Packing* remain good law, even if the reach of some of these cases has been blunted, their meaning reshaped by their subsequent interpretation.

This suggests that critics of the Court may have to complicate their analysis of its failings. Professor Owen Fiss argued in his 1986 essay *Free Speech and Social Structure* that modern free speech doctrine (what he called the "Free Speech Tradition") is fundamentally flawed due to its tendency to make two largely incorrect assumptions.[188] The first is that protecting individual autonomy inevitably ensures the "uninhibited, robust, and wide-open" public debate the First Amendment is supposed to guarantee.[189] When power is distributed unequally, Fiss argued, this is unlikely to be the case. Those with power will use their autonomy to monopolize expressive resources just like they monopolize other resources, thus denuding the quality of public debate.[190] The second incorrect assumption that underpins the modern Free Speech Tradition, Fiss argued, is that the primary danger to free expression comes from the government.[191]

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187. Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam).

188. Owen M. Fiss, Free Speech and Social Structure, 71 Iowa L. Rev. 1405, 1414 (1986).

189. Id. at 1410 (internal quotation marks omitted) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). Indeed, Professor Fiss argued that "[t]he Tradition assumes that by leaving individuals alone, free from the menacing arm of the policeman, a full and fair consideration of all the issues will emerge. The premise is that autonomy will lead to rich public debate." Id.

190. Id. (arguing that protecting speaker autonomy may not only "be insufficient to insure a rich public debate" but "might even become destructive of that goal").

191. Id. at 1414 ("Under the received Tradition, free speech becomes one strand . . . of a more general plea for limited government.").

But in fact, Fiss pointed out, in our highly commodified public sphere, private parties have the ability to shape in very significant ways the overall speech environment. This means that private parties possess similar, in some contexts greater, power to stifle the voices of others than the government.[192] Given its failure to grasp these two essential facts about expressive freedom, Fiss argued that a "radical break" with the Free Speech Tradition was necessary.[193]

Fiss is certainly correct that both of these assumptions play an important role in the modern tradition. They help justify the different rules that the Court tends to apply to public and private speakers, the stringent restrictions placed on content-based regulation of the public forum, and the long-standing discomfort the Court has evinced toward redistributive speech policies.

The assumptions are nevertheless far from uncontested, as the media-access cases demonstrate vividly. Indeed, in these and the other cases discussed in Part II, the Court recognized the possibility that the autonomy of private actors could be constrained, consistent with the Free Speech Tradition, when that autonomy poses a real threat to the robustness and inclusivity of public debate. It also assumed that courts would take into account the overtly private rules that govern property and contractual relationships when interpreting freedom of speech. In other words, it assumed that the First Amendment protected speakers against more than intentional discrimination at the hands of the state.

That the Free Speech Tradition is somewhat more complex than Fiss and other progressive critics have made it out to be should not be terribly surprising. After all, the primary justification that the New Deal Court provided for applying heightened judicial scrutiny in First Amendment cases was that doing so was necessary to protect the democratic system of government from capture by those with economic, political, or social power.[194] Consequently, a central principle of the New Deal Court's First

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192. Id. (arguing that "[t]he state of affairs protected by the first amendment can just as easily be threatened by a private citizen as by an agency of the state" because the state's "peculiar kind of power is not needed to curb and restrict public debate").

193. Id. at 1417.

194. This idea was articulated most famously by Justice Brandeis's assertion in his famous concurrence in *Whitney v. California* that freedom of speech was intended to guard against "the occasional tyrannies of governing majorities." 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring). But it infused the New Deal cases as well. It helps explain, for example, why the Court primarily relied upon First Amendment cases as support for its assertion in the second paragraph of the famous Footnote Four of *United States v. Carolene Products Co.* that heightened scrutiny is appropriate when laws "restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." 304 U.S. 144, 152 n.4 (1938) (citing, among other cases, De Jonge v. Oregon, 299 U.S. 353 (1937), Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931), Whitney v. California, 274 U.S. 357 (1927), and Gitlow v. New York, 268 U.S. 652 (1925)). The idea that judicial scrutiny is appropriate when necessary to reinforce and defend the practices of democratic representation against capture by dominant groups is most often invoked to justify

Amendment cases was the idea that "[f]reedom of speech . . . [must be] available to all, not merely to those who can pay their own way."[195] It would be strange, given all this, had the Court *not* paid attention to social context or material inequality when interpreting the First Amendment's command. In this respect, it is the current, much more formalist approach taken by the Court to free speech questions that is much more difficult to reconcile with the New Deal Court's insistence that the First Amendment was meant not only to guarantee an individual right to autonomy in thought and expression but *also* to facilitate and safeguard a particular kind of social institution: namely, the democratic public sphere.

This is not to say that the earlier age was a golden era of progressive judges, vindicating the public good in the name of the First Amendment. But it does mean that there are resources within the modern tradition that those dissatisfied with the current doctrinal arrangement can use to make free speech jurisprudence more protective of the expressive freedom of the "little people" and less protective of corporate power.

Think, for example, of what it could mean for the regulation of protest if courts were to treat the "ample alternative channels of communication" requirement that is recited in every time, place, or manner case as a stringent constraint on the government's powers rather than a parchment barrier. Surely one consequence would be to make it considerably harder to justify the "free speech cages" and other content-neutral devices that modern municipalities commonly employ to corral dissent at major political events.[196]

Or consider what it might mean to the regulation of the digital economy if the First Amendment were recognized to grant a right of access to privately owned but socially important sites of public expression, such as Facebook, similar to that which *Logan Valley* extended to those who wished to speak in privately owned shopping malls. Scholars routinely dismiss the possibility that any First Amendment constraints apply, or should apply, to internet companies such as Google and Facebook. They argue that it would be inappropriate, and a very bad idea, to impose on these companies the same duties of nondiscrimination that apply to the

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heightened scrutiny in equal protection cases; however, as Professor G. Edward White has shown, the Court initially made this argument in its First Amendment cases, particularly those involving freedom of speech. See G. Edward White, The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America, 95 Mich. L. Rev. 299, 327–28 & n.83 (1996).

195. Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).

196. See, e.g., ACLU of Colo. v. City & Cty. of Denver, 569 F. Supp. 2d 1142, 1175 (D. Colo. 2008) (upholding a content-neutral law that prevented protestors from being within sight or earshot of the Democratic National Convention and discussing other cases in which similarly restrictive content-neutral protest laws were upheld). See generally Timothy Zick, Speech and Spatial Tactics, 84 Tex. L. Rev. 581, 581–82 (2006) (criticizing the use of facially neutral time, place, and manner laws as "powerful weapon[s] of social and political control").

government when it regulates speech.[197] This is probably true—although one should not overstate how broadly that prohibition applies.[198] But *Logan Valley* suggests that the First Amendment limits the actions of private actors only when they stand in the government's shoes. It, and *Marsh* before it, suggest the possibility of a more nuanced constitutional rule.

Of course, one might worry that interpreting the First Amendment in this more genuinely imperial manner would unduly limit the freedom of powerful parties—be they the government or private companies—and thereby undermine their ability to maintain the "good order upon which [civil liberties] ultimately depend."[199] This concern is understandable. Freedom of expression is not, obviously, the only interest at stake in First Amendment cases. Speech can threaten, defame, clutter, and terrorize. But to say that courts could, and should, interpret the First Amendment's command in a manner that is less constrained by the requirement of formal equality than contemporary free speech law is not to say that the right to speak should always trump all other rights or regulatory interests. Precisely the reverse: It is to say that courts could, and should, engage in a far more realistic analysis than they currently do of the political, economic, and social realities that impede, or enable, the "uninhibited, robust, and wide-open" public debate that the First Amendment is supposed to make possible[200]—and develop rules in response.

To *this*, one might object that requiring judges to take serious account of economic, political, and social context would give them too much discretionary power or require too much of them. One might query whether judges have the capacity to engage in the contextual, ultimately sociological analysis required to effectuate an antisubordinating vision of the First Amendment. This concern also has merit. Certainly, cases such as *Red Lion* should give one pause. After all, even those who generally supported the approach that the Court took in that case acknowledge that the set of policies it upheld may have been normatively undesirable; by imposing costs on broadcasters who criticized political candidates, they

197. That there is discrimination in how private media companies like Facebook moderate internet speech is evident. See Kate Klonick, The New Governors: The People, Rules, and Processes Governing Online Speech, 131 Harv. L. Rev. 1598, 1653–55 (2018). For a recent argument *against* extending First Amendment scrutiny to the actions of Facebook and Google that assumes that doing so would require designating these companies as state actors, see Tim Wu, Knight First Amendment Inst., Is the First Amendment Obsolete? 22–23 (2017), https://knightcolumbia.org/sites/default/files/content/Emerging%20Threats%20Tim%20Wu%20Is%20the%20First%20Amendment%20Obsolete.pdf [http://perma.cc/YWN6-FSYJ]. Professor Tim Wu's answer to the question he poses is yes—but it need not be.

198. As Part I makes clear, the government enjoys considerable power to discriminate, both in institutions that are considered nonpublic forums and in public forums—when it can do so via content-neutral rules.

199. Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

200. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

may have denuded the quality of public debate.[201] This suggests that a doctrine that allows more active government intervention in the media environment might produce, in some cases, normatively undesirable results.

The problem is that there likely is no better alternative—at least if one takes off the table dramatic changes in economic policy that would reduce economic inequality and ensure that underlying differences in the distribution of property rights do not seriously undermine the robustness and inclusiveness of public debate.[202] Simply relying on the marketplace of ideas to solve the problem is no solution because, as Fiss noted in his critique of the Free Speech Tradition, in many cases, the marketplace *is* the problem.[203] And although some participants in this Symposium have suggested self-regulation as an alternative solution to the obvious failure of contemporary free speech law, it is hard to see why the corporate interests of powerful private actors would sufficiently align with the public's expressive interests to make self-regulation an adequate substitute for the carrot and stick of judicial intervention.[204]

In the end, vindicating the values that the Court has repeatedly said it believes the First Amendment is intended to safeguard—chief among these, the cultivation of a robust and inclusive public sphere that is necessary for the maintenance of a healthy democratic system of government—may just require courts to engage in the difficult task of balancing the often-competing constitutional interests at stake when the government regulates speech either directly or indirectly.

The anticlassificatory approach that the Court employs today in both its free speech and equal protection cases is very appealing because it produces what appear to be crystal-clear rules. Absolutes are frequently very comforting. In fact, one might question how clear the anticlassificatory approach is—particularly when it requires courts to ignore features of the economic and political landscape that they believe (correctly) should

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201. See, e.g., Fiss, supra note 188, at 1419–20 (noting that policies like the Fairness Doctrine "seek[] to enhance public debate by forcing . . . broadcasters . . . to present opposing sides of an issue . . . , but the fear is that [they] might work in the opposite direction, . . . by discouraging [broadcasters] from taking chances, and by undermining norms of professional independence"); Karst, supra note 10, at 49 (cautioning that a "right of reply" requirement for broadcasters "will give added encouragement to an editorial blandness already promoted by the broadcasters' commercial advertisers").

202. Even in a context of significantly reduced economic inequality, one might worry about social and political cleavages that make it difficult for some speakers to participate in public debate. See Fiss, supra note 188, at 1412. I leave that to one side, however, given that the kinds of redistributive economic policies that would make it necessary to think seriously about noneconomic sources of inequality are unlikely to be enacted any time soon.

203. See id. at 1413.

204. See Jack M. Balkin, Free Speech Is a Triangle, 118 Colum. L. Rev. 2011, 2025–28 (2018). In arguing for self-governance, Balkin assumes that the rules that govern classic public forums would necessarily govern internet domains. However, this need not be the case, as this Essay makes clear.

matter to the analysis. *Turner* provides a good example of how, even within a nominally anticlassificatory framework, courts can reach the results they want.

Even if we assume, however, that the anticlassificatory framework provides rules that do cabin judicial discretion more than the alternative approach, it does so only by outsourcing all the difficult questions—who shall speak? how shall they speak? what speech shall be permitted?—to property and contract law, or (in the case of government institutions) to internal regulations. Yet there is no reason to believe that the rules that govern those areas of the law were designed with any concern for free speech values.

It is certainly true, as the Court reminded us in *Citizens United*, that the First Amendment is predicated on a mistrust of government power.[205] But it is far from obvious that a formal rule that cabins judicial discretion provides any greater protection from the misuse of government power than the alternative. In fact, the history recounted in this Essay suggests that the opposite is true.

This is not to say that it will be easy to persuade the Court that the First Amendment should be interpreted in light of a substantive conception of equality. The transformation of the First Amendment that this Essay calls for may simply not be politically feasible right now. And yet there is value in remembering both what the First Amendment has been and what it may be again. Doing so reminds us that the free speech guarantee is susceptible to multiple interpretations and that the disequalizing tendencies of contemporary free speech law are neither necessary nor inevitable.

CONCLUSION

Supporters of the Roberts Court are fond of saying that it is the most speech-protective Court in history.[206] As this Essay has suggested, this is quite simply not so. In many respects, the Warren Court was much more solicitous of the rights of speakers than the Court is today. And we have come far from the days when the Court routinely claimed that, when compared to property rights, First Amendment rights occupied a "preferred position" in our constitutional scheme due to their importance to the democratic system of government.[207] It is true that today the First Amendment

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205. Citizens United v. FEC, 558 U.S. 310, 340 (2010).

206. See, e.g., Joel M. Gora, Free Speech Matters: The Roberts Court and the First Amendment, 25 J.L. & Pol'y 63, 75 (2016).

207. See, e.g., Saia v. New York, 334 U.S. 558, 562 (1948) ("Courts must balance the various community interests in passing on the constitutionality of local regulations . . . . But in that process they should be mindful to keep the freedoms of the First Amendment in a preferred position."); Marsh v. Alabama, 326 U.S. 501, 509 (1946) ("When we balance the Constitutional rights of owners of property against those of the people to enjoy

provides a powerful protection to those who wish to use their property for expressive purposes—and to guard against government efforts to regulate or restrict those uses—but it provides shoddy protection to everybody else. This is a problem, not only because it means that constitutional protection is afforded to those who least need it. It is a problem because it also means that the First Amendment is unable to effectively achieve its core purposes.

This Essay argues that scholars need not reinvent the wheel to construct a First Amendment doctrine that does a better job of ensuring that free speech rights are—in practice and not just in theory—"available to all, not merely to those who can pay their own way."[208] Instead, they can—and perhaps should—look to the First Amendment's past as a guidepost for its future. Even if the Roberts Court is unlikely to countenance the reinvigoration of half-buried or firmly cabined precedents, the complex history of the Court's engagement with substantive equality provides scholars and advocates with a vision of a First Amendment that is more sensitive to private power and more attentive to the *effects*—and not just the *purpose*—of government action. The antisubordinating vision of the First Amendment sketched out in this Essay may be in exile now, but it need not be forever.

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freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position."); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (holding that the fact that a license tax was "nondiscriminatory is immaterial" and that "[s]uch equality in treatment does not save the ordinance" because "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position").

208. *Murdock*, 319 U.S. at 111.

BEYOND THE BOSSES' CONSTITUTION: THE FIRST AMENDMENT AND CLASS ENTRENCHMENT

*Jedediah Purdy**

The Supreme Court's "weaponized" First Amendment has been its strongest antiregulatory tool in recent decades, slashing campaign-finance regulation, public-sector union financing, and pharmaceutical regulation, and threatening a broader remit. Along with others, I have previously criticized these developments as a "new Lochnerism." In this Essay, part of a Columbia Law Review *Symposium, I press beyond these criticisms to diagnose the ideological outlook of these opinions and to propose an alternative. The leading decisions of the antiregulatory First Amendment often associate free speech with a vision of market efficiency; but, I argue, closer to their heart is antistatist fear of entrenchment by elected officials, interest groups, and bureaucrats. These opinions limit the power of government to implement distributional judgments in key areas of policy and, by thus tying the government's hands, constrain opportunities for entrenchment. This antidistributive deployment of market-protecting policy is the signature of neoliberal jurisprudence.*

But this jurisprudence has deep problems in an order of capitalist democracy such as ours. Whenever the state cannot implement distributional judgments, markets will do so instead. Market distributions are, empirically speaking, highly unequal, and these inequalities produce their own kind of entrenchment—class entrenchment for the wealthy. A jurisprudence that aims at government neutrality by tying the distributional hands of the state cannot achieve neutrality but instead implicitly sides with market inequality over distinctively democratic forms of equality. Once we see that any constitutional vision involves some relationship between the "democratic" and the "capitalist" parts of capitalist democracy, it becomes possible not just to criticize the Court's siding with market winners but also to ask what kinds of equality-pursuing policies the Constitution must permit to reset that balance in favor of democracy.

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INTRODUCTION

Although the Supreme Court's "weaponiz[ed]" First Amendment[1] often comes dressed in rhetoric associating political and civic life with an idealized market, it is aimed less at advancing a perfect market than at impeding very imperfect politics. It aims centrally at averting partisan and bureaucratic entrenchment—at preventing political elites from picking future winners from among candidates, parties, and policies.[2] The problem is that, even if it accomplishes this (a question this Essay does not attempt to answer), it does so at the cost of supporting class entrenchment: the concentration of political power in a relatively small and privileged echelon of Americans.[3] It does so by constitutionally protecting the translation of unequal wealth into unequal political power. This Essay aims to illuminate the premises about the political economy of capitalist democracy that make these doctrinal outcomes plausible and even seemingly obvious, and to advance an alternative approach.

The Court has put an antidistributional principle at the center of today's First Amendment doctrine: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."[4] This per curiam anathema on official distributional judgments in regulating speech—in this instance, the spending of personal wealth in electoral

1. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

2. See infra Part I.

3. See infra section II.A.

4. Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam).

advocacy[5]—has echoed down from the 1976 ruling in *Buckley v. Valeo* to vindicate corporate campaign spending in *Citizens United v. FEC*[6] and invalidate conditional public financing in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,[7] among other consequences.[8] Prohibiting certain kinds of political choices about distribution, especially of political influence itself, has become a key doctrinal tool for defining government neutrality under the First Amendment.[9] Its effect, however, is not to avoid distributional decisions but to hand them off implicitly to markets.

An effective response must make the case for active democratic engagement with the terms of political power itself, centrally including the political power that arises from economic power. It must say what kind of interaction a democratic republic should build between economic and political power, and for what reasons. It must offer, that is, a political economy of power. This Essay thus moves from reconstructing the worldview that supports certain doctrines to addressing the question of what arrangement of market power and political power First Amendment doctrine should aim to cultivate.

Part I of this Essay elaborates the argument sketched above regarding the structure and sources of the Court's campaign-finance cases. Part II develops an alternative picture of the most important distortion of democracy in recent decades: the class entrenchment of the wealthy in political influence. Turning to the question of what political economy of power is desirable in a democratic republic, this Essay proposes that a democratic republic must be able to achieve political will formation around a creditable idea of the common good. This goal requires a modicum of civic equality, which in turn requires that the polity be able to set the terms of its own will formation—that is, to legislate on the formation and distribution of political influence, the very topic the current Court puts out of bounds. The Essay goes on to suggest that this doctrinal pursuit of civic equality should take notice—as the Court's current jurisprudence furtively does—of the political-economic order it aims to make possible, here one of stronger democracy and greater equality and security. One might call it a social-democratic jurisprudence. In contrast, the Court's recent First Amendment jurisprudence, with its conceptual annulment and practical embrace of class entrenchment, has produced a bosses' Constitution. Part III develops this approach further through the First Amendment cases addressing public-sector union fees.

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5. See id. at 7.

6. See 558 U.S. 310, 349–50, 365 (2010) (citing *Buckley*, 424 U.S. at 48–49).

7. See 564 U.S. 721, 727–28, 741 (2011) (citing *Buckley*, 424 U.S. at 48–49).

8. See, e.g., McCutcheon v. FEC, 134 S. Ct. 1434, 1440–42, 1450 (2014) (citing *Buckley*, 424 U.S. at 48–49) (invalidating a statutory limit on aggregate campaign contributions).

9. See infra Part I.

I. THE COURT'S POLITICAL ECONOMY OF SPEECH

A. *Speech, Democracy, and Entrenchment*

The Court's reasoning in the political-spending cases adopts a metaphor of public, political speech as occurring in an efficient market, "the 'open marketplace' of ideas protected by the First Amendment," in which "ideas 'may compete' . . . 'without government interference.'"[10] In this marketplace, electoral "expenditure is political speech presented to the electorate," an offering that "presupposes that the people have the ultimate influence over elected officials."[11] The purpose of the advertising is "advising voters on which persons or entities are hostile to their interests."[12] Within this image, political speech (including spending) is thus "an essential mechanism of democracy, for it is the means to hold officials accountable to the people" by presenting voters with competing accounts of their situation and interests.[13] So understood, speech is the cornerstone of "a republic where the people are sovereign."[14]

These passages bolster decisions holding that limits on campaign spending may not be constitutionally justified as measures to reduce "distortion" of political power or "corruption" in the form of undue political influence.[15] The Court's praise of advertising's service to democracy is a buttress for the view that government must not be allowed to make distributional judgments concerning political speech and influence because "[l]eveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election . . . , and it is a dangerous business for Congress to use the election laws to influence the voters' choices."[16] It is avoiding this *summum malum* that powers the praise of political advertising and market-style voter choices as a democratic *summum bonum*. The Court treats elections and political debate *as if* they were perfect markets because this premise secures them against the vices of political rent seeking.

The Court's jurisprudence, accordingly, is not invested in the thoroughgoing coherence or adequacy of the market metaphor. As Professor David Grewal and I have emphasized elsewhere, modern arguments favoring private economic power over democratic countermeasures tend to have shifting, overlapping aspects: affirmative idealization of the efficiency of

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10. *Citizens United*, 558 U.S. at 354 (quoting N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 208 (2008)).

11. Id. at 360.

12. Id. at 354.

13. Id. at 339.

14. Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam).

15. See *Citizens United*, 558 U.S. at 349–61 (rejecting the antidistortion and anti-corruption rationales for regulating corporate political speech).

16. Id. at 350 (internal quotation marks omitted) (quoting Davis v. FEC, 554 U.S. 724, 742 (2008)).

market arrangements; moralized identification of the rights and transactions of the marketplace as uniquely compatible with liberty, equality, and dignity; a tragic register insisting that the predictable deficiencies of politics generally, or certain democratic institutions in particular, prevent them from doing better than markets can, even if we might wish otherwise; and a preargumentative "common-sense" dimension that implicitly dismisses certain alternatives as "off the table" before the serious argument has begun.[17] It is typical to move among these different registers almost unselfconsciously because they hang together as an ideological worldview. Indeed, besides their praise of markets and denigration of politics, the political-spending opinions invoke the "worth" and "voice" of speakers, as if corporations were marginalized populations in search of dignity, and liberally invoke the language of nondiscrimination, almost reflexively borrowing the moral language of First Amendment liberties.[18] So the *Citizens United* Court announced of the corporate-spending ban, "The censorship we now confront is vast in its reach . . . [and] 'muffle[s] the voices that best represent the most significant segments of the economy.'"[19] In these opinions, however, avoiding the pathologies of politics is the keystone.

The implicit standpoint of the campaign-finance cases, then, is the following: The constitutional evil to be avoided is manipulation by the political class of the rules for later elections, which would "deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration" and will receive majoritarian endorsement.[20] Seen in this way, limiting campaign spending is a usurping attempt to predetermine the course of democratic self-rule, just like prohibiting antiwar pamphleteering or banning Karl Marx's writings.[21] The Court's way of averting this hazard involves it in a certain view of democratic will formation. In this latter view, voting decisions are fairly characterized on the paradigm of the fully informed economic agent of neoclassical modeling, who gratefully accepts the helpful data that advertising provides.[22] This upbeat idea that the wealthy, whether through the

17. David Singh Grewal & Jedediah Purdy, Introduction: Law and Neoliberalism, 77 Law & Contemp. Probs., no. 4, 2014, at 1, 6–7.

18. See *Citizens United*, 558 U.S. at 340–41 ("By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice.").

19. Id. at 354 (quoting McConnell v. FEC, 540 U.S. 93, 257–58 (2003) (Scalia, J., concurring in part, dissenting in part, and concurring in the judgment in part)).

20. Id. at 341.

21. See generally Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245, 256–57 (arguing that the First Amendment should protect, among other things, philosophy and public discussions of public issues because of their importance to self-government).

22. See generally Herbert A. Simon, A Behavioral Model of Rational Choice, 69 Q.J. Econ. 99, 99 (1955) ("Traditional economic theory postulates an 'economic man,' who, in

corporate form or otherwise, are simply submitting arguments for assessment by their fellow citizens, is not an empirical claim about political persuasion and judgment. It is a half-theoretical, half-rhetorical premise. Current First Amendment doctrine tends toward this premise in good part to avoid a square confrontation with the problems that arise from its rejection of explicit distributional judgments concerning political influence.

B. *A Theoretical and Historical Origin Point for the Court's View*

The judicial outlook sketched above emerged before the rise of the "conservative legal movement" that today furnishes many of its spokespersons on the bench.[23] Its early articulation arose from a shared sense of the distinctive problems of capitalist democracy and the role of a constitutional order in mitigating them. The social and intellectual world of its early spokespersons was the end of the post–World War II "great exception," the last years of a period of widely shared growth, the flattest distributions of wealth and income the country has seen, and a strong role for organized labor in the Keynesian management of the national economy.[24]

From the point of view of the worried center-right, the postwar era presented a threat: Too much political control of the economy, bolstered by unions and by the left, would stifle personal liberty and initiative, leading to some combination of stagnation and tyranny.[25] The influence of this perspective on elite legal culture was evident in Justice Powell's 1971 memorandum to Eugene Sydnor of the Chamber of Commerce, written shortly before his nomination to the Supreme Court, in which Powell called for a full-court press by business in politics, universities, media, and the courts for "the preservation of the system [of free enterprise] itself."[26] Justice Powell's memo crystallized a development in twentieth-century conservative jurisprudence that has come to full flower

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the course of being 'economic' is also 'rational.' This man is assumed to have knowledge of the relevant aspects of his environment which, if not absolutely complete, is at least impressively clear and voluminous.").

23. See generally Steven M. Teles, The Rise of the Conservative Legal Movement (2008) (charting the development, since the 1970s, of the "conservative legal movement" into a "sophisticated and deeply organized network").

24. See Wolfgang Streeck, Buying Time: The Delayed Crisis of Democratic Capitalism, at xiii–xiv (Patrick Camiller & David Fernbach trans., 2d ed. 2017) [hereinafter Streeck, Buying Time]; David Singh Grewal & Jedediah Purdy, Inequality Rediscovered, 18 Theoretical Inquiries L. 61, 61–67 (2017) [hereinafter Grewal & Purdy, Inequality] (describing the economic growth and optimism that prevailed in the three decades following World War II).

25. See Kim Phillips-Fein, Invisible Hands: The Businessmen's Crusade Against the New Deal 150–212 (2010) (describing business interests' mobilization of ideas against the regulatory state in the late 1960s and 1970s).

26. Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce 30 (Aug. 23, 1971) [hereinafter Powell Memorandum] (on file with the *Columbia Law Review*).

in the twenty-first: an across-the-board resistance to the politics of distribution, in which political spending plays a central role.

The fear of state-led distribution has been a frequently renewed resource in U.S. politics since James Madison's warnings against redistributive "factions" in Federalist No. 10.[27] It defined the right wing of the classically liberal Republican Party in the first Gilded Age, and the Liberty League and other opponents of the New Deal recast it for their purposes.[28] When the conservative *Reader's Digest* published a polemical summary of libertarian economist Friedrich Hayek's already polemical *The Road to Serfdom*, an antistatist beachhead was announced at the apex of America's (always incomplete and racially stratified) closest approach to social democracy.[29] Hayek and his fellow Chicago economist Milton Friedman (whom Powell admiringly quoted in his 1971 memo[30]) brought to the defense of markets theoretical sophistication and, especially in Hayek's case, the ambition to synoptic social theory.[31] By the early 1970s, these thinkers, like Powell, were developing the neoliberal response to a cross-national wave of labor militancy, social-movement discontent, and inflationary pressures (the last widely seen as connected with organized labor's expectation of regular wage hikes, even as productivity slowed),[32] which among thinkers of the second Frankfurt School came to be known as the West's "legitimation crisis."[33] Hayek and his allies helped the reflective wing of American business to formulate an imperative to restore

27. See The Federalist No. 10, at 53 (James Madison) (Ian Shapiro ed., 2009) (warning against redistribution and debt relief as the signal threats of an unchecked local democracy).

28. See President Grover Cleveland, Second Inaugural Address (Mar. 4, 1893) ("[Economic paternalism] perverts the patriotic sentiments of our countrymen and tempts them to pitiful calculation of . . . sordid gain . . . . It undermines the self-reliance of our people and substitutes in its place dependence upon governmental favoritism."); Phillips-Fein, supra note 25, at 3–25 (detailing the mobilization of free-market ideas against the New Deal).

29. See Angus Burgin, The Great Persuasion: Reinventing Free Markets Since the Depression 87–122 (2012) (detailing the popularization and reception of Hayek's thought and its role in conservative retrenchment against the New Deal); see also Grewal & Purdy, Inequality, supra note 24, at 66 (noting exceptions to the post–World War II "trend of economic inclusion," such as African Americans).

30. See Powell Memorandum, supra note 26, at 5–6.

31. See, e.g., Friedrich A. Hayek, The Mirage of Social Justice 107–32 (Phoenix ed. 1978) (theorizing the nature and benefits of the market order).

32. See Wolfgang Streeck, The Crises of Democratic Capitalism [hereinafter Streeck, Crises], *in* How Will Capitalism End? 73, 77–78 (2016) [hereinafter Streeck, How Will Capitalism End?] (recounting the rise of labor militancy and inflation beginning in the late 1960s).

33. See Streeck, Buying Time, supra note 24, at 1–46 (recounting the "legitimation crisis" debates of the 1970s and criticizing their failure to anticipate the resilience of capitalism).

competitive pressure throughout the economy and, conversely, to roll back uses of the state that baffled or annulled market competition.[34]

Hayek followed political economist Joseph Schumpeter and other skeptics of robust democracy in holding that such ideas as "society" and "the political community" were sentimental mystifications, and distributional politics a semiorganized form of looting.[35] Hayek contended, moreover, that abandoning market coordination implied moving toward the only systemic alternative: outright political command of economic life.[36] He thus worked out in theory the position that Powell adopted in his memo:

> The threat to the enterprise system . . . also is a threat to individual freedom.
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> . . . .
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> . . . [T]he only alternatives to free enterprise are varying degrees of bureaucratic regulation of individual freedom—ranging from that under moderate socialism to the iron heel of the leftist or rightist dictatorship.
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> . . . .
>
> . . . [F]reedom as a concept is indivisible. As the experience of the socialist and totalitarian states demonstrates, the contraction and denial of economic freedom is followed inevitably by governmental restrictions on other cherished rights.[37]

Hayek argued that, if democracy were to be viable despite these deficiencies, the scope of politically open questions must be closely restricted—specifically to exclude questions of distribution.[38]

The Court's worry about political entrenchment thus has a particular historical paradigm: the defense of market ordering, with its accompanying liberties, against the self-perpetuating rule of a bureaucratic state acting on behalf of well-organized or ideologically sympathetic interest groups. Hayek and Friedman joined public-choice theorists such as Gordon Tullock and James Buchanan in warning against this political

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34. See, e.g., Burgin, supra note 29, at 186–213 (describing Friedman's advocacy for laissez faire principles in the 1970s).

35. See Friedrich Hayek, 'Social' or Distributive Justice, *in* The Essence of Hayek 62, 67 (Chiaki Nishiyama & Kurt R. Leube eds., 1984) ("I believe that 'social justice' will ultimately be recognized as a will-o'-the-wisp which has lured men to abandon many of the values which in the past have inspired the development of civilization . . . .").

36. See id. at 91–93 (arguing that the only alternative to market allocation in the social division of labor is, in effect, the conscription of some people in defense of the privileges of others).

37. Powell Memorandum, supra note 26, at 32–33.

38. See Friedrich Hayek, Whither Democracy?, *in* The Essence of Hayek, supra note 35, at 352, 357–58 (arguing for the construction of a government that systematically avoids distributional decisions because the "different treatment which is necessary in order to place people who are individually very different into the same material position seems . . . not only incompatible with personal freedom, but highly immoral").

entrenchment as the distinctive hazard of democratic capitalism.[39] The key to staving off this danger, it was influentially argued on the neoliberal right, was to cordon off questions of distribution from active political contestation.

It was in this setting that the Court announced per curiam that the refusal of distributional judgments was the essential commitment of the Constitution's protection of freedom of speech.[40] When one tries picturing the goal of averting political redistribution as a jurisprudential keystone, other doctrinal developments form an arch around it. The affirmative action cases head off distributional judgments and political entrenchment along racial lines, as in the opinions of Justices O'Connor and Scalia in *Croson*[41] and Justice Roberts's opinion in *Parents Involved*.[42] The Court's treatment of public-sector unions in *Janus v. AFSCME* (discussed in Part III) suggests a pair of touchstone worries: that the support of public-sector unions might provide a means of political entrenchment, and that the political empowerment of such unions might enable them to foist ruinous distributional demands on local and state governments.[43] The Spending Clause opinions in *National Federation of Independent Business v. Sebelius*, especially the joint dissent of four conservative Justices, aim at heading off Congress's imposing a redistributional form of social provision on the states via the power of general taxation.[44] In short, the antidistributional nerve of *Buckley* and the subsequent campaign-finance cases connects that reasoning both to the rising neoliberal political economy of the 1970s and to a substantial body of post–Warren Court jurisprudence, from the Nixon appointees' halt of Warren Court and Great Society egalitarianism to the Rehnquist and Roberts Courts' rollback

39. See generally James M. Buchanan & Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy (1962) (arguing for a positive theory of politics and government based on the analysis of decision dynamics among self-interested actors), reprinted in 2 The Selected Works of Gordon Tullock (Charles K. Rowley ed., 2004).

40. See supra note 4 and accompanying text.

41. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–97 (1989) (plurality opinion) (O'Connor, J.) (noting the danger of "simple racial politics" and the fact of Richmond's majority-black city government as reasons for applying strict scrutiny to affirmative action programs); id. at 520 (Scalia, J., concurring in the judgment) (rejecting the notion that governments may use racial classifications to ameliorate the effects of past discrimination).

42. See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 725–32 (2007) (expressing "concern that racial balancing has 'no logical stopping point'" and, if permitted, will embed racial proportionality permanently in American life (quoting *Croson*, 448 U.S. at 498)).

43. See infra notes 98–107 and accompanying text.

44. See 567 U.S. 519, 690–91, 706–07 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (arguing that federalism principles should prohibit Congress from requiring states to choose between adopting a federally funded social-provision policy, on the one hand, and funding their own while simultaneously funding other states' federally subsidized programs through federal taxes, on the other).

of the same. Constitutional resistance to redistribution is at the heart of this jurisprudence.

This Part has diagnosed a set of premises about markets and democracy in the Court's First Amendment doctrine and located an origin point for these in the political, economic, and legal debates of the early 1970s. The next Part provides a larger context for explaining and assessing the Court's First Amendment doctrine, as well as criteria for marking out a different, more egalitarian and democratic path forward. I argue that a capitalist democracy like that of the United States must manage two competing sets of imperatives: those of marginal productivity aimed at profit and those of social provision and self-rule. While the Justices who have shaped the current doctrine have seen chiefly the danger that politics poses to markets, the greater danger is the threat that capitalism's dynamics pose to social provision and self-rule. Preserving democracy requires actively fostering the conditions for its success. The kind of redistributive policy that the *Buckley* Court made anathema is, in fact, indispensable.

II. AN ALTERNATIVE: THE TENSIONS OF CAPITALIST DEMOCRACY

Capitalist democracy welds together two quite different principles for generating answers to the basic problems of social coordination: Who plays what roles in cooperation, who gets what resources in distribution, and who has what authority in the political decisions that set the rules of further cooperation and distribution?[45] Capitalist ordering, based on the private ownership of productive resources (including labor power) and their market-mediated allocation in pursuit of the highest marginal return, tends persistently to produce inequality in wealth and income.[46] It also produces class stratification, as different social groups play different roles, from investor and rentier to professional and laborer.[47]

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45. This is a fairly conventional account of the questions any system of social cooperation must answer. See, e.g., Barrington Moore, Jr., Injustice: The Social Bases of Obedience and Revolt 9 (1978) (dividing the problem of social coordination into problems of authority, division of labor, and allocation of goods and services).

46. See Wolfgang Streeck, Crises, supra note 32, at 74–75 (characterizing the "capitalist" half of capitalist democracy as governed by a "principle[] . . . of resource allocation . . . operating according to marginal productivity, or what is revealed as merit by a 'free play of market forces'"); David Singh Grewal, The Laws of Capitalism, 128 Harv. L. Rev. 626, 629–44 (2014) (reviewing Thomas Piketty, Capital in the Twenty-First Century (Arthur Goldhammer trans., 2014)) (summarizing Piketty's findings of persistent, cross-national, multicentury trends toward increasing inequality of both income and wealth).

47. See Grewal, supra note 46, at 632 (summarizing Piketty's diagnosis of class stratification under a system of "patrimonial capitalism" in which inherited wealth creates a sizable rentier class). This class-stratified division of labor is not unique to capitalist societies and in fact has characterized all industrial societies, including the authoritarian socialist regimes of the Soviet bloc. See, e.g., Kazimierz M. Słomczyński & Irina Tomescu-Dubrow, Class Structure and Social Stratification in Poland from the 1970s to the 2010s, *in* Dynamics of Class and Stratification in Poland 39, 39–65 (Irina Tomescu-Dubrow et al.

Democratic ordering, by contrast, presents a principle of majority decisionmaking by members of a community of political equals.[48] To give a democratic response to the basic problems of social coordination is to say that the terms of cooperation and distribution must ultimately take their legitimacy from the collective decision of a community of equals, such as a principle of "social need or entitlement, as certified by the collective choices of democratic politics."[49] A democratic polity might have good reason to embrace market allocation for any number of purposes, but the use of markets would have its justification in a collective choice among equals; democracy would have to come first. The relation between the two principles of capitalist democracy is particularly fraught in the allocation of political authority to set the rules of cooperation and distribution.[50] Wealth and class stratification tend constantly to undermine the equality of citizens (which is always artificial and legally constituted), giving certain classes (the wealthy, professionals, investors) the capacity to set political agendas and control important decisions.[51] This overriding of the democratic principle by its capitalist competitor is the

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eds., 2018) (providing a sociological overview of these dynamics under Soviet-bloc socialism and subsequent capitalism). The tensions in relation to American-style capitalist democracy, however, are especially acute.

48. See Streeck, Crises, supra note 32, at 75 (characterizing the "democratic" half of capitalist democracy as governed by a principle "based on social need or entitlement, as certified by the collective choices of democratic politics"). This is not merely a conceptual stipulation. As David Grewal and I have recently argued, democratic authorization of political power constitutes not just the ethical core of American constitutionalism's conception of legality but also the very foundation and structure of the Constitution's authority. See David Singh Grewal & Jedediah Purdy, The Original Theory of Constitutionalism, 127 Yale L.J. 664, 681–90 (2018) [hereinafter Grewal & Purdy, Original Theory] (reviewing Richard Tuck, The Sleeping Sovereign: The Invention of Modern Democracy (2016)). While a sociological description such as Streeck's captures essential difficulties in capitalist democracy, these difficulties arise and present the questions I am exploring here specifically because of the constitutional commitment to democratic self-rule.

49. Streeck, Crises, supra note 32, at 75. While I find Streeck's characterization an invaluable shorthand, I don't mean to follow him, or the Polanyian tradition in which he writes, in sometimes seeming to essentialize the national community in ways that can invite perceived affinities with dangerous forms of nationalism. See Grewal & Purdy, Original Theory, supra note 48, at 666–73 (explaining that the polity of democratic constitutionalism is an artificial, legally constituted entity—though no less real for that, a point that should be not at all mysterious to lawyers); Adam Tooze, A General Logic of Crisis, London Rev. Books (Jan. 5, 2017) (reviewing Streeck, How Will Capitalism End?, supra note 46), http://www.lrb.co.uk/v39/n01/adam-tooze/a-general-logic-of-crisis [http://perma.cc/3ACT-QFV5] (arguing that Streeck strays toward this essentialization).

50. Cf. Streeck, Crises, supra note 32, at 76 ("[T]heories of political economy . . . recognize market allocation as just one type of political-economic regime, governed by the interests of those . . . in a strong market position. An alternative regime, political allocation, is preferred by those with little economic weight but potentially extensive political power.").

51. See Martin Gilens, Affluence and Influence: Economic Inequality and Political Power in America 1 (2012) ("The American government does respond to the public's preferences, but that responsiveness is strongly tilted toward the most affluent citizens.").

perennial tendency of capitalist democracy. American democracy demonstrates the tendency well.

A. *Distributional Contests and Class Entrenchment*

American democracy is profoundly divided along class lines. Professor Martin Gilens concluded, summing up his own research and that of others, that "under most circumstances, the preferences of the vast majority of Americans appear to have essentially no impact on which policies the government does or doesn't adopt."[52] The policy preferences of wealthy Americans diverge systematically from those of the general public: Significantly smaller shares of the wealthy support substantial redistribution (17% versus 52%), national health insurance (32% versus 61%), affordable college (28% versus 78%), and a living wage (40% versus 78%).[53] Elected representatives themselves are predominantly professional or wealthy. Less than two percent of members of the U.S. Congress entered politics from blue-collar jobs.[54] It is estimated that at least half of congresspersons are millionaires and that the median net worth of a member of Congress is over $1 million.[55] The disproportionate representation of the wealthy reinforces their disparate influence: "[L]awmakers

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52. Id.; see also Larry M. Bartels, Unequal Democracy: The Political Economy of the New Gilded Age 242–44 (2d ed. 2016) (finding that the political views of the poor had almost no influence on Senate roll call votes during the 112th Congress); Martin Gilens & Benjamin I. Page, Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens, 12 Persp. on Pol. 564, 572 (2014) (finding that nonwealthy and unorganized voters wield almost no political influence). But see Yosef Bhatti & Robert S. Erikson, How Poorly Are the Poor Represented in the U.S. Senate?, *in* Who Gets Represented? 223, 223–24 (Peter K. Enns & Christopher Wlezien eds., 2011) ("[W]e do not challenge Bartels's finding of unequal representation as necessarily incorrect. We do, however, offer what we believe to be compelling reasons to interpret the evidence with considerable caution."). See generally Kate Andrias, Separations of Wealth: Inequality and the Erosion of Checks and Balances, 18 U. Pa. J. Const. L. 419, 421 (2015) (summarizing data on inequality and arguing that the U.S. government is appropriately understood as captured by the wealthy). With regard to the debate just noted, my claims about class entrenchment do not depend on Gilens and Page's conclusion that the wealthy nearly always prevail in policy contests. I claim only that political power is profoundly unequal.

53. See Benjamin I. Page, Larry M. Bartels & Jason Seawright, Democracy and the Policy Preferences of Wealthy Americans, 11 Persp. on Pol. 51, 57–64 (2013). This finding cannot really be considered authoritative, as it is based on interviews with eighty-three wealthy individuals in the Chicago area, but data on this issue are scarce. See id. at 53 (describing the methodology behind these findings).

54. See Nicholas Carnes, White-Collar Government: The Hidden Role of Class in Economic Policy Making 7–20 (2013) (summarizing findings that over the past century no more than two percent of members of Congress have been members of the working class and that from 1999 to 2008 only six percent of members of Congress had spent any time at all in blue-collar jobs).

55. See Russ Choma, One Member of Congress = 18 American Households: Lawmakers' Personal Finances Far from Average, OpenSecrets.org (Jan. 12, 2015), https://www.opensecrets.org/news/2015/01/one-member-of-congress-18-american-households-lawmakers-personal-finances-far-from-average/ [http://perma.cc/FK96-ABRN].

from different classes tend to think, vote, and advocate differently on economic issues,"[56] with working-class representatives more likely to support progressive economic legislation and to attend to the priorities of less wealthy constituents.[57]

The influence that wealth exercises over political judgment is not mostly transactional—not a matter of bribes—but structural and social. It is structural in the sense that costly campaigns require constant infusions of money, and political representatives and their staffers know where to secure it.[58] It is structural, too, in that a high-dollar influence industry creates an increasing overlap in personnel between politics and lobbying, as politicians who have relied on money directed from the influence industry during their elected careers move over to influence brokering upon leaving office.[59] The social character of unequal influence is a product of these structural characteristics. Those who hold power know, listen to, care about, and identify with those who—like them—have money.[60]

This is a form of class entrenchment. Reflecting on it suggests that class entrenchment arises readily under capitalist democracy and may even be fairly described as the default form of politics under that regime. The reasons for this are not obscure. The American political situation just described is an instance of a general tendency. Capitalist economies tend, historically and today, toward high and growing levels of economic inequality.[61] An economy that distributes gains unequally tends to produce successful constituencies that want to sustain their success.[62] They have the means to do so by virtue of being economically advantaged.[63] The policies they support maintain or amplify the inequality-producing dynamics that generated their advantages in the first place.[64] The pattern

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56. Carnes, supra note 54, at 3.

57. See id. at 71–82 (summarizing the distinctive priorities of working-class representatives).

58. See Zephyr Teachout, Corruption in America 246–57 (2014) (setting out the various ways in which the need for money directs the efforts and attention of politicians).

59. See id. at 246–47 (explaining that in 1970 only three percent of congressional representatives entered lobbying upon leaving office, whereas today that figure is over fifty percent).

60. See Bartels, supra note 52, at 301–05 (describing the narrow and class-stratified world of social contact and influence that shaped Treasury Secretary Timothy Geithner's response to the 2008 financial crisis in the course of the Obama Administration's 2009 policymaking efforts); Teachout, supra note 58, at 249–53 (describing the gift economy of the wealthy and influential).

61. See Grewal, supra note 46, at 629–42 (summarizing findings to this effect).

62. See Page, Bartels & Seawright, supra note 53, at 67 (discussing how many political preferences of wealthy Americans can be explained by their interest in protecting personal wealth).

63. See Gilens & Page, supra note 52, at 572 ("[E]conomic elites are estimated to have a quite substantial, highly significant, independent impact on policy.").

64. See Carnes, supra note 54, at 111–20 ("Even when high-stakes economic legislation is on the line, lawmakers from different classes think and vote differently. . . . [I]n a class-balanced Congress, businesses probably would have enjoyed fewer tax breaks and

of class advantage will, of course, differ from polity to polity, depending in part on the ways in which economic power may be converted to political influence, and vice versa. For instance, campaign donation limits that are impossible to reach for most voters but within the reach of professionals and executives will empower a nexus of those classes and political brokers clustered around parties or their proxies, while unlimited independent expenditures will empower very wealthy political entrepreneurs such as Sheldon Adelson and Thomas Steyer.[65] The goal of the campaign finance legislation reviewed and weakened in *Buckley v. Valeo* was to empower a mix of parties and dedicated volunteers—the archetypical protagonists of "civil society"—to the relative disadvantage of large donors and spenders.[66]

In seeking to avert incumbent and partisan entrenchment, the Court has developed a First Amendment jurisprudence that shields and fosters class entrenchment. It has also made class entrenchment constitutionally invisible by characterizing political spending as serving equal citizenship rather than undercutting it, defining the structural characteristics of class entrenchment as insufficiently problematic to justify campaign-finance regulation, and declaring constitutionally out of bounds the redistribution of political influence toward greater equality.[67] Such redistribution is *the* signal means for a polity to assert democracy against the default drift toward class entrenchment.[68] Appreciating the structural character of class entrenchment and the role of political spending in it helps to underscore that actively pursuing political equality is the only alternative to that default drift. The Court's First Amendment jurisprudence simultaneously knocks out this buttress of democracy and obscures why a polity would need it in the first place.

This is what makes the Court's characterization of capitalist democracy ideological. Its characterization of capitalist democracy generally, its praise of market-modeled elections, and its wariness of partisan and incumbent entrenchment might, taken alone, be characterized as an imaginary, or a worldview, or simply a set of heuristics: a way of organizing

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would have had to shoulder more of the economic fallout from unforeseeable events [between 1999 and 2008].").

65. See generally Robert G. Kaiser, So Much Damn Money: The Triumph of Lobbying and the Erosion of American Government 3–24 (2009) (detailing the extent of spending in politics); Top Individual Contributors: All Federal Contributions, OpenSecrets.org, https://www.opensecrets.org/overview/topindivs.php [http://perma.cc/K8VJ-BKUQ] (last visited Aug. 14, 2018) (listing Adelson and Steyer among the top individual contributors in the 2018 election cycle).

66. See Buckley v. Valeo, 424 U.S. 1, 6–7 (1976) (per curiam) (characterizing the statute under review, the Federal Election Campaign Act of 1971 (FECA)); Richard Briffault, The Federal Election Campaign Act and the 1980 Election, 84 Colum. L. Rev. 2083, 2083 (1984) (reviewing Herbert E. Alexander, Financing the 1980 Election (1983) and Elizabeth Drew, Politics and Money (1983)) ("The central thrust of FECA was to move the campaign finance process in a more egalitarian and public direction.").

67. See supra section I.A.

68. See infra section II.B.3.

institutions and events into certain patterns of salience, highlighting certain priorities and dangers and discounting others.[69] All social practices, including forms of reasoning such as legal argument and academic inquiry, occur within imaginative frames of this kind.[70] When I say that the court's characterization is ideology, I mean something more. These judicial characterizations *obscure* central features of social and political reality and, indeed, render them legally unintelligible in ways that facilitate class entrenchment while denying the basic tension within capitalist democracy. To say that jurisprudence is ideological is to say that it mischaracterizes social and political reality by denying one or more of its constitutive conflicts and, at the same time, takes sides in those conflicts.[71]

B. *Principles for a Democratic First Amendment*

So, what should an egalitarian First Amendment jurisprudence do? This section addresses this question through a characterization of self-rule under capitalist democracy.

1. *Neutrality, Right and Wrong.* — The first step is to recognize that class entrenchment is a perennial tendency of capitalist democracy and arises from the tensions between the regime's two competing principles of social coordination.[72] Appreciating this makes clear that, in one sense, the jurisprudential goal of enforcing state neutrality via the First Amendment is a chimera.

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69. See generally Jedediah Purdy, After Nature 6–7 (2015) ("Imagination means how we see and how we learn to see, how we suppose the world works, how we suppose that it matters, and what we feel we have at stake in it. It is an implicit, everyday metaphysics . . . [in which] some facts stand out . . . while others recede . . . ."); Charles Taylor, A Secular Age 171–76 (2007) (setting out a philosophical account of the role of a "social imaginary" in organizing experience).

70. See, e.g., 2 Charles Taylor, Philosophical Papers: Philosophy and the Human Sciences 21–28 (1985) (challenging the "epistemological orientation which would rule interpretation out of the sciences of man").

71. See Karl Marx, The German Ideology: Part I, *in* The Marx-Engels Reader 146, 148–55 (Robert C. Tucker ed., 2d ed. 1978) (suggesting that in ideology "men and their circumstances appear upside-down as in a *camera obscura*"); see also Jorge Larrain, The Concept of Ideology 60–61 (1979) ("[I]deology is reaffirmed as a consciousness which conceals contradictions in the interest of the dominant class. The inverted character of ideological consciousness corresponds to the real inversion of social relations . . . ."). Marx's definition of ideology as obscuring social reality is very stark, and any strict application of it requires a firm idea of what exactly counts as "social reality." I do not, in general, share the young Marx's confidence that patterned and discernible material relations are the genuine stuff of social life and liberal interpretations the mere ideological dressing. See Karl Marx, A Contribution to the Critique of Political Economy 20–21 (Maurice Dobb ed., S.W. Ryazanskaya trans., Int'l Publishers 1970) (1859) ("The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness."). Having said that, however, the basic tensions of capitalist democracy are so foundational, and their obscuring so significant, that a starker characterization of the situation seems justified. See infra note 72 and accompanying text.

72. See generally Streeck, Crises, supra note 32, at 74–75 (outlining the capitalist and democratic principles that perpetually compete in capitalist democracies).

Any doctrinal elaboration of the First Amendment will both presuppose and advance a specific dynamic between the twinned principles of capitalist democracy. Among other effects, any version of the First Amendment will tend to facilitate or impede certain forms of class entrenchment.

This is not to say that neutrality is impossible or undesirable in doctrine or that decisions must be outcome oriented according to the Justices' feelings about specific cases.[73] If neutrality means avoiding this caricature of unprincipled decisionmaking, then neutrality is both desirable and achievable. But such neutrality has multiple possible forms. It might be consistent with neutrality to permit *no* private expenditure on political campaigns, relying on public financing and the strength of volunteer efforts and other shows of popular support. Alternatively, neutrality might require the doctrines of *Buckley* and *Citizens United*.[74] It might be, too, that the best version of neutrality would start from a constitutional presumption that campaign-finance regulation is legitimate, subject to some constraint of reasonableness.[75] Any of these doctrines would be neutral both (1) in the formal sense that they do not require free-roaming, case-by-case judicial decisions about the distribution of political power and (2) in the substantive sense that they implement a version of the idea that the state is obliged not to make invidious distinctions among citizens.[76] None, however, would be neutral in the sense of implying no attitude toward the competing tendencies of capitalist democracy: economic inequality and political equality. An egalitarian First Amendment jurisprudence should seek a version of neutrality that aims at supporting political equality against economic inequality.

2. *Democratic Will Formation.* — A First Amendment jurisprudence concerned to foster, or at least not inhibit, the vitality of democratic equality must be oriented toward collective will formation that allows the majority to rule. The self-legislation of the majority, binding for all, is the normative core of modern constitutional democracy.[77] Constitutional

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73. But cf. City of Mobile v. Bolden, 446 U.S. 55, 75 & n.22 (1980) (arguing against a claim for the judicial redistribution of voting power by denying the possibility of identifying a legitimate distributional principle).

74. See supra notes 4–6 and accompanying text.

75. This is basically the position that Justice Stevens recommends adopting by constitutional amendment, a recourse he advises only because of the Court's spending-protective precedents in this area. See John Paul Stevens, Six Amendments: How and Why We Should Change the Constitution 57–80 (2014).

76. See Ronald Dworkin, Law's Empire 199–201 (1986) (explaining the essential role in legal legitimacy of equal concern and respect for the interests and perspectives of those governed—that is, the second sense of neutrality); Frederick Schauer, Formalism, 97 Yale L.J. 509, 539 (1988) (explaining that the virtue of the first sense of neutrality lies in "disabling certain classes of decisionmakers from making certain kinds of decisions").

77. See Grewal & Purdy, Original Theory, supra note 48, at 683 (explaining that conceptual and institutional innovations enabled a "new practice of *popular authorship* of fundamental law by the political community" in eighteenth-century constitutional thought); see also Jack M. Balkin, Republicanism and the Constitution of Opportunity, 94 Tex. L.

interpretation should take place with an eye to sustaining the conditions of popular sovereignty, preventing the drift of government into deep or irremediable elite usurpation.[78]

Collective will formation requires that the political process be able to resolve disputes by authoritative decisions connected with a conception of the common good.[79] While the content of any "common good" is notoriously indeterminate and, indeed, would contradict self-rule were it neatly fixed in advance, politics must be able to *produce* an account of the common good that will be generally recognized as legitimate even as it is contested through further politics. The political production of a common good becomes impossible if citizens pervasively mistrust the results of the political process—for instance, if they doubt the objectivity of voting, they regard the system as irremediably rigged by such means as gerrymandering and influence peddling, or they come to regard their political opponents as so essentially hostile to their values and interests as to be disqualified from sharing in any common good.[80] For a *democratic* republic to produce such an account of the common good, there must be no pervasive exclusion from political participation, and the distribution of political influence must not be so marked by inequality that the majority of people who must live under the law cannot regard themselves in any serious sense as having authorized it.[81] A democratic republic

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Rev. 1427, 1431–37 (2016) (defining republican government by reference to principles including self-rule, the common good, and civic equality). My assertion above the line obviously implicates a deep and long-running body of debate in political thought, which I do not pretend to survey. My goal here is to set out a normative orientation with strong roots in both the U.S. constitutional tradition and the general theory of capitalist democracy.

78. See, e.g., Balkin, supra note 77, at 1435–37 (identifying republicanism with anti-corruption and antientrenchment principles).

79. Cf. id. at 1433 (explaining that republicanism relies on a notion of the common good).

80. See Steven Levitsky & Daniel Ziblatt, How Democracies Die 102–44 (2018) (exploring the potential of polarization to undermine liberal democracy by eroding mutual toleration and institutional forbearance).

81. See, e.g., Balkin, supra note 77, at 1433–34, 1437–39 (arguing that republicanism emphasizes both civic equality and a good constitutional structure, including in the realm of political economy); Joseph Fishkin & William E. Forbath, The Anti-Oligarchy Constitution, 94 B.U. L. Rev. 669, 687–96 (2014) ("Extreme concentrations of economic and political power undermine equal citizenship and equal opportunity. In this way, oligarchy is incompatible with, and a threat to, the American constitutional scheme."); Ganesh Sitaraman, Economic Structure and Constitutional Structure: An Intellectual History, 94 Tex. L. Rev. 1301, 1319–27 (2016) (arguing that the Founders believed that "relative economic equality was necessary for republican government"). By this standard, the United States failed in important ways to be a democratic republic rather than a *Herrenvolk* republic before the Voting Rights Act of 1965, and its democratic status is thrown into doubt today by racial inequality in wealth, education, and criminal justice; by mass incarceration, especially when accompanied by disenfranchisement; and by the presence of a large population of unauthorized migrants who live under the laws of the United States but play hardly any part in their production or authorization. See Office for Civil Rights, U.S. Dep't of Educ., 2013–2014 Civil Rights Data Collection: A First Look 3–8 (2016), https://www2.ed.gov/about/

requires for its legitimacy the consent of living generations, not simply the inheritance of past political acts. Any government that prevents the current political community from renewing or revising its own basic commitments usurps popular sovereignty.[82]

Constitutional interpretation can play only a relatively modest part in any program to achieve these conditions, and this goes a fortiori for the interpretation of any one part of the Constitution, such as the First Amendment.[83] That being said, the First Amendment has come to be closely connected with the structure of political contests, and there are significant stakes in its interpretation. At present, First Amendment doctrine presents a substantial barrier to popular sovereignty–renewing measures. An alternative approach should lead First Amendment jurisprudence to permit, even facilitate, the renewal of popular sovereignty, partly by linking the desiderata of democratic will formation to an account of the political economy of capitalist democracy that is both more realistic about market ordering and more committed to the prerogatives of a democratic polity.

3. *Necessary Redistribution.* — Democracy requires the deliberate and ongoing adjustment of economic power—distributional judgment.[84] The posture of distribution-blind neutrality that the Court has adopted in the First Amendment cases discussed here implicitly approves ways of contesting democratic will formation that tend to undercut democracy by

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offices/list/ocr/docs/2013-14-first-look.pdf [https://perma.cc/TP8P-ETAR] (identifying racial inequalities in U.S. public education in contexts such as school discipline, access to high-level math and science courses, and chronic absenteeism); Jenny Gathright, Forget Wealth and Neighborhood. The Racial Income Gap Persists, Nat'l Pub. Radio: Code Switch (Mar. 19, 2018), https://www.npr.org/sections/codeswitch/2018/03/19/594993620/forget-wealth-and-neighborhood-the-racial-income-gap-persists (on file with the *Columbia Law Review*) ("[I]n 99 percent of neighborhoods in the United States, black boys earn less in adulthood than white boys who come from similar socioeconomic backgrounds[,] . . . undermin[ing] the widely-held belief that class, not race, is the most fundamental predictor of economic outcomes for children in the U.S."); Leah Sakala, Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity, Prison Policy Initiative (May 28, 2014), https://www.prisonpolicy.org/reports/rates.html [https://perma.cc/6L9Q-ZT27] ("Nationally, according to the U.S. Census, Blacks are incarcerated five times more than Whites are, and Hispanics are nearly twice as likely to be incarcerated as Whites[.]").

82. See Grewal & Purdy, Original Theory, supra note 48, at 681–91 (outlining the origins and logic of this principle).

83. Cf. Leslie Kendrick, Another First Amendment, 118 Colum. L. Rev. 2095, 2112 (2018) ("The goal of seeking a more egalitarian First Amendment is, first and foremost, to achieve a more egalitarian society. I doubt whether this tail can wag that dog.").

84. See, e.g., John Rawls, A Theory of Justice 97 (1971) ("[A]s far as possible the basic structure [of society] should be appraised from the position of equal citizenship."); id. at 277–80 (noting the need for ongoing redistribution to maintain "the fair value of the equal liberties," that is, to make formal liberty a meaningful basis for a more robust equality among citizens); Michael Walzer, Spheres of Justice 291–303 (1983) ("At a certain point in the development of an enterprise, then, it must pass out of entrepreneurial control; it must be organized or reorganized in some political way, according to the prevailing (democratic) conception of how power ought to be distributed.").

systemically amplifying the influence of the wealthy and super wealthy and (as discussed in the next Part) weakening workers' and others' capacity to organize themselves for collective action.[85]

An egalitarian First Amendment jurisprudence would be marked by a willingness to accept certain risks on behalf of democratic self-rule. Part of the reason a democratic polity rules itself is so that it can address constitutional questions in an ongoing fashion: how its self-rule shall happen, what forms of economic power shall register in political life, and what some of the terms of cooperation shall be among social members.[86] A polity can decide, for instance, to favor time-intensive and face-to-face activity over costly and heavily mediated forms of argument. In fact, that is just the sort of decision democratic republics should be able to make over their own future practices.

Lawmaking inevitably and appropriately structures the political process to build up the constituencies and institutions that will channel energy and mobilization into future will formation. Democratic institutions iteratively reproduce and revise themselves.[87] If they are judicially impeded from revisiting the terms of self-rule, then other forces will establish those terms through drift, the accretion of economic power, and the strategic self-organizing of advantaged industries and classes.[88] The configuration of economic power in relation to political power does not stand still over time, and *someone* (really, many persons and institutions) will give it a shape. If a political community cannot do this work, the work will still happen by other means and on other terms. An egalitarian First Amendment need not empower judicial prescription of basic distributional questions, but it requires judicial recognition of the democratic prerogative to answer those questions.

4. *Process and Substance: Democracy and Social Democracy.* — Constitutional jurisprudence is connected with the substance of the economic order that it authorizes. New Deal jurisprudence authorized a regime of partial corporatism, extensive unionization, social provision through an interweaving of state and private (often employer-based) obligations, and economic planning.[89] It was not only a jurisprudence about the scope

85. See infra notes 98–107 and accompanying text.

86. See supra note 45 and accompanying text.

87. See Seyla Benhabib, Democratic Iterations: The Local, the National, and the Global, *in* Another Cosmopolitanism 41, 41–44 (Robert Post ed., 2006) (illustrating how "democratic iterations" mediate the will formation of democratic majorities). These institutions need not be representative or permanent, like legislatures, but may also include such institutional majoritarian practices as elections and constitutional referenda.

88. See supra notes 58–64 and accompanying text.

89. See William E. Forbath, The New Deal Constitution in Exile, 51 Duke L.J. 165, 166 (2001) ("The constitutional vision New Dealers championed . . . held that all Americans had rights to decent work and livelihoods, social provision, and a measure of economic democracy, including rights on the part of wage-earning Americans to organize and bargain collectively with employers."). See generally Gérard Duménil & Dominique Lévy, The Crisis of Neoliberalism 281–93 (2011) (describing the main tenets of the New Deal as

and forms of self-rule in an industrial economy, as official functionalist narrations tended to have it.[90] It was also a jurisprudence of permission for (a modest and flawed) social democracy.[91] Conversely, as sketched earlier, the current jurisprudence of distributional neutrality shares its origins with discourses, polemics, and programs that were aimed at blocking and rolling back the statist egalitarianism of the New Deal and the Great Society, which its critics recast as a form of corrupting interest-group entrenchment.[92]

There are many reasons for a polity to deploy markets as its basic economic mode, from efficiency to personal autonomy.[93] But it is quite another thing for the same polity to constrain itself constitutionally to give the resulting economic arrangements a major role in its future political will formation.[94] When market ordering is constitutionalized in this fashion, it tends to move from being part of a menu of governing strategies that a political community might adopt and pursue to being itself a key determinant of which options even appear on the menu, let alone get chosen.[95] Constitutionally forbidding ongoing engagement with the structure of economic and political power takes away much of democracy's reason for being.

The stakes of self-rule for citizens (and noncitizen social members) in capitalist democracy include taming or eliminating arbitrary and overweening exercises and concentrations of power and building up the conditions of dignified, unfrightened existence and activity in a community of relative equals. At any time, these goals take specific institutional forms—unions, election laws, universal health care, the creation of public

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the federal regulation of labor relations, the implementation of large public-works programs, and the protection of workers' rights to unionize and collectively bargain).

90. See, e.g., Wickard v. Filburn, 317 U.S. 111, 127–29 (1942) (finding that the Commerce Clause authorized regulation of wheat production on the basis of its aggregate effect on interstate commerce).

91. See Forbath, supra note 89, at 166. I do not mean to deny either the many flaws of what we call "the New Deal" or its complexity and variety. See, e.g., Ira Katznelson, Fear Itself: The New Deal and the Origins of Our Time 156–94 (2013) (outlining how the reach and radicalism of New Deal reforms were limited by compromises with Jim Crow segregation).

92. See supra section I.B.

93. See, e.g., Milton Friedman, Capitalism and Freedom 8 (2d ed. 1982) ("Economic arrangements play a dual role in the promotion of a free society. On the one hand, freedom in economic arrangements is itself a component of freedom broadly understood . . . . In the second place, economic freedom is also an indispensable means toward the achievement of political freedom."); id. at 167 ("[T]he essential function of payment in accordance with product in a market society is to enable resources to be allocated efficiently without compulsion . . . .").

94. For a summary of the ways in which these values may interact in various market arrangements, see Jedediah Purdy, The Meaning of Property 123–27 (2010) (drawing on and applying Professor Amartya Sen's account of the kinds of values that markets may serve).

95. See supra notes 58–64 and accompanying text.

utilities, guarantees against harassment and exploitation—and constitutional adjudication turns, accordingly, to whether such measures are required, favored, permitted, or forbidden. Today the issue seems to many of us to be a choice between oligarchy and a democratic-republican renewal.[96] To rework the link between economic and political concentrations of power, that renewal may have to move from the market-inflected state skepticism of the 1970s and 1980s to a posture that understands the mutual constituting of political and economic citizenship in terms that are more social democratic and more committed to the organized power of working people and mobilized citizens in contradistinction to wealth and capital than any that has counted for much in recent decades. We should consider what it might be like, not just to grit our teeth and acknowledge this conclusion as a lesson foisted on jurisprudence by recent political science and macroeconomics, but to embrace it as part of the horizon of a possible better world.

This Part has framed First Amendment jurisprudence within the context of capitalist democracy, arguing for the necessity of the redistributive policy that *Buckley* anathematized and for a conception of neutrality that aims explicitly at maintaining a certain relation between economic and political ordering, rather than allowing one to emerge by default. The full implications of this view, of course, are beyond the scope of a single Essay. The next Part offers one application: a diagnosis of the Court's recent treatment of public-sector union fees as a threat to free expression and an alternative view that understands such fees as essential parts of building the class power that is necessary in a capitalist democracy if it is to remain democratic. It shows, moreover, that this idea is not alien to American jurisprudence. Indeed, Justice Frankfurter believed something along these lines.[97]

III. UNION FEES AND THE SHAPE OF ECONOMIC POWER: FURTHER DEFINING THE ALTERNATIVES

In June 2018, the Court ruled in *Janus v. AFSCME* that the First Amendment forbids public-sector unions from charging nonmember public employees in their bargaining units "agency fees" for employment-related services and advocacy.[98] The Court framed the issue as one of individual liberty from state compulsion. Justice Alito invoked Justice Jackson's great phrase, "[N]o official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or

96. See, e.g., Fishkin & Forbath, supra note 81, at 670–73 (positing democratic political economy as a counterweight and alternative to oligarchy); Sitaraman, supra note 81, at 1304 (same).

97. See infra notes 116–120 and accompanying text.

98. See Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2459–60 (2018).

force citizens to confess by word or act their faith therein."[99] Justice Alito warned, "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning."[100]

As in the political-spending cases discussed in Part I, the Court invoked the dangers of entrenchment and self-dealing, noting that the case arose from a political context in which Illinois had nearly $160 billion in unfunded pension and retiree healthcare liabilities and sought in bargaining to drive down employee costs.[101] The defendant union instead "advocated wage and tax increases, cutting spending 'to Wall Street financial institutions,'" and other left-of-center measures.[102] Justice Alito's opinion presented these events as evidence that "[w]hat unions have to say . . . in the context of collective bargaining is of great public importance" and amounts to political speech that agency fees subsidize.[103] It further noted that collective bargaining can involve "controversial subjects such as climate change, the Confederacy, [and] sexual orientation and gender identity."[104] Justice Alito's questioning in oral argument signaled alignment with the Hayek–Friedman–Powell line of concern about the proliferation of redistributionist policies that might stem from the entrenchment of political influence. He worried aloud that an empowered public-sector union might "push a city to the brink and perhaps over the brink into bankruptcy."[105]

Oral argument also indicated that at least one of the Justices who joined Justice Alito's opinion understood the agency-fee requirement in *Janus* as a violation of the anti-redistribution principle of *Buckley*. Justice Kennedy pushed the union's lawyer toward the concession that the fee amounted to an impermissible redistribution of political speech and thus posed a danger of entrenchment. Justice Kennedy pressed AFSCME's lawyers to acknowledge that, "if you do not prevail in this case, the unions will have less political influence."[106] When David Frederick conceded the point, Justice Kennedy replied, "Isn't that the end of this case?"[107] That is to say, if the requirement to pay agency fees shapes the political playing field by directing resources to union advocacy, it must violate the First Amendment.

Janus, then, has the same logic as the political-spending cases. At its core is the plaintiff who wishes to determine how his money is disbursed

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99. Id. at 2463 (emphasis omitted) (internal quotation marks omitted) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

100. Id.

101. See id. at 2474–75 (recounting the budget problems in Illinois).

102. Id. at 2475 (quoting Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 33 Pub. Emp. Rep. for Ill. ¶ 67 (Ill. Labor Relations Bd. 2016), 2016 WL 7645201).

103. Id.

104. Id. at 2476 (footnotes omitted).

105. Transcript of Oral Argument at 63, *Janus*, 138 S. Ct. 2448 (No. 16-1466), 2018 WL 1383160.

106. Id. at 54.

107. Id.

and who connects his money with constitutionally protected speech by showing its relevance to political debate. The individual-rights core of the opinion is buttressed by the structural worry that the challenged regime distributes the power of political influence in a way that entrenches certain established interests, here public-sector unions. The worry about distribution and entrenchment of political influence is linked, in turn, with a specific political outcome that is to be avoided: an empowered set of public employees with an agenda of egalitarian redistribution. Public-sector unions are cast here in the same role as the self-entrenching officials and bureaucrats who figured as the bête noire of the *Buckley*-era turn to an anti-redistributionist First Amendment doctrine.

A. *The Court's View of Workers' Interests, and an Alternative*

The assumption that the associational interest to be protected in unions' membership and political activity is a negative and individual one—an opt-out[108]—excludes a different way of understanding the relationship of organized labor to democratic will formation. The interest in refusing unwanted associations is a privacy interest, one that has great power in many legal domains, from the common law guarantee against physical invasion to the personal rights of substantive due process.[109] But is the institutional structure of bargaining power and political advocacy that connects large employers with large bodies of workers best understood as a domain of private and voluntary relations, or as a domain of shared arrangements in which participation is in some important respects ineluctable once one is in the workplace? If the economy is a concert of individuals, orchestrated by personal choice, then privacy rights are consonant with it.[110] But on a different view, class structure is part of this economy. Who occupies what role is, of course, decided by the interplay of personal choice and social structure.[111] But that there will be employers and employees, investors, and day laborers, is—for now—fate.[112]

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108. See *Janus*, 138 S. Ct. at 2463 ("The right to eschew association for expressive purposes is likewise protected.").

109. Cf. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277–78 (1990) (describing the common law protection against unwanted contact as a basis for a right to refuse unwanted medical care and locating that same right in the privacy interest protected by the Fourteenth Amendment).

110. See, e.g., Obergefell v. Hodges, 135 S. Ct. 2584, 2593, 2598–99 (2015) (holding that the right to marry whom you choose is an essential element of the constitutional privacy interest in self-definition and self-expression); Lawrence v. Texas, 539 U.S. 558, 562, 567 (2003) (holding that the same constitutional privacy interests protect the free choice of sexual partners).

111. See generally Anthony Giddens, The Constitution of Society: Outline of the Theory of Structuration 1–40 (1984) (outlining a social theory attentive to both structure and the ways these structures are continually recreated by agents).

112. See, e.g., G.A. Cohen, The Structure of Proletarian Unfreedom, 12 Phil. & Pub. Aff. 3, 11–12 (1983) (arguing that individual mobility does not alter the "collective unfreedom"

It is because of shared fate that processes of collective will formation become essential. To begin with an analogy to the workplace, politics is not an optional undertaking. It is a response to the fact that for certain purposes people are trapped together—in shared economic regimes, shared regimes of legitimate violence[113]—and there must be some process for determining the rules of those regimes. Democracy is, of course, optional, at both the individual and the systemic levels. But its efforts at collective will formation are an alternative not to the absence of politics but to a different political dispensation. The right way to see unions, on this view, is as akin to political subcommunities. A vote on unionization is more like a constitutional referendum than it is like the election of representatives, and once a union exists it is a forum of collective will formation within its workplace, appropriately binding on all who are, so to speak, within that jurisdiction.[114] Organized labor presents a political-economic counterweight to wealth, an essential institution of rough civic equality.[115] Absent clear suppression of a core interest in political speech, the First Amendment should not be interpreted as protecting personal rights that undercut this democratic institution.

B. *Two Ways of Seeing the Inseparability of Politics and Economics*

It is ironic that toward the end of his career in 1961, Justice Frankfurter took the same conceptual view of union activity that Justice Alito does today—that it is impossible to separate bread-and-butter economic representation from political advocacy—while drawing the opposite conclusion from that insight. For Alito, the inseparability of union representation from political advocacy means that even mandatory funding of representation is problematic under the First Amendment, because there is no getting politics out of it.[116] Frankfurter's course of reasoning was the opposite. While Alito proceeds nominally from a conception of what is political speech (and so the concern of the First Amendment) and finds that it sweeps in all union advocacy, Frankfurter

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of class society, which guarantees that a substantial share of people will always occupy a subordinate class position).

113. See, e.g., Jonah Birch, Ending Their Wars, Jacobin (May 28, 2018), https://www.jacobinmag.com/2018/05/war-socialists-debs-vietnam-internationalism [https://perma.cc/Z3M8-D35F] ("In the organization of state violence on an unprecedented scale, we see capitalism's tendency to subordinate human need to the logic of profit and power.").

114. See Gabriel Winant, Where Did It All Go Wrong?, Nation (Feb. 7, 2018), https://www.thenation.com/article/organized-labors-lost-generations [https://perma.cc/WTW2-JCNF] (giving this characterization of union elections).

115. See, e.g., James Feigenbaum et al., Opinion, Right-to-Work Laws Have Devastated Unions—and Democrats, N.Y. Times (Mar. 8, 2018), https://www.nytimes.com/2018/03/08/opinion/conor-lamb-unions-pennsylvania.html (on file with the *Columbia Law Review*) (summarizing research showing a sharp drop in electoral support for Democrats where state laws weaken the labor movement).

116. See Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2480–81 (2018).

proceeded from the assumption that unions played a legitimate and important role in American self-rule and reasoned that the activity in which they have historically engaged should enjoy a presumption of constitutionality.[117] For Frankfurter, casting constitutional doubt on the standard legislative mechanisms for funding union advocacy "would be completely to ignore the long history of union conduct and its pervasive acceptance in our political life."[118] Frankfurter took for granted the fundamentally collective character of unions, with its consequence that they cannot do their work if they are unable to generate mandatory forms of collective action. He analogized the speech situation of the union dues payer to that of the federal taxpayer and offered as a premise that a union could not be said to violate its members' speech interests when it called a strike.[119] What, after all, would a union be if it were not a locus of collective action? It would be like a state that could not make law.[120]

Frankfurter's view serves as a coda to this discussion, and also a bridge to an alternative, democratic political economy in First Amendment doctrine. In this view, a democratic polity has an interest in structuring economic power and its translation into political power in ways that counteract the structural advantages of wealth and coordination that otherwise strengthen owners and employers. Institutions that balance the power of wealth by enabling working people to combine for effective advocacy—in collective bargaining and in the broader contests of politics—should be assumed to be compatible with First Amendment interests unless there is a very strong showing to the contrary. But such a showing must not rest on findings that a union imposes unity on the voices of its members, once the union has been authorized to represent them, nor on the worry that unions might make distributional demands on the state. That would be condemning them for doing their job in the constitutional order.

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117. See Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 812–13 (1961) (Frankfurter, J., dissenting) (describing historically the accepted role of unions in pursuing workplace goals through political activity).

118. Id. at 812.

119. See id. at 806, 810.

120. Here and in this Essay's framing, there is a certain elision of the distinction between public-sector and private-sector unions, although that distinction is essential to the technical premise of *Janus*. My reasons are that (1) from the standpoint I am advocating, the two domains have essential commonalities because both are areas of workers' collective power, and the rationale that Justice Frankfurter applied to private-sector unions also applies to public-sector ones; and (2) in the *Janus* oral argument, Justices Ginsburg and Breyer both speculated that a ruling against the union might also tend to undermine private-sector unions, with Justice Ginsburg even suggesting that Shelley v. Kraemer, 334 U.S. 1 (1948), might prohibit judicial enforcement of union agreements. See Transcript of Oral Argument, supra note 105, at 28–29.

CONCLUSION

Progressive engagement with First Amendment doctrine should start by recognizing that any plausible version of civic equality and self-rule requires political engagement with the terms of self-rule. If appropriately constituted majorities cannot decide how majorities shall rule, then other forces will. This point has particular bite in a regime of capitalist democracy, in which historical and contemporary empirics strongly suggest that unequal economic power tends to grow over time and to embed itself in political power. Some legally ordered relationship between political power and economic power is not just inevitable; its substance is of the first importance, because only it can sustain countervailing principles of equal citizenship, common good, and self-rule. In the face of a candidly neoliberal jurisprudence that advances the political domination of the wealthy, it is all the more important to recover and develop a constitutionalism of social democracy.

PARTISAN GERRYMANDERING, THE FIRST AMENDMENT, AND THE POLITICAL OUTSIDER

*Bertrall Ross**

The most recent call for judicial intervention into state partisan gerrymandering practices ran aground on the shoals of standing doctrine in Gill v. Whitford. *The First Amendment stood at the center of this latest gerrymandering challenge. Democratic voters claimed that the legislative districting scheme infringed on their associational rights by denying their party an opportunity for fair representation in the state legislature. For the* Gill *majority, the voters' alleged representational harm was the sort of generalized grievance that failed to satisfy standing's particularized injury requirement.*

Gill *was the latest in a series of First Amendment freedom of association fights between partisan insiders—members or supporters of one of the two major political parties—that dates back to the 1970s. In these fights, the interests and needs of political outsiders—both nonvoters and those unaffiliated with the major political parties—have gone unheard and unaddressed. Political outsiders were not always marginalized in legal controversies involving the freedom of association. In fact, the Supreme Court originally constructed its First Amendment freedom of association doctrine in the 1950s to protect the political activity of dissident minority groups excluded from democratic politics.*

In this Essay, I argue that advocates should return to the Court's initial freedom of association concern with ensuring the inclusion of political outsiders' voices in the democratic space. Gerrymandering can inflict multiple harms, on both insiders and outsiders. While partisan gerrymandering may deprive one political party of holding power in a way that corresponds to its electoral support in the jurisdiction (a "representational harm"), it can also prevent individuals who do not belong to the majority party in the gerrymandered districts from being able to effectively participate in elections (a "participatory harm"). Both political outsiders and members of the minority party experience this latter harm. I argue that the participatory harm should drive future

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gerrymandering challenges. Such claims could empower political outsiders, advance minority parties' interest in fair representation, and overcome the standing obstacles laid out by the Court in Gill.

INTRODUCTION

The Supreme Court's decision in *Gill v. Whitford* dealt partisan gerrymandering opponents a significant setback. In an opinion written by Chief Justice Roberts, the majority found that the plaintiffs failed to show they had standing to challenge the Wisconsin legislature's districting for state legislative elections.[1] The problem for the Court was the statewide nature of the injury claimed by the plaintiffs.[2] For the Democratic plaintiffs in *Gill*, the constitutional harm arose from the Republican legislature's decision to draw a statewide map that deliberately diluted Democratic voters' electoral influence statewide.[3] The Republican legislature pulled this trick off in the same way that political parties have since the beginning of the Republic.[4] It did so by "packing" Democrats in cities into as few districts as possible and spreading other Democrats in the state into the remaining districts through a process called "cracking."[5] This cracking and packing of Democratic voters virtually eliminated the opportunity

1. Gill v. Whitford, 138 S. Ct. 1916, 1932 (2018) (finding that "the plaintiffs failed to meaningfully pursue their allegations of individual harm" at trial).

2. Id. at 1931.

3. See Brief for Appellees at 34, *Gill*, 138 S. Ct. 1916 (No. 16-1161), 2017 WL 3726003. The Court described the plaintiffs' assertion of a statewide harm from partisan gerrymandering as a "harm to their interest 'in their collective representation in the legislature,' and in influencing the legislature's overall 'composition and policymaking.'" *Gill*, 138 S. Ct. at 1921 (quoting Brief for Appellees, supra, at 31).

4. See generally Elmer C. Griffith, The Rise and Development of the Gerrymander 23–29 (1907) (discussing the development of gerrymandering during the early 1700s).

5. See *Gill*, 138 S. Ct. at 1931–32 (describing the plaintiffs' allegation that the Wisconsin legislature packed and cracked Democratic voters).

for the Democratic party to ever win a majority of seats in the state legislature under the map.[6]

For the Court, these statewide harms amounted to a "generalized grievance" insufficient to support legal standing for the individual Democratic voters bringing constitutional claims under the First and Fourteenth Amendments.[7] Since individuals do not have a right to elect their preferred representatives in a district and no individual district alone produces unfair partisan representation, the plaintiffs failed to show that they suffered a concrete harm from the legislature's drawing of the particular district in which they lived.[8] Unable to surmount this standing requirement, the plaintiffs' primary claim against partisan gerrymanders—that they distort partisan representation in the state legislature[9]—went unaddressed.

While the *Gill* majority appeared to leave a remnant of hope for partisan gerrymandering opponents through its decision to remand the case to the lower courts to assess whether any of the plaintiffs have standing, the leading theory of the partisan gerrymandering harm appears to be dead in the Supreme Court.[10] A new theory of the constitutional harm is therefore needed if gerrymandering challenges are ever to prevail.

In a concurring opinion joined by three other Justices, Justice Kagan offered an alternative theory of the constitutional harm. Rather than view the harm through the lens of the Fourteenth Amendment and its emphasis on asymmetry in representation produced by the dilution of the vote, Justice Kagan suggested that lower courts focus their attention on the First Amendment associational harms from partisan gerrymandering.[11] This theory of the harm was not new. Justice Kennedy referred to the freedom of association as a potential constitutional basis for adjudicating partisan gerrymandering claims fifteen years ago in *Vieth v. Jubelirer*, one of the last major gerrymandering cases to reach the Court.[12]

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6. Whitford v. Gill, 218 F. Supp. 3d 837, 898 (W.D. Wis. 2016) (describing the Wisconsin legislature's gerrymander as having "achieved the intended effect . . . by allocating votes among the newly created districts in such a way that, in any likely electoral scenario, the number of Republican seats would not drop below 50%"), vacated, 138 S. Ct. 1916 (2018).

7. *Gill*, 138 S. Ct. at 1931.

8. Id. at 1930. In a case rejecting a challenge to multimember districts in the early 1970s, the Court famously announced that it is not a denial of equal protection "to deny legislative seats to losing candidates [and their supporters]." Whitcomb v. Chavis, 403 U.S. 124, 153 (1971).

9. See Brief for Appellees, supra note 3, at 35 (arguing that "vote dilution is so invidious" because it "results in representation that is not responsive to voters' needs and interests").

10. See *Gill*, 138 S. Ct. at 1934.

11. Id. at 1938 (Kagan, J., concurring).

12. See 541 U.S. 267, 314 (2004) (Kennedy, J., concurring) (suggesting that "[t]he First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering").

Justice Kagan, citing Justice Kennedy's reasoning in *Vieth*, tried to revive this theory as a basis for adjudicating partisan gerrymandering claims in the future.[13]

However, Justice Kagan construed the associational harm in statewide terms. According to Justice Kagan, "the associational injury flowing from a statewide partisan gerrymander . . . has nothing to do with the packing or cracking of any single district's lines."[14] Instead, a gerrymander "burden[s] the ability of like-minded people across the State to affiliate in a political party and carry out the organization's activities and objects."[15] Since "the valued association and the injury to it are statewide, so too is the relevant standing requirement."[16] In the case of Wisconsin, the disfavored Democratic Party and its members suffered an associational harm from being deprived of their "natural political strength by a partisan gerrymander."[17] This "natural strength" referred to the number of seats the Democratic Party would be expected to win statewide in the absence of the gerrymander.[18] To remedy this deprivation, the state would presumably need to redraw the statewide map to secure fairer representation for the Democratic Party in the state legislature.

In providing a constitutional roadmap for future challengers of partisan gerrymandering, Justice Kagan appeared to miss the central element in the majority's standing ruling: that they disapproved of statewide harm as a basis for litigants' standing. A theory of the First Amendment harm from partisan gerrymandering that is specifically applicable to individual districts must be developed, or such claims apparently will not overcome the standing obstacle.

In this Essay, I argue for a particular way of conceptualizing the First Amendment harm from gerrymandering that arises in individual districts. This conceptualization requires gerrymandering opponents to abandon their nearly exclusive focus on the constitutional rights of political insiders—those who are affiliated with or otherwise consistently vote for candidates of one of the two major parties. Instead, they would need to shift their attention to political outsiders—nonvoters or those who generally do not affiliate with or vote for candidates of either of the two parties. Doing so reveals how gerrymandering infringes upon *individuals'* associational freedoms by inflicting cognizable harms at the district level.

To date, a consistent thread across partisan gerrymandering suits is the political-insider status of the litigants. One set of political insiders,

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13. See *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring).

14. Id. at 1939.

15. Id.

16. Id.

17. Id. at 1938.

18. See id. (explaining that a party deprived of its "natural political strength . . . may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office").

members of the political party out of power, is seeking constitutional protection against another set of political insiders, members of the political party that controls the state political institutions responsible for drawing district lines. This context of First Amendment contestation stands in marked contrast to the original controversies raising freedom of association claims before the Supreme Court in the 1950s and 1960s. In these early cases, members of the Communist Party and the National Association for the Advancement of Colored People (NAACP) sought judicial protection against state actions designed to disrupt the associations' political activities and ultimately dismantle the associations.[19] The Supreme Court initially proved reluctant to provide constitutional protection to Communist Party members subject to legal and political persecution during the Second Red Scare of the McCarthy era.[20] But the Court did eventually rely on the First Amendment's freedom of association to protect NAACP members against Southern state efforts to expose Association members to intimidation and disturb the Association's expressive activities targeting Jim Crow segregation.[21] In justifying its protection of freedom of association and associational expression, the Court explained that "[o]ur form of government is built on the premise that every citizen shall have the right to engage in political expression and association."[22]

In these early cases, the Court connected the freedom of association to the expressive needs of political outsiders in the two-party political space: "All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups . . . ."[23]

Yet in recent decades, advocates and courts have neglected the First Amendment freedom of association's origin as a tool for protecting political outsiders.[24] Litigants challenging partisan gerrymandering focus exclusively on the rights of political insiders. Those who support gerrymandering claims generally argue that the states are discriminating against the viewpoint of members of the party out of power through the partisan gerrymandering of districts.[25] The primary target of this claim

19. See infra text accompanying notes 34–56.

20. See infra notes 42–43 and accompanying text.

21. See infra note 44 and accompanying text.

22. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

23. Id. at 250–51. While the Court in *Sweezy* was not particularly assertive in protecting the associational activities of Communist Party members, it would rely on this description of the First Amendment freedom to more assertively protect the associational rights of NAACP members. See NAACP v. Button, 371 U.S. 415, 431 (1963).

24. See infra Part II.

25. Several briefs in the recent partisan gerrymandering cases advance this viewpoint discrimination claim. See, e.g., Brief of Appellants at 30, Benisek v. Lamone, 138 S. Ct. 1942 (2018) (No. 17-333), 2018 WL 557076; Brief for Appellees, supra note 3, at 36; Brief of Amici Curiae Election Law and Constitutional Law Scholars in Support of Appellees at 12–13, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161), 2017 WL 3948425.

that I label the fair representation claim of associational freedom is the legislature's use of districting to maximize partisan advantage in legislative seats held, which is said to deprive members of the party out of power of their representational rights in state legislatures and congressional delegations.[26] The goal is thus to protect the representational rights of political insiders by targeting a statewide harm from partisan gerrymandering.

In addition to the fact that a majority of the Court appeared to close off such claims in *Gill*, even the plaintiffs' success would have done little to promote the democratic inclusion of political outsiders. Rational choice theory, which is broadly accepted among political scientists, suggests that representatives are primarily motivated by the desire to be reelected.[27] If the Court had struck down the Wisconsin statewide map on the basis of a fair representation claim, representatives' desire to be reelected would likely have led the party in power to continue to draw as many safe districts as feasible within the constitutional limitation of giving the party out of power something close to a fair opportunity to elect a majority of representatives.

In this alternative universe in which such partisan gerrymandering claims succeed, incumbents would rarely have to compete with other viable candidates in elections and would not need to engage in the resource-expenditure and mobilization efforts required to attract new or unaffiliated voters to win elections.[28] Political outsiders, the original focal point for protection under the First Amendment freedom of association, would therefore be equally or increasingly marginalized from the political process.

Partisan gerrymandering opponents have overlooked an alternative First Amendment freedom of association claim centering on individuals' inability to participate effectively in gerrymandered districts. Unlike current challenges to gerrymandering, the theory I propose emphasizes the harm from states' packing and cracking of opposing party members in individual districts and provides constitutional redress for political outsiders as well as political insiders.

In the first case to reach the Supreme Court challenging a districting practice for the partisan advantage it produced, the American Civil Liberties Union (ACLU) and the Indiana Civil Liberties Union (ICLU) advanced a variant of this associational-freedom claim, which I label the

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26. See Shapiro v. McManus, 203 F. Supp. 3d 579, 595 (D. Md. 2016) (finding that gerrymandering for partisan advantage infringes on certain citizens' representational rights).

27. See infra note 116.

28. See, e.g., Benjamin Plener Cover, Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal, 70 Stan. L. Rev. 1131, 1197 (2018) ("The proliferation of safe districts may . . . discourage high-quality challengers, reduce party mobilization, and depress voter participation . . . ." (footnote omitted)).

electoral competition claim.[29] In their amicus brief to the court in *Davis v. Bandemer*, the ACLU and ICLU targeted partisan districting as a device that reduced competitiveness between parties in the electoral marketplace of ideas.[30] Safe districts produced through packing and cracking opposing party members, the brief explained, entrenched representatives in power and undercut the competitiveness necessary for opposing party members to express themselves through an effective ballot—that is, one providing them with a realistic opportunity to elect their preferred candidate.[31]

The ACLU and ICLU's proposed freedom of association claim—and the one I elaborate on here—targets the legislature's intentional drawing of individual noncompetitive districts. The state's construction of safe districts imposes a constitutional injury to both party insiders from the opposing party and party outsiders by rendering ineffective any political-associational activity that they might engage in within the individual district. A judicial embrace of this alternative electoral competition model of associational freedom would likely force states to respond in a way that promotes political insiders' and outsiders' opportunity for association within districts and their broader inclusion in the political process.[32] The party in power would likely continue to seek to maximize partisan advantage in statewide maps but would be able to do so only by

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29. See Brief of the American Civil Liberties Union & the Indiana Civil Liberties Union as Amici Curiae at *8–10, Davis v. Bandemer, 478 U.S. 109 (1986) (No. 84-1244), 1985 WL 670036 [hereinafter Brief of the Civil Liberties Unions]. The American Civil Liberties Union and others continued to advance this associational-rights claim over thirty years later in the constitutional challenge to the Wisconsin statewide map. See Brief of the American Civil Liberties Union et al. as Amici Curiae, in Support of Appellees at 2, *Gill*, 138 S. Ct. 1916 (No. 16-1161), 2017 WL 3948434 ("When a redistricting plan intentionally and effectively entrenches the state's preferred party in office against voters' choices, the associational aspect of the right to vote is substantially burdened.").

30. See Brief of the Civil Liberties Unions, supra note 29, at *16–17 (describing the electoral system as a "more formalized and structured marketplace of expression" that involves "an organized competition of ideas presented by opposing candidates and political parties").

31. Id. at *21 (citing to the Court's vote-dilution jurisprudence and arguing that partisan gerrymandering runs afoul of the Constitution when it "minimize[s] or cancel[s] out the voting strength of racial or political elements of the voting population" (internal quotation marks omitted) (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965))).

32. Other scholars have also identified competitiveness harms from partisan gerrymandering. But they have thus far failed to identify a clear and justiciable constitutional basis for courts to strike down noncompetitive districts. See, e.g., Richard Briffault, Defining the Constitutional Question in Partisan Gerrymandering, 14 Cornell J.L. & Pub. Pol'y 397, 401–02 (2005) (describing the competitiveness harm from partisan gerrymandering as a structural harm that "suffers from the lack of a clear constitutional basis"); Samuel Issacharoff, Gerrymandering and Political Cartels, 116 Harv. L. Rev. 593, 600, 614–15 (2002) (identifying the harm from gerrymandering as being "the insult to the competitiveness of the process resulting from the ability of insiders to lessen competitive pressures" and then describing as a constitutional source of the harm a "richer concept of republicanism" that the Court has never recognized or enforced).

drawing districts that meet whatever competitiveness constraint the Court constructs. This greater district competitiveness would not only enhance the opportunity for political insiders of the opposing party to cast an effective ballot in electoral contests with two viable candidates. It would also increase the likelihood that candidates would devote resources to mobilizing and associating with unaffiliated and nonvoters whose support is more likely to prove pivotal to winning elections.[33]

A viable path forward for partisan gerrymandering opponents after *Gill* should therefore focus on returning to the roots of First Amendment associational freedom as a tool for protecting political outsiders. Challenging the harms that result from noncompetitive districts offers the potential to do so.

The rest of this Essay proceeds as follows. In the first Part, I describe the origins and evolution of the First Amendment freedom of association claim. In the second Part, I disaggregate two associational-freedom claims for challenging partisan gerrymanders. In the third Part, I employ theory and empirical evidence to demonstrate the likely effects of the two associational-freedom claims on political outsiders in partisan gerrymandering controversies. On the basis of these differing effects, I argue that courts should embrace the electoral competition associational-freedom claim as the constitutional path forward after *Gill*. Finally, in the fourth Part, I argue that challenges to partisan gerrymandering premised on the electoral competition associational-freedom claim would not only advance political inclusion and equality. They would also overcome the standing obstacles to constitutional challenges of partisan gerrymandering that the Court constructed in *Gill*.

I. FIRST AMENDMENT ASSOCIATIONAL FREEDOM: FROM PROTECTING POLITICAL OUTSIDERS TO POLITICAL INSIDERS

The First Amendment freedom of association has undergone a striking transformation. The doctrine emerged in the 1950s McCarthy-era Communist Red Scare and African American mobilization against Jim Crow in the South. In the early cases, political outsiders' claims for First Amendment protection reached a mostly responsive Court that advanced disfavored minorities' associational rights against political insiders and the entrenched two-party system. But in recent cases, the primary First Amendment fights are between political insiders—the political outsiders that were once the beneficiaries of freedom of association protections have been ignored.

In the 1950s, both Communists and African Americans, through the NAACP, sought change outside of the ordinary political channels. For

33. Empirical evidence showing that competitive districts enhance turnout through increased campaign expenditures on mobilization efforts supports this prediction about candidate behavior. See infra notes 128–134.

Communists, the American system of capitalism needed to be abolished through the organization of workers to overthrow the bourgeois world order.[34] For the NAACP, a democratic process that excluded African Americans through a combination of voting barriers and violent intimidation necessitated a campaign for change through protest and litigation in the courts.[35] Political insiders did not stand idly by in the face of these threats to the status quo. Elected actors at the state and federal levels also mobilized and passed laws to undercut these political outsiders' activities.

To disrupt the Communist Party, the states and the federal government passed loyalty-oath requirements for labor union officers and state workers.[36] For example, the federal Labor Management Relations Act of 1947 required a labor union officer to declare that he was "not a member of the Communist Party or affiliated with such party, . . . that he [did] not believe in, and [was] not a member of or support[ed] any organization that believe[d] in or t[aught], the overthrow of the United States Government by force or by any illegal or unconstitutional methods."[37] If the labor union failed to provide the National Labor Relations Board with signed oaths of their labor union officers, the Board would not carry out investigations requested by the labor union or respond to any complaints or petitions it submitted.[38]

Governmental bodies also tried to disrupt and ultimately dismantle the Communist Party and the NAACP through forced-disclosure laws and practices. States passed laws or engaged in actions designed to force Communist-affiliated individuals and NAACP members to disclose their associational relationships and the Communist Party and the NAACP to

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34. See, e.g., Communist Party of America, Manifesto and Program, Constitution: Report to the International Communist International 1 (1919) ("The Communist Party [of America] proposes to end Capitalism and organize a workers' industrial republic.").

35. See, e.g., August Meier & John H. Bracey, Jr., The NAACP as a Reform Movement, 1909–1965: "To Reach the Conscience of America," 59 J.S. Hist. 3, 8–26 (1993) (describing the litigation and protest movement activity of the NAACP during an era of black disfranchisement).

36. See, e.g., Harold M. Hyman, To Try Men's Souls 333–37 (1959) (describing the loyalty-oath requirements adopted during the Second Red Scare of the 1940s and 1950s).

37. See Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 385–86 (1950) (quoting Labor Management Relations Act § 9, 29 U.S.C. § 159(h) (repealed 1959)).

38. Id. States also enacted loyalty-oath requirements. In *Wieman v. Updegraff*, the Court reviewed an Oklahoma loyalty-oath requirement for all state officers. 344 U.S. 183, 185–86 (1952). In *Sweezy v. New Hampshire*, the Court reviewed a New Hampshire law authorizing the attorney general to question the associational affiliations of individuals subject to investigation as potential subversives. 354 U.S. 234, 236–43 (1957). In *Shelton v. Tucker*, the Court reviewed an Alabama statute requiring "every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years." 364 U.S. 479, 480 (1960).

disclose their membership lists.[39] These disclosure demands were often made in the context of investigations into whether the organization had engaged in subversive activities. Compelled disclosure of membership lists, particularly in the case of the NAACP, would have opened the door to severe state and private intimidation of the associations' members.[40]

In addition to compelling disclosure, the state tried to disrupt the NAACP's activities through the prohibition of activities outside of the political process. For example, Southern States attempted to prohibit the NAACP from soliciting participants in litigation as a way to undercut the association's efforts to advance antidiscrimination goals in the courts.[41]

These state efforts had a dramatic chilling effect on both individuals associating with the Communist Party and the NAACP and the organizations' political activities.[42] Unable to resist the force of the state alone, these outsider political associations turned to the Constitution and the courts for protection. In the context of the Second Red Scare of the 1950s, the Court proved only weakly responsive to Communist Party members' claims that the state actions violated their First Amendment right to associate.[43] But when reviewing Southern state actions intended to disrupt and dismantle the NAACP, the Court proved much more receptive to the freedom of association claims. Over the period of a decade, the Court struck down as infringements on the freedom of association state efforts

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39. See Uphaus v. Wyman, 360 U.S. 72, 74 (1959) (describing efforts by New Hampshire to subpoena the membership list of an allegedly subversive association); *Sweezy*, 354 U.S. at 239–45 (describing efforts by the state to compel an individual to disclose his knowledge of persons involved in a Communist-affiliated organization); see also infra note 44 and accompanying text (describing state efforts to force the NAACP to disclose membership lists).

40. See Brief for Petitioner at *12–17, NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (No. 91), 1957 WL 55387 (describing the climate of intimidation in Alabama that surrounded the state's request that the NAACP disclose its membership list).

41. See Brief for Petitioner at 7–9, NAACP v. Button, 371 U.S. 415 (1963) (No. 5), 1961 WL 101714 (describing the NAACP's solicitation activities and identifying them as a tool for advancing the Association's goals of eliminating racial discrimination through litigation).

42. See, e.g., Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) (finding "evidence that fear of community hostility and economic reprisals that would follow public disclosure of the membership lists had discouraged new members from joining the organization and induced former members to withdraw"); *Patterson*, 357 U.S. at 462–63 (identifying the deterrent effect on associational activity from the state's compelled disclosure of the NAACP's membership list); *Am. Commc'ns Ass'n*, 339 U.S. at 402 (acknowledging that a statute pressuring unions to deny Communists officer roles amounted to an indirect discouragement that could "have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes").

43. See supra note 38 (identifying cases in which the Supreme Court upheld a state statute mandating disclosure of the membership list of an allegedly subversive organization and struck down state loyalty-oath requirements, but not on the grounds that they infringed on an organization's First Amendment right to associate).

at compelled disclosure in Alabama, Arkansas, and Florida that targeted NAACP members and the organization's membership list.[44]

In striking down state laws targeting the NAACP under the First Amendment freedom of association, the Court drew a connection between associational privacy and viable outsider political activities. The Court recognized that an association of political outsiders "espous[ing] dissident beliefs" could not survive without constitutional protection for its members' associational privacy.[45] The NAACP presented evidence in the compelled-disclosure cases that past exposure of its members' identities led "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[46] Such targeting of association members, as the Court later found, "had discouraged new members from joining the organizations and induced former members to withdraw."[47]

In addition to protecting the NAACP's associational privacy from compelled disclosure, the Court also granted constitutional protection for the association's activities intended to advance African American rights and interests through the courts. The combination of Southern states' poll taxes, literacy tests, and other voting barriers along with acts of private intimidation and violence directed toward African Americans who attempted to register and vote forced African Americans to pursue actions to advance their rights and interests outside of the democratic process.[48] One such action was litigation in the courts.[49] Virginia reacted to the NAACP's litigation efforts in the state with a law banning legal solicitation.[50] According to the NAACP, the state designed this law to discourage the Association's legal activities by preventing it "from underwriting the cost and providing counsel in litigation designed to test the validity of state-imposed racial discrimination."[51]

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44. See Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 557–58 (1963) (finding unconstitutional a Florida legislative committee's attempt to compel the NAACP to disclose its membership records); *Bates*, 361 U.S. at 525 (striking down a local occupational-license-tax ordinance requiring that the NAACP disclose member names); *Patterson*, 357 U.S. at 466 (striking down Alabama's attempt to compel the NAACP to disclose member names).

45. *Gibson*, 372 U.S. at 544 (internal quotation marks omitted) (quoting *Patterson*, 357 U.S. at 462).

46. *Patterson*, 357 U.S. at 462.

47. *Bates*, 361 U.S. at 524.

48. See Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 195–202 (rev. ed. 2009) (describing state voting practices that left nearly three-quarters of African Americans in the South disenfranchised in 1960).

49. See Patricia Sullivan, Lift Every Voice: The NAACP and the Making of the Civil Rights Movement 287–434 (2009) (describing the Association's litigation activities following World War II).

50. See NAACP v. Button, 371 U.S. 415, 423–26 (1963) (describing the solicitation ban as construed and applied by the Virginia Supreme Court of Appeals).

51. Brief for Petitioner at 2, 29–30, *Button*, 371 U.S. 415 (No. 5), 1961 WL 101714.

The Supreme Court struck down the law and, in the process, established constitutional protections for associational expression. The Court construed solicitation for litigation to be a form of expression protected under the First Amendment. "In the context of NAACP objectives" to end segregation and eliminate all racial barriers that deprive African Americans of their "privileges and burdens of equal citizenship rights," the Court explained, "litigation is not [merely] a technique of resolving private differences."[52] Instead, it is "a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country."[53]

The Court recognized expression through litigation as the only tool that many political outsiders like the NAACP had to advance their goals. "Groups which find themselves unable to achieve their objectives through the ballot," the Court noted, "frequently turn to the courts."[54] "And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."[55] The Court concluded by legitimizing political outsiders and their expression as worthy of broader societal attention and engagement. "The NAACP is not a conventional political party," the Court recognized, "but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, . . . makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society."[56]

The Supreme Court thus originally protected associational-freedom and associational-expressive activity as a means to protect political outsiders from state suppression. The goal of political and societal inclusiveness for associations continued to serve as a guide when the Court started to review challenges to ballot access restrictions under the First Amendment. In a series of cases beginning in the late 1960s, political outsiders to the entrenched two-party system challenged state ballot access requirements imposed on third parties and other outsider candidates.[57] For example, in Ohio, a new party had "to obtain petitions signed by qualified electors totaling 15% of the number of ballots cast in the last preceding gubernatorial election."[58] The ballot access law combined with other Ohio election laws "ma[d]e it virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties."[59]

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52. *Button*, 371 U.S. at 419, 429.

53. Id. at 429.

54. Id.

55. Id. at 430.

56. Id. at 431.

57. See James S. Jardine, Ballot Access Rights: The Constitutional Status of the Right to Run for Office, 1974 Utah L. Rev. 290, 296–302 (describing the series of ballot access cases that the Court reviewed in the late 1960s and early 1970s).

58. Williams v. Rhodes, 393 U.S. 23, 24–25 (1968).

59. Id. at 25.

Third-party political outsiders seeking inclusion in the political process advanced two complementary constitutional claims. First, third-party members drew on the Court's "one person, one vote" jurisprudence and argued that ballot access restrictions, by denying them the opportunity to vote for their candidate of choice, violated their Fourteenth Amendment right to cast a meaningful vote.[60] Second, the third parties argued that the ballot access restrictions unconstitutionally infringed on their members' freedom of association.[61]

The Court embraced both of the third parties' constitutional claims. "The right to form a party for the advancement of political goals," the Court determined, "means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."[62] Further, "the right to vote," the Court found, "is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot."[63] The Court concluded in a later case that "[t]he exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens."[64]

In these ballot access cases, competition emerged as a broader democratic structural goal that promoted the political inclusion at the heart of the third parties' constitutional claims. As the Court explained, constitutional protection of associational and voting rights advances "[c]ompetition in ideas and governmental policies [that] is at the core of our electoral process and of the First Amendment freedoms."[65]

The ballot access cases represented the last time the Court specifically targeted outsiders for protection under the freedom of association framework. As the Warren Court shifted to the more conservative-leaning Burger Court, the justices turned their attention from political outsiders to political insiders.[66] In the Burger Court's first freedom of association case, the Court invalidated a state statute prohibiting a person from voting in a party's primary if she had voted in another party's primary

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60. See Statement as to Jurisdiction at 62–63, *Williams*, 393 U.S. 23 (No. 543), 1968 WL 129460 (arguing that the ballot restriction infringes on rights of third parties, independent voters, and candidates to be free from discriminatory impairment of the right of suffrage).

61. See Appellees' Brief at 9, Dies v. Carter, 403 U.S. 904 (1971) (No. 1606), 1971 WL 133723 (arguing that a filing fee requirement for candidate ballot access "threaten[ed] the cherished freedom of association protected by the First Amendment").

62. *Williams*, 393 U.S. at 31.

63. Id.

64. Anderson v. Celebrezze, 460 U.S. 780, 787–88 (1983).

65. *Williams*, 393 U.S. at 32.

66. See Michael J. Graetz & Linda Greenhouse, The Burger Court and the Rise of the Judicial Right 7–8 (2016) (arguing that the Burger Court shifted constitutional jurisprudence in a conservative direction).

within the preceding 23 months.[67] The majority announced that "[t]he right to associate with the political party of one's choice is an integral part" of the First Amendment freedom to associate.[68] That universalist declaration laid the foundation for the Court to extend the freedom of association mandate to political insiders.

In a series of First Amendment cases that followed, the Court struck down state political patronage practices that resulted in the firing or refusal to promote public employees because of their affiliation with the party out of power. Individuals faced with the choice of maintaining their party affiliation or losing their job, the Court explained, will often have to sacrifice their political beliefs and associational freedom.[69] Forcing a public employee to make this choice runs counter to the constitutional "freedom to associate with others for the common advancement of political beliefs and ideas."[70]

As the Court shifted toward protecting political insiders in the political patronage cases, it continued to emphasize the democratic structural goal of a competitive political process. As the Court detailed in its opinion in the foundational political patronage case of *Elrod v. Burns*:

> Conditioning public employment on partisan support prevents support of competing political interests. Existing employees are deterred from such support, as well as the multitude seeking jobs. As government employment . . . becomes more pervasive, the greater the dependence on it becomes, and therefore the greater becomes the power to starve political opposition by commanding partisan support, financial and otherwise. Patronage thus tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant.[71]

Favoring political incumbents through political patronage thus ran counter to the fundamental principle announced in the ballot access cases that "[c]ompetition in ideas and governmental policies is at the core of our electoral process."[72] But rather than competition between political outsiders and insiders, the Court in the political patronage cases suggested that competition between political insiders was a constitutional value entitled to protection as well.

Next, the Court turned its attention to state party primary requirements. In these cases, the Court extended the freedom of association to

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67. See Kusper v. Pontikes, 414 U.S. 51, 61 (1973).

68. Id. at 57.

69. See Elrod v. Burns, 427 U.S. 347, 355–56 (1976) (explaining how an employment requirement that public employees pledge allegiance to a party constrains an individual from "act[ing] according to his beliefs" and "associat[ing] with others of his political persuasion").

70. Id. at 357.

71. Id. at 356.

72. Williams v. Rhodes, 393 U.S. 23, 32 (1968).

the political parties themselves.[73] In a case invalidating Connecticut's closed-primary requirement, which (against the party out of power's preferences) limited primary voting to party registrants, the Court explained that "[t]he Party's attempt to broaden the base of public participation in and support of its activities [through an open primary] is conduct undeniably central to the exercise of the right of association."[74] The state's closed-primary requirement, the Court continued, infringed on the associational rights of the party out of power and "the freedom of its adherents" by "plac[ing] limits upon the group of registered voters whom the Party may invite to participate in the 'basic function' of selecting the Party's candidates."[75]

Nearly a decade and a half later, the Court also struck down California's blanket primary requirement in which all voters, regardless of partisan affiliation, could vote for any candidate during the primary.[76] "[A] corollary of the right to associate," the Court declared, "is the right not to associate."[77] "Freedom of association," the Court concluded, "would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being."[78]

As the Court shifted focus from political outsiders to political insiders in the political patronage and party primary cases, it opened the door to the freedom of association claim that has emerged in the current partisan gerrymandering controversies. In the next Part, I describe the nature of this new constitutional challenge to partisan gerrymandering, then show how it neglects political outsiders' rights to democratic inclusion.

II. THE FIRST AMENDMENT AND PARTISAN GERRYMANDERING

The origin of First Amendment claims against partisan gerrymandering is commonly attributed to Justice Kennedy's concurrence in the 2004

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73. For accounts of the party primary cases engaging the tension between party autonomy, associational harms, and competition in the political marketplace, see, e.g., Bruce E. Cain, Party Autonomy and Two-Party Electoral Competition, 149 U. Pa. L. Rev. 793, 801–10 (2001) (discussing the impact of blanket-primary rules in California); Samuel Issacharoff, Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition, 101 Colum. L. Rev. 274, 282–93 (2001) (addressing the Court's analysis of California's primary system and its encroachment on the freedom of association).

74. Tashjian v. Republican Party of Conn., 479 U.S. 208, 214 (1986).

75. Id. at 215–16 (quoting Kusper v. Pontikes, 414 U.S. 51, 58 (1973)).

76. See Cal. Democratic Party v. Jones, 530 U.S. 567, 582 (2000) (declaring California's blanket primary unconstitutional).

77. Id. at 574.

78. Id. (internal quotation marks omitted) (quoting Democratic Party of the U.S. v. Wisconsin ex rel. La Follete, 450 U.S. 107, 122 (1981)).

case of *Vieth v. Jubelirer*.[79] But nearly twenty years earlier, it was the American Civil Liberties Union and the Indiana Civil Liberties Union that first advanced a First Amendment claim against partisan gerrymandering in the Supreme Court. In the amicus brief supporting the Democratic Party members' constitutional challenge to Indiana's state-legislative-district map in *Davis v. Bandemer*, the ACLU and ICLU advanced a First Amendment claim derived from the NAACP associational freedom, ballot access, and political patronage cases.[80] According to this claim, the gerrymandered map infringed on Democratic Party members' freedom of association and the right to cast an effective ballot by undermining competition in the electoral space.

As a starting point, the ACLU and ICLU asserted a relationship between free expression and competition in the democratic process. "We commonly understand that our system of free expression depends upon a marketplace of ideas, an environment in which policies and programs compete for acceptance by the American people."[81] The key to "fair ideological competition," according to the amicus brief, is ensuring the neutrality of government actors responsible for "regulating the political and ideological activities of its citizens."[82] This means that the government can neither "favor one speechmaker over another [nor] one ideological association or political party over others."[83] The requirement of government neutrality that applied to protect the competition of ideas in public forums thus also applied to the electoral space in which government neutrality protects the competition of ideas between opposing candidates and parties. "[U]nless government remains neutral in fashioning and administering the rules of the contest," the ACLU and ICLU contended, "the electoral competition cannot operate fairly."[84]

Biased government action through the drawing of uncompetitive districts favorable to one party over the other infringed on the losing party's members' associational expression by denying them the opportunity to effectively participate in the electoral space. Such biased government action, the ACLU and ICLU argued, has been found unconstitutional when "districting plans were employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population' . . . [and] in a long-line of vote dilution cases."[85] "These vote dilution and reapportionment cases," the brief concluded, "implicitly recognize that when a state regulates its election machinery and when it

79. See infra notes 89–95 and accompanying text.

80. See Brief of the Civil Liberties Unions, supra note 29, at *8–29.

81. Id. at *5.

82. Id.

83. Id.

84. Id. at *17.

85. Id. at *21 (citation omitted) (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965)).

defines electoral boundaries, it must do so in a neutral and even-handed way."[86]

In its opinion in *Davis v. Bandemer*, the Court ignored the ACLU and ICLU's First Amendment claims as it established a standard for adjudicating partisan gerrymandering claims under the Fourteenth Amendment Equal Protection Clause.[87] But the brief nonetheless provided an associational model of constitutional protection potentially applicable to partisan gerrymanders. According to this model, partisan gerrymandering raises constitutional concerns when it undercuts competition in the electoral space.[88] The lack of competition infringes on the right of members of the minority party in uncompetitive districts to associate with like-minded voters to advance their political goals because their vote is rendered ineffective in a district where they have no opportunity to elect their candidate of choice.

Eighteen years after the ACLU and ICLU's brief in *Davis v. Bandemer*, a First Amendment freedom of association claim reappeared in the context of the next partisan gerrymandering controversy to reach the Supreme Court. In briefs submitted to the Court in *Vieth v. Jubelirer*,[89] a case challenging a statewide map in Pennsylvania, remnants of the electoral competition claim of associational freedom lingered, but a new model of constitutional protection against gerrymandering also emerged and found a supporter on the Court.

In their brief challenging the constitutionality of the Pennsylvania partisan gerrymander, the appellants in *Vieth v. Jubelirer* advanced a First Amendment claim as an alternative to the equal protection claim against the statewide map.[90] Drawing on the political patronage cases, the appellants argued that the partisan gerrymander violated the First Amendment prohibition on viewpoint discrimination, which "serves, in part, to prevent indirect distortions of democracy and majority rule."[91] On its face, the source of democratic distortion that the appellants identified in *Vieth* was the same as the one identified by the ACLU and ICLU in *Bandemer*. The appellants argued that viewpoint discrimination (in the form of the partisan gerrymander) distorted democracy because of its

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86. Id. at *22.

87. See 478 U.S. 109, 127 (1986) (establishing a standard for adjudicating partisan gerrymandering claims under the Equal Protection Clause in which the challenger must prove "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group").

88. See Brief of the Civil Liberties Unions, supra note 29, at *5 ("[F]or this electoral competition to operate fairly government must remain neutral. . . . It cannot enact laws designed to petrify the political process or skew the fairness of the electoral competition.").

89. 541 U.S. 267 (2004).

90. See Brief for Appellants at *18, *Vieth*, 541 U.S. 267 (No. 02-1590), 2003 WL 22070244.

91. Id. at *23.

impact on "effective competition in the marketplace of political ideas."[92] But upon closer examination, it seems clear that the *Vieth* appellants' concern with partisan gerrymandering's impact on competition in the marketplace of ideas focused on a different political arena. Whereas the ACLU and ICLU seemed to argue that partisan gerrymandering ran afoul of the goal of fair competition of voter ideas in the electoral space, the appellants in *Vieth* appeared to emphasize the goal of more equitable representation in the legislative space to advance the fair competition of ideas and policy preferences between elected representatives.[93] To ensure fair competition of ideas, the *Vieth* appellants asserted, voters from the two major parties needed "a fair opportunity to elect representatives" because otherwise "freedom of political association yields no policy fruit."[94]

This model of associational freedom found an audience with Justice Kennedy, who authored the pivotal concurrence in *Vieth*. After considering the equal protection claims, the focus of most of the briefing in the case, Justice Kennedy pointed to the First Amendment as a potentially more viable constitutional basis for adjudicating partisan gerrymandering claims.[95] Following the lead of the appellants' brief, Justice Kennedy analogized to the political patronage and party primary cases. He construed those decisions as establishing protections for individuals against viewpoint discrimination on the basis of partisan affiliation.[96] Like political patronage, Justice Kennedy explained, partisan gerrymandering implicates "the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views."[97] Then, drawing on the political primary cases, Justice Kennedy described the harm to representative democracy from partisan gerrymandering's infringement on associational freedoms: "Representative democracy in any populous unit of governance is unimaginable

92. Id. (quoting Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics 499 (1968)).

93. Compare id. at *24 (noting that partisan gerrymandering "can replace the 'consent of the governed' with a system in which legislators decide who will remain in office and whom they will represent"), with Brief of the Civil Liberties Unions, supra note 29, at *5–6 (emphasizing that our electoral system "is an organized competition of ideas presented [to voters] by opposing candidates and political parties").

94. Brief for Appellants, supra note 90, at *23 (internal quotation marks omitted) (quoting Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics 499 (1968)).

95. For the equal protection claim, Justice Kennedy acknowledged the weighty arguments for finding challenges to partisan gerrymandering claims nonjusticiable. These include: (1) the permissibility of politics as a classification, (2) the absence of "agreed upon substantive principles of fairness in districting," and (3) the lack of a "basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights." *Vieth*, 541 U.S. at 307–09 (Kennedy, J., concurring).

96. Id. at 314.

97. Id.

without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."[98] The focus of the First Amendment viewpoint discrimination analysis in a partisan gerrymandering dispute, Justice Kennedy concluded, should therefore be "on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association."[99]

Justice Kennedy did not define "representational rights" in *Vieth*, but in past cases construing the Voting Rights Act (VRA) in particular, representational rights referred to the opportunity of individuals from racial minority groups to elect their candidate of choice to advance their views in the legislative process.[100] The Court, following the directions of Congress, found violations of representational rights when the state deprived members of racial minority groups of a fair opportunity to elect representatives of their choice.[101] In the context of judicial application of the VRA, this remedy was often to provide the proportionate opportunity to elect representatives statewide from the statutorily protected group by requiring the state to construct a proportionate number of districts that were majority minority.[102]

There is a subtle, but important, distinction between these representational rights that are the focus of the fair representation model of associational freedom and the participatory rights at the center of the electoral competition model of associational freedom. As construed in the Court's voting rights jurisprudence, effective participation refers to the

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98. Id. (internal quotation marks omitted) (quoting Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000)).

99. Id. at 315.

100. See Bertrall L. Ross II, Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics, 101 Calif. L. Rev. 1565, 1605–09 (2013) (describing the Court's conceptualization of representational rights for racial minorities under the VRA as "the opportunity to elect their preferred candidate").

101. Section 2 of the amended Voting Rights Act of 1982 provides that:

> A violation [of the Act] is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [racial minority groups] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Voting Rights Act of 1965, 42 U.S.C. § 1973(b) (2012).

In the seminal case interpreting section 2, the Court established a legal standard subjecting state and political subdivisions to liability when they deprived geographically compact, politically cohesive racial communities of an opportunity to elect their preferred candidate in contexts of racially polarized voting. See Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986) (establishing the three preconditions for assessing liability under section 2 of the VRA).

102. See Lani Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 Mich. L. Rev. 1077, 1097–98 (1991) (describing the Supreme Court's focus after *Gingles* on protecting opportunities for racial minority groups to elect members of their group).

opportunity for individuals to have their voices heard by candidates in the political process at the individual district level.[103] Ensuring that opportunity requires construing electoral districts such that candidates are incentivized to take into account the interests of individual members of most, if not all, groups during elections and when governing.[104] Importantly, and distinguishing the participatory model from the representational model, this right to participate does not guarantee to individuals the proportionate opportunity to elect preferred candidates or candidates from one's group.[105] So long as candidates are forced by the electoral context to

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103. The Court first recognized an equal protection right to full and effective participation when reviewing the constitutionality of malapportioned districts. See Reynolds v. Sims, 377 U.S. 533, 565–66 (1964). While equally apportioned legislative districts were necessary to satisfy the equal protection standard, they were not sufficient. In cases immediately following the establishment of one person, one vote, the Court in its review of the constitutionality of multimember districts said that properly apportioned multimember districts could still run afoul of the Constitution. In a case decided a year after *Reynolds*, the Court surmised, "It might well be that, designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." Fortson v. Dorsey, 379 U.S. 433, 439 (1965). "When this is demonstrated," the Court continued, "it will be time enough to consider whether the system still passes constitutional muster." Id.

In the multimember districting cases that followed, the Court rejected constitutional challenges that focused on the representational harms to minorities from such districts and accepted constitutional challenges that focused on the participatory harms to minorities perpetuated by such districts in contexts of participatory inequality. Compare Mobile v. Bolden, 466 U.S. 55, 65, 73 (1980) (holding that at-large elections of city officials do not run afoul of the Fourteenth and Fifteenth Amendments because such elections do not disenfranchise voters), and Whitcomb v. Chavis, 403 U.S. 124, 160 (1971) ("The short of it is that we are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them."), with Rogers v. Lodge, 458 U.S. 613, 622–24 (1982) ("We are . . . unconvinced that we should disturb the District Court's finding that the at-large system . . . was being maintained for the invidious purpose of diluting the voting strength of the black population. . . . [T]he fact that [no black candidate] ha[d] ever been elected is important evidence of purposeful exclusion."), and White v. Regester, 412 U.S. 755, 769 (1973) ("The District Court . . . conclude[d] that the multimember district . . . invidiously excluded Mexican-Americans from effective participation in political life . . . . On the record before us, we are not inclined to overturn these findings . . . .").

104. In the first partisan gerrymandering case, the Court construed the right to effective participation established in the multimember districting cases as protecting the right of group members to exercise influence in the political process, such that their interests cannot be entirely ignored by the candidate elected to represent that district. See Davis v. Bandemer, 478 U.S. 109, 131–32 (1986).

105. See id. at 131 ("[T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm.").

consider the interests of voters and potential voters in their campaign and when governing, the participatory right has been protected.[106]

Justice Kennedy's invitation to litigants to bring First Amendment claims against partisan gerrymandering stood for over ten years before challengers to such gerrymanders made a serious attempt to apply the fair representation model. The difficulty of developing a manageable standard for assessing when viewpoint discrimination amounted to a constitutional violation of political party members' representational rights fueled the delay. More than a decade after *Vieth*, challengers to a statewide plan in Wisconsin advanced First Amendment freedom of association claims accompanied by novel empirical tests for assessing when party members' representational rights had been violated.

The challengers to the statewide map in Wisconsin argued that "partisan gerrymandering offends First Amendment values by 'penalizing citizens because of . . . their association with a political party, or their expression of political views.'"[107] In support of the challengers' constitutional claim, New York University's Brennan Center, in an amicus brief, contended that "[e]xtreme partisan gerrymandering—the government's intentional burdening of the efficacy of citizen's votes '*because of* their participation in the electoral process, their voting history, their association with a political party, or their expression of political views,'—is plainly irreconcilable with . . . First Amendment principles."[108] An amicus brief by election law and constitutional law scholars joined the fray, asserting that "the right of association . . . limits the dominant political group's ability to discriminate against groups that espouse a rival point of view."[109]

These First Amendment claims and others contained in the briefs were arguably consistent with both the fair representation and the electoral competition models of associational freedom. But the briefs' assessments of the harm from partisan gerrymandering and the suggested tools for measuring the harm relied upon the fair representation model of associational freedom.

According to the challengers, the viewpoint discrimination embedded in the Wisconsin statewide map produced the constitutional harm of

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106. See id. at 132 (requiring proof that "the candidate elected will entirely ignore the interests of [a group of] voters" before establishing a presumption of unconstitutionality).

107. Brief for Appellees, supra note 3, at 36 (quoting Vieth v. Jubelirer, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring)).

108. Brief for the Brennan Center for Justice at N.Y.U. School of Law as Amicus Curiae in Support of Appellees at 34, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161), 2017 WL 4311106 (emphasis added by the Brennan Center) (citation omitted) (quoting *Vieth*, 541 U.S at 314 (Kennedy, J., concurring)).

109. Brief of Amici Curiae Election Law and Constitutional Law Scholars in Support of Appellees, supra note 25, at 5.

partisan asymmetry in state legislative representation.[110] A statewide map suffers from partisan asymmetry when there is a difference between the parties in the number of votes that would be necessary under a statewide plan to elect a majority of the legislators.[111] For example, a map is considered asymmetric if it would require the Democratic Party to win at least 55% of the statewide votes to secure a legislative majority and the Republican Party to win only 45% of the statewide vote to secure a legislative majority. Partisan asymmetry can be measured according to either the vote–seat ratio developed over five decades ago or the more recently developed efficiency gap—a measure of the two parties' relative wasted votes in elections statewide.[112] Whatever the measure, the focus of the constitutional harm from partisan asymmetry is on representational disparities between the parties in the legislature.

In *Whitford v. Gill*, the district court found that the Wisconsin statewide map violated Democratic voters' representational rights.[113] The court considered the partisan asymmetry in Wisconsin, in which Democratic candidates received approximately 50% of the vote statewide but less than 40% of the seats in the state assembly, to be probative of a constitutional violation.[114] The Supreme Court, however, vacated the decision and remanded the case back to the district court after finding that the challengers had failed to show they had standing to bring a constitutional claim against the statewide harm alleged to arise from the Wisconsin map.[115]

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110. See Brief for Appellees, supra note 3, at 35 (identifying partisan asymmetry as the harm caused by the Wisconsin statewide map).

111. See Edward R. Tufte, The Relationship Between Seats and Votes in Two-Party Systems, 67 Am. Pol. Sci. Rev. 540, 542 (1973) (developing the original measure of partisan asymmetry).

112. See, e.g., Brief of Appellants, supra note 25, at 30 (advancing a First Amendment viewpoint discrimination claim against the alleged partisan gerrymandering of an individual district in Maryland); Brief for Appellees, supra note 3, at 36 (advancing a First Amendment viewpoint discrimination claim against the alleged statewide partisan gerrymandering in Wisconsin). Researcher Eric McGhee and Professor Nicholas Stephanopoulos developed a novel empirical measure for assessing when gerrymandering should be considered presumptively unconstitutional. See Nicholas O. Stephanopoulos & Eric M. McGhee, Partisan Gerrymandering and the Efficiency Gap, 82 U. Chi. L. Rev. 831, 850–53, 884–91 (2015) (defining and computing the efficiency gap and identifying a standard that courts can use in assessing the constitutionality of partisan gerrymanders). This measure, called the efficiency gap, is a more simplified and user-friendly way of determining partisan asymmetry. See id. at 855–63 (comparing the efficiency gap to other measures of partisan asymmetry). The district court in *Whitford* relied in part on the efficiency gap in finding the Wisconsin statewide map unconstitutional. See Whitford v. Gill, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016), vacated, 138 S. Ct. 1916 (2018).

113. See *Whitford*, 218 F. Supp. 3d. at 898–901.

114. Id. at 901.

115. See *Gill*, 138 S. Ct. at 1923; see also supra text accompanying note 28 (examining the Court's ruling in *Gill*).

In the next Part, I show that even if litigants were to overcome the standing hurdle, judicial enforcement of the fair representation model of associational freedom would further incentivize the principal source of political-outsider marginalization—state legislators' construction of incumbent-protective safe districts. Rather than fixate on the statewide harm that is the target of the fair representation claim, challengers should shift their focus to the associational-freedom harm arising from reducing the competitiveness of individual districts. This shift, I argue, could contribute to a more politically inclusive and equal democracy. In Part IV, I return to the question of standing. I argue that a constitutional challenge premised on the electoral competition model of associational freedom should overcome the two standing obstacles presented in *Gill*.

III. A PARTISAN GERRYMANDERING REMEDY FOR THE POLITICAL OUTSIDER

The question of remedy has been overlooked in First Amendment challenges to partisan gerrymandering. While the two First Amendment models advanced in the briefs and the case law offer an account of the harm from partisan gerrymandering, and seek to provide an objective basis for assessing when that harm has occurred, they do not address the specific remedies for constitutional violations that should follow. Once likely remedies are considered, though, it becomes clear that the two models are likely to differ markedly in their impact on political outsiders.

My starting point for predicting the impact of potential gerrymandering remedies is rational choice theory. According to rational choice theory, elected officials are primarily motivated by the desire to be reelected.[116] When drawing district lines, rational elected officials should try to advance their reelection goals in two ways. First, they should support the district map that best ensures their opportunity to be reelected in all foreseeable elections under the districting plan. Simply put, legislators should support the drawing of safe districts for themselves and oppose the drawing of competitive districts that would put their reelection at greater risk. Second, legislators should support a statewide map that, consistent with their first objective, ensures their party the greatest degree of control in the state legislature and sends as many of their party members to Congress as possible. Greater party representation in the state legislature and in the congressional delegation increases the likelihood that the state legislature and Congress will pass laws favorable to their partisan supporters, which should also increase the legislators'

116. See David R. Mayhew, Congress: The Electoral Connection 5 (2d ed. 2004) (articulating the rational choice assumption of representatives "as single-minded seekers of reelection"); see also John W. Kingdon, Congressmen's Voting Decisions 31, 60–66 (3d ed. 1989) (corroborating the rational choice assumption through a survey of congresspersons in which constituency was the second-most-mentioned factor influencing the congressmember's decision because of fear that a wrong roll-call vote would cost them in the next election).

likelihood of being reelected. The constitutionally unconstrained result that should follow when the districting process is entirely controlled by one party is a statewide map that provides representative members of the party with safe districts and the party with a durable asymmetric advantage in the state legislature and congressional delegation.[117]

What effect would First Amendment constraints have on rational legislators' approach to districting? If the fair representation model of associational freedom were adopted, then legislators' primary means of ensuring their own reelection—the drawing of safe districts—would remain constitutionally unconstrained. Courts would presumably require the legislature to minimize partisan asymmetry but would not address district-level electoral competitiveness. Rational legislators would therefore continue to support statewide maps with safe districts for themselves.

If the Court were to adopt and enforce the fair representation model, however, it would create a constitutional obstacle to rational legislators' second means of advancing their reelection goal: maximizing partisan advantage in the state legislature or in the congressional delegation. The state's response to judicial enforcement of a fair representation model will likely be to draw as many safe districts for its own members while packing as many members of the opposing party into as few districts as possible within the constraint of partisan symmetry. To satisfy the partisan-symmetry constraint, the state might need to construct a few more competitive districts with most of these districts, if not all, drawn to

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117. In *Bandemer*, Justice O'Connor famously argued in dissent that partisan gerrymandering is a "self-limiting enterprise" rendering judicial intervention unnecessary. Davis v. Bandemer, 478 U.S 109, 152 (1986) (O'Connor, J., concurring); see also Peter H. Shuck, The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics, 87 Colum. L. Rev. 1325, 1345 (1987) (expanding on Justice O'Connor's argument regarding the self-limitations inherent in partisan gerrymandering). Since there are only so many partisan supporters to go around in any particular state or jurisdiction, the party in power would have to trade off drawing safe districts for its members with asymmetric partisan advantage for its party. *Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring). If the party in power drew safe districts for its members, it would leave the remaining districts competitive and undercut partisan advantage. If the party in power drew districts to secure a high degree of partisan advantage, it could not draw safe districts for its members. Either way, the party in power would be unable to secure durable asymmetric partisan advantage. What this argument does not account for is voters' different levels of party loyalty and mapmakers' ability to account for that variation in the data that is used to draw districts. See Vann R. Newkirk II, How Redistricting Became a Technological Arms Race, Atlantic (Oct. 28, 2017), http://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888 [https://perma.cc/VB74-TBBX] (describing how advances in technology and data collection have allowed politicians to gerrymander with greater precision). A district need not have a twenty- or thirty-point party-registration advantage to be safe for a representative if voters have a history of voting consistently and frequently for one party over the other. Drawing a district with a ten-point registration advantage or less might do the trick of safely securing the reelection of the party's representative in the district if that district has more loyal voters. This variation in voters' party loyalty allows the party in power to avoid trade-offs between safe districts and partisan advantage to secure more-durable partisan advantage.

give the party in power an advantage, albeit not a safe and durable advantage. Thus, a fair representation constitutional constraint might force states to draw a few more competitive districts than they would have if left constitutionally unconstrained, but safe districts will likely continue to dominate the electoral scene.

The state districting practices likely to result from judicial enforcement of the fair representation model can be contrasted with those likely to result from judicial enforcement of the electoral competition model of associational freedom. Under the electoral competition model, the constitutional harm arises from districting practices that deny voters in particular districts the opportunity to effectively participate in the electoral process.[118] Safe districts cause this harm by denying individuals not affiliated with the majority party in the district an opportunity to influence election outcomes. In safe districts, incumbents run either unopposed or against an opponent without a viable chance to win. In these districts, the incumbent can ignore minority party voters' interests and needs, adopting a policy platform and governing approach that uncompromisingly advances partisan supporters' needs and interests.

Judicial invalidation of districting practices that violate the electoral competition model would result in states drawing districts within judicially established competitiveness parameters. Legislators would therefore be constrained from advancing their reelection goal through the construction of safe districts. The party in power could still advance the secondary goal of partisan advantage unconstrained, but its members would not be able to create a durable partisan advantage for themselves because of the competitiveness constraint. The most likely result would be that the ruling party would create as many competitive districts that lean in their favor as possible.

When examining the choice of associational-freedom models from the perspective of which one best advances the constitutional rights of political insiders, there is no clear answer. It all depends on whether, as a normative matter, one feels that the guarantee of representation in the legislative process is more or less valuable than the guarantee of effective participation in the electoral process. Neither the Constitution nor democratic theory helps us resolves this normative conundrum.

Clearer answers emerge when we compare the probable effects of judicial enforcement of the two models on one group of political outsiders—nonvoters. To understand the disparate effects of judicial enforcement of the two models on this group, it is necessary to understand the reasons why certain individuals do not vote. In their seminal book *Who Votes*, political scientists Raymond Wolfinger and Steven Rosenstone used a cost–benefit theoretical framework for voting to offer an empirical

118. See supra note 29 and accompanying text.

account of why certain people do not vote.[119] According to the cost–benefit framework initially developed by economist Anthony Downs, individuals will not vote when the costs of voting exceed its benefits.[120] Wolfinger and Rosenstone's empirical analysis identified specific resource constraints that made it relatively more costly for certain people to vote. The study found that those with less education, who also tended to be poor, voted significantly less than those with more education, who tended to be wealthier.[121] Since the early 1970s, there has been a consistent 25–35% turnout gap between individuals in the highest and lowest income quintiles in the United States.[122]

The turnout disparity between the wealthy and the poor is unsurprising if one views voting through the cost–benefit lens. Voting entails the cost of obtaining information necessary to make informed choices about candidates and issues. Education can overcome this cost by "increas[ing] cognitive skills, which facilitates learning about politics."[123] When individuals are educated about politics and the electoral process, they "are likely to get more gratification from political participation" and to understand how elections are administered, which further facilitates their participation.[124]

If education is the principal barrier to voting that renders nonvoters political outsiders, then there is not much that a change in districting practices can do about their outsider status. Whether the state legislature draws safe districts that give a durable partisan advantage to the party in power or competitive districts that give neither party a durable advantage, the effect on nonvoter participation and inclusion into the political process should be minimal or nonexistent.

A little over a decade after Wolfinger and Rosenstone's account of nonvoting, Rosenstone joined with political scientist John Mark Hansen to conduct a different empirical test of voting that shifted the scholarly conversation.[125] In their empirical test, Wolfinger and Rosenstone had

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119. See generally Raymond E. Wolfinger & Steven J. Rosenstone, Who Votes? 1–12 (1980) (explaining their approach to determining the relationship between voter turnout and certain demographic characteristics).

120. See Anthony Downs, An Economic Theory of Democracy 260–65 (1957) (advancing the cost–benefit rational choice model of voting).

121. See Wolfinger & Rosenstone, supra note 119, at 22–36 (isolating the effect of education and income on turnout). Specifically, the study found that "[c]itizens with a college degree are 38 percent more likely to vote than are people with fewer than five years of schooling." Id. at 34.

122. Jan E. Leighley & Jonathan Nagler, Who Votes Now? Demographics, Issues, Inequality, and Turnout in the United States 29 fig.2.2 (2014); Jan E. Leighley & Jonathan Nagler, Electoral Laws and Turnout, 1972–2008, at 24 tbl.3 (Nov. 20, 2009) (unpublished manuscript), https://ssrn.com/abstract=1443556 (on file with the *Columbia Law Review*).

123. Wolfinger & Rosenstone, supra note 119, at 35.

124. Id. at 36.

125. Steven J. Rosenstone & John Mark Hansen, Mobilization, Participation, and Democracy in America 228 (1993) ("Over and over we have shown that resources, interests,

not included variables measuring "political interest, information, sense of citizen duty, attitudes about issues, political disaffection, party identification, or any other individual perspective on politics."[126] Rosenstone and Hansen addressed this omission in their influential book, *Mobilization, Participation, and Democracy in America*, and found that a decline in electoral mobilization by candidates, political parties, campaigns, interest groups, and social movements, which correlated positively with individuals' interest in voting, explained half of the decline in turnout between the 1960s and 1980s.[127] Later experimental studies reinforced the Rosenstone and Hansen study findings that candidate and party efforts to reach out to voters by phone or in person increased individuals' likelihood of turning out to vote.[128]

Empirical studies have thus found nonvoting to be the product of individuals' lack of resources, particularly education, and lack of campaign-mobilization efforts toward certain populations. The consequence of such nonvoting is clear. As V.O. Key asserted more than a half century ago, "The blunt truth is that politicians and officials are under no compulsion to pay much heed to classes and groups that do not vote."[129]

A vicious cycle of marginalization has emerged in which undereducated and low-income individuals tend not to vote due to resource constraints. Campaigns respond to their nonvoting behavior by making a strategic decision to not expend campaign resources or energy on mobilizing individuals whose past behavior suggests they will not vote in future elections.[130] Then, once in office, candidates who do not owe any

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and social positions distinguish people who participate in politics from people who do not."); see also Donald P. Green & Michael Schwam-Baird, Mobilization, Participation, and American Democracy: A Retrospective and Postscript, 22 Party Pol. 158, 158 (2015) ("The publication of Stephen J Rosenstone and John Mark Hansen's *Mobilization, Participation, and Democracy in America* in 1993 marked an important turning point in the study of political participation.").

126. Wolfinger & Rosenstone, supra note 119, at 4.

127. Rosenstone & Hansen, supra note 125, at 216–18 (explaining how the change in canvassing methods, decline in electoral competition, increasing demands on campaign resources, and decline in social-movement activity all contributed to the overall decline in voter turnout between the 1960s and 1980s).

128. In a study that initiated a slew of experiments seeking to identify the effect of mobilization activities on voter turnout, political scientists Alan Gerber and Donald Green found that personal contact with individuals to encourage them to vote increased turnout by 9.8%. Alan S. Gerber & Donald P. Green, The Effects of Canvassing, Telephone Calls, and Direct Mail on Voter Turnout: A Field Experiment, 94 Am. Pol. Sci. Rev. 653, 660 (2000). Other studies found similar positive effects of personal contact on turnout. See, e.g., Donald P. Green, Alan S. Gerber & David W. Nickerson, Getting Out the Vote in Local Elections: Results from Six Door-to-Door Canvassing Experiments, 65 J. Pol. 1083, 1094 (2003) (finding that personal contact led to a seven percent boost in turnout on average in six local elections).

129. V.O. Key, Jr., with Alexander Heard, Southern Politics in State and Nation 527 (Alfred A. Knopf ed., Univ. of Tenn. Press Knoxville reprt. 1984) (1949).

130. See Green & Schwam-Baird, supra note 125, at 159 (noting that "strategic politicians target their mobilization efforts in ways that are designed to maximize electoral

of their electoral success to nonvoters tend to support policy programs that are not responsive to the needs and interests of those individuals.[131]

If party and candidate voter-mobilization activities provide at least a partial explanation for who does and does not vote, then districting practices *can* make a difference for political outsiders. As political scientist E.E. Schattschneider famously theorized, "The root of the problem of nonvoting is to be found in the way in which the alternatives in American politics are defined, the way in which issues get referred to the public, the scale of competition and organization and above all by *what* issues are developed."[132]

State legislatures' drawing of safe districts appears to be the central districting practice that directly implicates political outsiders. According to a series of empirical studies, electoral competition has a positive impact on turnout.[133] One apparent reason why competition contributes to higher turnout is that candidates tend to expend more money and effort on electoral contests that are anticipated to be close.[134] A large

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returns," which means that they "focus their efforts on segments of the electorate that look much like those who already participate").

131. Over the past twenty years, political scientists Larry Bartels, Martin Gilens, and others have provided empirical support for this final stage in the cycle of nonresponsiveness, showing that politicians are not at all responsive to the preferences and needs of the poor, a group that makes up the greatest proportion of nonvoters. See Larry M. Bartels, Unequal Democracy: The Political Economy of the New Gilded Age 259–60 (2008) ("[T]he views of low-income constituents had no discernible impact on the voting behavior of their senators."); Martin Gilens, Affluence and Influence 79–81 (2012) ("[W]hen preferences between the well-off and the poor diverge, government policy bears absolutely no relationship to the degree of support or opposition among the poor.").

132. E.E. Schattschneider, The Semisovereign People: A Realist's View of Democracy in America 110 (1960).

133. See, e.g., Gary W. Cox & Michael C. Munger, Closeness, Expenditures, and Turnout in the 1982 U.S. House Elections, 83 Am. Pol. Sci. Rev. 217, 226 (1989) (finding a positive relationship between competitiveness of elections, campaign expenditures, and turnout); Ron Shachar & Barry Nalebuff, Follow the Leader: Theory and Evidence on Political Participation, 89 Am. Econ. Rev. 525, 545 (1999) (finding "that an increase of 1 percent in the closeness of the race . . . leads to a 0.34-percent increase in participation"). After these earlier studies suggested a modest positive relationship between competition and turnout, later studies overcoming attenuation and endogeneity bias in their empirical models found a much more robust correlation between competition and turnout. See, e.g., Gábor Simonvits, Competition and Turnout Revisited: The Importance of Measuring Expected Closeness Accurately, 31 Electoral Stud. 364, 369 (2012) ("[A] 1% decrease in the relative margin of the victory of the party that got the most of the votes in the first round is expected to increase turnout in the runoff by 0.2%."); see also Sebastian Garmann, A Note on Electoral Competition and Turnout in Run-Off Electoral Systems: Taking into Account Both Endogeneity and Attenuation Bias, 34 Electoral Stud. 261, 261–62 (2014) (identifying the endogeneity and attenuation biases that arise in earlier studies seeking to measure the causal effect of competition on turnout).

134. See Christine Fauvelle-Aymar & Abel François, The Impact of Closeness on Turnout: An Empirical Relation Based on a Study of a Two-Round Ballot, 127 Pub. Choice 469, 481 (2006) (finding that an "increase in electoral spending leads to an increase in

proportion of those campaign expenditures are spent on mobilization activities that, as described above, have been found to be positively correlated with turnout.[135]

As we see evidenced throughout the country in state legislatures' strong proclivity for drawing safe districts, rational elected officials acting without constitutional constraints are not going to construct more than a handful of competitive districts. In addition, as argued above, judicial enforcement of the fair representation model of associational freedom is unlikely to change this dynamic.[136] In contrast, if courts were to enforce a requirement of electoral competition, then elected officials would be forced to draw a robust number of competitive districts. The electoral logic that might follow is one in which competitive districts increase campaign expenditures, mobilization, and turnout. Consistent turnout by nonvoters might then lead to greater responsiveness to those who were once political outsiders; in turn, that should lead previous nonvoters to turn out more for future elections. Through that process, courts enforcing the First Amendment could transform the cycle of political marginalization into a cycle of political inclusion.

IV. OVERCOMING *GILL*'S STANDING OBSTACLE

The potential for greater democratic inclusion and equality is not the only benefit offered by a First Amendment challenge to partisan gerrymandering premised on the electoral competition model of associational freedom. Such claims are also much more likely to overcome the standing obstacles the Court raised in *Gill*.

The majority in *Gill* found that the challengers failed to show that the statewide map caused a concrete injury to them as individuals. The Court considered any individual's "abstract interest in policies adopted by the legislature [to be a] nonjusticiable 'general interest common to all members of the public.'"[137] This standing determination represented a fatal blow to the challengers' First Amendment claim and the leading fair representation model of associational freedom that it rested on.

The Court's standing determination in *Gill* is very much consistent with the Court's past review of districting challenges under the Fourteenth Amendment, as the Court has consistently refused to recognize a representational harm as the basis for state constitutional liability. In cases reviewing challenges to malapportioned, multimember, and racially gerrymandered districts under the Fourteenth Amendment, the Court has never found a constitutional violation on the basis of an asserted

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electoral participation"); Shachar & Nalebuff, supra note 133, at 533 (finding that the "probability of a contact is a positive function of the predicted closeness of the race").

135. See supra note 127 and accompanying text.

136. See supra Part II.

137. Gill v. Whitford, 138 S. Ct. 1916, 1931 (2018) (quoting Ex parte Levitt, 302 U.S. 633, 634 (1937) (per curiam)).

representational harm.[138] Instead, when the Court has found a constitutional violation, it has been on the basis of a participatory harm—that is, the damage inflicted on an individual's ability to effectively participate in the political process.[139] The Justices' past recognition of participatory harms from districting practices provides an opening for the electoral competition model of associational freedom as the last viable opportunity to place constitutional constraints on partisan gerrymandering.

Unlike the public's shared interest in particular policies adopted by the legislature, the opportunity to effectively participate is particular and unique to individuals marginalized in specific safe districts due to their associational choice. As the Court in *Gill* explained just before declaring an individual's interest in policies too abstract for standing purposes, an individual's interest "in the overall composition of the legislature is embodied in his right to vote for his representative."[140] Past Supreme Court decisions have determined that this right to vote includes not only the right to cast a ballot but also the right to fully and effectively participate in the political process.[141] Just like the districts that the Court has invalidated in its voting rights precedents because they make the votes of members of particular groups ineffective, safe districts render

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138. In *Whitcomb v. Chavis*, the Court rejected an equal protection challenge by poor African Americans against multimember districts in Indiana on the basis of an asserted representational harm. The Court explained:

> As our system has it, one candidate wins, the other loses. Arguably the losing candidates' supporters are without representation since the men they voted for have been defeated; arguably, they have been denied equal protection of the laws since they have no legislative voice of their own. . . . But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called "safe" districts where the same party wins year after year.

Whitcomb v. Chavis, 403 U.S. 124, 153 (1971).

139. See supra note 101.

140. *Gill*, 138 S. Ct. at 1921.

141. In the seminal case of *Reynolds v. Sims* establishing the one person, one vote requirement under the Fourteenth Amendment Equal Protection Clause, the Court announced:

> [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. . . . Full and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature.

Reynolds v. Sims, 377 U.S. 533, 565 (1964). Over the next two years, the Court elaborated on this right to full and effective participation when it determined that districting schemes that "operate to minimize or cancel out the voting strength of racial or political elements of the voting population" would be deemed a violation of the Equal Protection Clause. Burns v. Richardson, 384 U.S. 73, 88 (1966) (internal quotation marks omitted) (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965)).

the votes of both minority-party political insiders and politically excluded outsiders ineffective as well.[142]

Any such litigation premised on the electoral competition model of associational freedom will eventually have to identify the specific point at which a district's lack of competitiveness will infringe on an individual's associational rights. The confines of a symposium essay do not allow me to take on that question here. But I have offered an important first step in laying out the individual and particularized injuries that arise from the state's drawing of specific districts, with the goal of overcoming *Gill*'s standing obstacle.

CONCLUSION

We do not yet know exactly how powerful competitive electoral districts will be in drawing political outsiders into the political process. Until courts decide to step in and adopt a constitutional mandate that forces states to draw such districts, the impact is impossible to precisely predict. But the available evidence suggests that judicial enforcement of the electoral competition model of associational freedom would not only protect political insiders' right to effective participation in the electoral process but also help incorporate political outsiders in democratic politics. That distinguishes this model from the fair representation model of associational freedom, in which the constitutional benefit, in the form of a guarantee of representation in the legislative process, accrues only to political insiders.

At the core of the First Amendment freedom of association is the goal of creating a more inclusive democracy through the protection of political outsiders and their voices. The less-educated, poor nonvoters of the present do not have the benefit of a formal association seeking to

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142. In *White v. Regester*, the Court found that two multimember districting schemes in Texas violated the constitutional rights of African American and Mexican American voters. See 412 U.S. 755, 766 (1973). The Court explained that it is not enough to sustain a constitutional claim "that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential." Id. at 765–66. Instead, "[t]he plaintiffs' burden is to produce evidence to support finding that the political processes leading up to nomination and election were not equally open to participation by the group in question," and plaintiffs must prove "that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." Id. at 765; see also Rogers v. Lodge, 458 U.S. 613, 624–27 (1982) (finding that multimember districts in Georgia violated the participatory rights of African American voters).

The participatory nature of the constitutional harm in the so-called racial gerrymandering cases is less clear, but the Court's constitutional concern seems to be directed at white voters whose participation will be rendered meaningless in districts designed to secure representation for racial-minority voters. See, e.g., Shaw v. Reno, 509 U.S. 630, 648 (1993) (announcing as one of the harms associated with racial gerrymandering the belief it instills in elected officials that their "primary obligation is to represent only the members of [the favored] racial group, rather than their constituency as a whole").

advance their political goals outside of the political process, as the NAACP once did for African Americans. But judicial enforcement of the freedom of association in the partisan gerrymandering context can nonetheless force political insiders to respond to and promote the political goals of political outsiders.

CAN FREE SPEECH BE PROGRESSIVE?

*Louis Michael Seidman**

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

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

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.

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