LECTURE

THE SANKOFA PRINCIPLE IN PROTEST LAW

*Justin Hansford**

The Columbia Law Review*'s Karl Llewellyn Lecture series*[1] *celebrates pioneers in the law who have innovated and challenged legal theory. The second annual Lecture was delivered by Howard University School of Law Professor Justin Hansford on November 15, 2024, as the opening address at the* Review*'s Symposium on the Law of Protest. A transcript of Professor Hansford's Lecture is published in this Issue.*

INTRODUCTION

> The thing about jail is there is nothing to do. The novelty wears off after about five minutes. My cell was maybe 10-feet long and 8-feet wide, with a toilet, a faucet, and a sink. On the right was a metal bunk bed, and on the left was a third bed. Everything was made of cold metal. The mattress was thin and hard and worn and musky.
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> I'd been arrested earlier that day at a Walmart in Maplewood, Missouri, about 10 miles outside of Ferguson. I was there as part of Ferguson October, a historic, inspiring, and exhausting weekend of protests against the killing of Mike Brown and the pattern of racialized police violence that spawned it. I had been engaged in this struggle for months. At this particular moment, though, I wasn't a protester or participant—I was a legal observer.[2]

I was ostensibly a neutral party who had been arrested and thrown into jail. Any liberal pretensions to neutrality that I had convinced myself of that day perished when confronted with the material reality of police officers who, in the face of five legal observers—three Asian, one Black,

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1. Karl Llewellyn Lecture, Columbia L. Rev., https://www.columbialawreview.org/karl-llewellyn-lecture/ (last visited Feb. 16, 2025).

2. Justin Hansford, I Went to Ferguson to Protect the Protesters. I Got Arrested Instead., Vox (Oct. 24, 2014), https://www.vox.com/2014/10/24/7033567/ferguson-protest-arrested-michael-brown [https://perma.cc/W8JZ-9NP2].

and one white—arrested only the one Black legal observer that day—myself.

> But just like the nationally recognized journalists who ha[d] been arrested in Ferguson while fulfilling their professional duties, I found that no tradition of professional courtesy could save me from the urge to squelch political dissent.
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> I had until then never even seen the inside of a jail cell, not even for a field trip.[3]

Now, a decade later, we have witnessed horrific events in Gaza that compel many of us to confront our own conscience. The UN Special Committee has recently identified these events as genocide,[4] prompting many to consider whether they should heighten their level of protest, prompting some to consider whether their university's or workplace's stance on the issue reflects that institution's stated values, and prompting me to consider the implications of this historical moment through a critical reading of the First Amendment and the law of protest. Although First Amendment jurisprudence is complex and often obscure,[5] we can clarify our understanding by framing our reading of protest law with fundamental critical race theory concepts. This will help us make informed assessments of how institutions of power will respond to our activism in the years to come.

Two critical race theory concepts in particular illuminate our understanding of protest law: interest convergence[6] and the critique of liberal notions of colorblindness.[7] When applied together, these ideas provide

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3. Id.

4. Press Release, Off. of the UN High Comm'r for Hum. Rts., UN Special Committee Finds Israel's Warfare Methods in Gaza Consistent With Genocide, Including Use of Starvation as Weapon of War (Nov. 14, 2024), https://www.ohchr.org/en/press-releases/2024/11/un-special-committee-finds-israels-warfare-methods-gaza-consistent-genocide [https://perma.cc/Y4DT-WEHP].

5. See Steven J. Heyman, The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence, 19 Wm. & Mary Bill Rts. J. 661, 663 (2011) ("[O]ur free speech jurisprudence seems highly conflicted: in some cases, courts interpret the First Amendment to promote its core values, while in others they insist that speech is entitled to protection despite the harm that it may cause to those values."); John Inazu, First Amendment Scrutiny: Realigning First Amendment Doctrine Around Government Interests, 89 Brook. L. Rev. 1, 2 (2023) ("First Amendment jurisprudence . . . relies on a dizzying array of standards of review, including strict, exacting, intermediate, and rational basis review. And it creates confusing and sometimes contradictory triggers for those standards . . . further complicated by the Court's normative parsing of different kinds of . . . First Amendment expression and action.").

6. See Derrick A. Bell, Jr., Comment, *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 528 (1980) ("Further progress to fulfill the mandate of *Brown* is possible to the extent that the divergence of racial interests can be avoided or minimized. . . . [O]ver time, all will reap the benefits from a concerted effort towards achieving racial equality.").

7. See Neil Gotanda, A Critique of "Our Constitution Is Color-Blind", 44 Stan. L. Rev. 1, 7–8 (1991) (describing the liberal practice of "color-blind constitutionalism,"

us a framework for effectively analyzing the past, present, and future of First Amendment law regarding protests as we enter the era of Project 2025.[8]

I. THE FIRST AMENDMENT AND THE INTEREST-CONVERGENCE DILEMMA

The First Amendment, incorporated to the states through the Fourteenth Amendment,[9] states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[10] While this sentiment is beautiful, First Amendment rights have never been absolute—limitations on freedom of expression have varied from the doctrinal (libel,[11] true threats[12]) to the material (the hesitancy to insult your boss when under contract pursuant to an at-will employment agreement). But when regulation of political speech involving race and inequality becomes the topic of the day, attempting to grasp—or, even more so, predict—the legal response becomes an exercise that would befuddle even the most careful observer, especially if not guided by theoretical insights that might illuminate the patterns. This is especially so when, as is often the case, free speech and racial justice are framed as being in zero-sum conflict with the values of fairness, neutrality, and freedom.[13]

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wherein "public officials exercising state powers [must] operate according to the rule that race is *not* to be considered").

8. See Heritage Found., Project 2025 Presidential Transition Project, https://www.project2025.org/ [https://perma.cc/34W5-RBVA] [hereinafter Project 2025 Website] (last visited Feb. 17, 2025) (outlining a plan authored by hundreds of conservative scholars and policy experts to "offer[] a menu of policy suggestions to meet our country's deepest challenges and put America back on track").

9. See U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); see also, e.g., Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming that "freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States").

10. U.S. Const. amend. I.

11. See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283–84 (1964) (affirming that awarding damages in libel actions brought by public officials is not unconstitutional under the First Amendment if there is proof of "actual malice").

12. See Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) (establishing that offensive political hyperbole is protected by the First Amendment unless the government can prove that it constitutes "a 'true threat'").

13. See, e.g., Heiko Giebler & Wolfgang Merkel, Freedom and Equality in Democracies: Is There a Trade-Off?, 37 Int'l Pol. Sci. Rev. 594, 594–95 (2016) ("Building on centuries of political thought, more recent views on this question range from the firm conviction that too much socio-economic equality jeopardises political and individual

This binary fails to fully capture critical race theory's intellectual contributions to our understanding of the law, especially its critique of neutrality rhetoric and the role of interest convergence in the evolution of legal principles.[14]

In the tradition of the Ghanaian Akan people, the Sankofa is a symbol represented by a bird with its head looking backwards while carrying an egg in its beak, symbolizing taking care of the future.[15] The literal translation means to "go back and get it."[16] The Sankofa principle counsels the wisdom of predicating future action on past patterns.[17] If we similarly were to begin our inspection of the future of free speech and protest law by looking backwards before looking forward,[18] the recurring theme that would emerge is that protests and acts of political dissent have historically been met with more violent state repression when they have implicated questions of identity.[19] This pattern has transcended the bounds of race, echoing in debates around class and gender,[20] and trans-

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freedom to the position that a certain level of socio-economic equality is necessary for the proper realisation of freedom." (citations omitted)); Paul Spicker, Why Freedom Implies Equality, 2 J. Applied Phil. 205, 207 (1985) ("The distinction between negative and positive freedom . . . rests on the assumption that the elements of freedom can be separated from each other. MacCallum argues against this that all freedom is necessarily composed of the freedom *of* a person *from* restraints *to* do something." (citing Gerald C. MacCallum, Jr., Negative and Positive Freedom, 76 Phil. Rev. 312 (1967))).

14. See Justin Hansford, The First Amendment Freedom of Assembly as a Racial Project, 127 Yale L.J. Forum 685, 688–89 (2018), https://www.yalelawjournal.org/pdf/Hansford_qqek3ose.pdf [https://perma.cc/XB4J-HHTJ] [hereinafter Hansford, The First Amendment Freedom of Assembly] ("Critical race theory scholars have long articulated the First Amendment's extraordinarily blunt and hypocritical approach to addressing racial issues." (citing 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 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))).

15. See Appiah K. Kwarteng, The Sankofa Bird and Reflection, J. Applied Christian Leadership, Spring 2016, at 60, 60 ("The Sankofa bird is a symbolic Ghanaian expression represented by a bird whose head is looking back while holding an egg in her beak, which is her future. Her feet facing forward also symbolize moving into the future.").

16. Id. (internal quotation marks omitted).

17. Id.

18. Cf. Paul Gowder, Constitutional Sankofa, 112 Geo. L.J. 1437, 1439 (2024) (describing Sankofa, a term that "several scholars of Afrofuturist art" use to describe the practice of intertwining history and the future).

19. See Nina Farnia, Imperialism and Black Dissent, 75 Stan. L. Rev. 397, 457–61 (2023) (arguing that, starting in the Cold War era, Black dissent movements started being criminalized with unparalleled levels of interagency coordination in an overt effort to ensure the continued centering of white supremacy throughout all of First Amendment jurisprudence).

20. See, e.g., Eric Holder with Sam Koppelman, Our Unfinished March 78–80 (2022) (describing a violent reaction to a suffragist march that caused "more than two hundred women who attended . . . to go to the hospital with injuries"); Laura Weinrib, The Taming of Free Speech: America's Civil Liberties Compromise 15 (2016) ("In a decade marked by

cended the bounds of the state, echoing in universities and other institutions of power.[21]

The historical trajectory of the law in this area begins at the nation's Founding. It should go without saying that racial justice dissent before abolition was met with the most violent responses, including the lash for those enslaved (and other horrible incidents of violence too ghastly to mention).[22] But in the 1800s, even white workers, including a growing number of immigrant laborers, resisted the deplorable working conditions and meager wages of the era, only to find their resistance met with violent responses from the law.[23] This included the Great Railroad Strike of 1877, which involved over 100,000 workers and paralyzed the nation's transportation system;[24] the Haymarket Riot of 1886, which began as a

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revolution and unprecedented destruction abroad, the true impetus for rethinking the American civil liberties tradition was . . . class war.").

21. See Emma Tucker, Police Tactics at Campus Protests Reveal Disparities in Approaches to Public Order and Lessons Learned Post-George Floyd, CNN, https://edition.cnn.com/2024/05/05/us/police-tactics-campus-protests-george-floyd/index.html [https://perma.cc/WU38-CF3A] (last updated May 5, 2024) ("Civil rights groups have criticized . . . excessive police response to [pro-Palestine] protests as officers, clad in riot gear, swarm campuses and in some cases have deployed rubber bullets, chemical irritants and pepper balls . . . ."); see also Tom Gjelten, Peaceful Protesters Tear-Gassed to Clear Way for Trump Church Photo-Op, NPR (June 1, 2020), https://www.npr.org/2020/06/01/867532070/trumps-unannounced-church-visit-angers-church-officials [https://perma.cc/NH4D-6NAG] (describing how police tear-gasses and pushed protesters on the plaza in front of St. John's Church).

22. See Christine Mathias, The Black Roots of Abolition, Dissent, Fall 2017, at 164, 164 (reviewing Manisha Sinha, The Slave's Cause: A History of Abolition (2016)) ("Abolitionism is often depicted as an ineffectual campaign led by bourgeois liberals, teetotalers, and 'perpetual naysayers,' but Sinha argues that it was actually a radical, interracial movement. Most importantly, she shows that slaves' resistance galvanized abolitionists, rather than the other way around."); J.D. Dickey, The Tormented Rise of Abolition in 1830's America, TIME (Mar. 1, 2022), https://time.com/6131768/republic-of-violence-abolition-literature/ [https://perma.cc/KJ4B-3AP6] ("Abolition in America stood at a crossroads in the mid-1830s. Reviled in the national press, denounced by demagogues, and attacked by mobs, abolitionists faced unprecedented hostility and violence coordinated by Southerners and their sympathizers in the North.").

23. See Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, at 30–31 (Henry Steele Commager & Richard B. Morris eds., Perennial Classics 2002) (1988) (detailing the rebirth of a multiethnic labor movement, sometimes led by immigrant workers protesting wage cuts, that intensified into strikes across the nation that were suppressed by federal troops).

24. See Paul F. Lipold, "Striking Deaths" at Their Roots: Assaying the Social Determinants of Extreme Labor–Management Violence in US Labor History—1877–1947, 38 Soc. Sci. Hist. 541, 548–49 (2014) (noting that "the year of the Great Strike of 1877" was the "single most violent year ever recorded in American labor history . . . wherein an estimated 100 individuals lost their lives"); Ian Cooper-Smith, The Great Railroad Strike of 1877, Emergency Workplace Org. Comm. (Dec. 5, 2022), https://workerorganizing.org/the-great-railroad-strike-of-1877-5576/ [https://perma.cc/AHC4-688T] (last updated Dec. 5, 2023).

peaceful union rally;[25] and the Pullman Strike of 1894, which affected over 250,000 workers.[26] The state and local police, the National Guard, and the militias sent by railroad owners worked together to suppress the Great Railroad Strike of 1877, jailing nearly 1,000 people and killing another 100.[27] The Haymarket Riot ended after police fired upon the crowd, resulting in numerous deaths[28] and the mayor declaring all public gatherings unlawful.[29]During the Pullman Strike, President Grover Cleveland criminalized the strike and mobilized over twelve thousand federal troops to suppress the dissenting workers.[30]

Later, Eugene Debs—an influential activist, labor organizer, and presidential candidate—was indicted for sedition based on a speech delivered during World War I to a public assembly in Canton, Ohio, in 1918.[31] The apparent sin of his sermon was that he urged attendees to recognize their worth beyond mere "cannon fodder."[32] The Supreme

25. See Douglas O. Linder, The Haymarket Riot and Trial: An Account, Famous Trials, https://famous-trials.com/haymarket/1181-home [https://perma.cc/4Y2D-D4RF] [hereinafter Linder, The Haymarket Riot: An Account] (last visited Feb. 22, 2025) (describing how police officers fired into a crowd of strike workers that "insisted that the gathering was peaceable").

26. Proclamation No. 9233, 80 Fed. Reg. 10,315, 10,316 (Feb. 19, 2015) ("At its peak, the Pullman strike affected some 250,000 workers in 27 States and disrupted Federal mail delivery. . . . President Cleveland ultimately intervened with Federal troops. The strike ended violently by mid-July, a labor defeat with national reverberations.").

27. Philip Plotch, Rutherford B. Hayes (1877–1881): The Great Railroad Strike, Eno Ctr. for Transp. (July 19, 2024), https://enotrans.org/article/rutherford-b-hayes-1877-1881-the-great-railroad-strike/ [https://perma.cc/EAV2-QT4T] ("A combination of city and state law enforcement, the National Guard, and private militias organized by the railroads, all fought against the workers. Over the course of the strikes, . . . nearly 1,000 people were jailed and about 100 were killed.").

28. See Linder, The Haymarket Riot: An Account, supra note 25 (noting that a homemade bomb thrown at a company of Chicago police "set off a frenzy of fire from police pistols that would leave eight officers and an unknown number of civilians dead, and scores more injured").

29. See Douglas O. Linder, The Haymarket Riot and Trial: A Chronology, Famous Trials, https://famous-trials.com/haymarket/1174-chronology [https://perma.cc/9F43-4PNW] (last visited Feb. 23, 2025) ("In response to the Haymarket Riot, Mayor Harrison proclaims that all public gatherings are now illegal.").

30. The Origins of Labor Day, PBS News (Sept. 2, 2001), https://www.pbs.org/newshour/economy/business-july-dec01-labor_day_9-2 [https://perma.cc/524K-RLNW].

31. See Erick Trickey, When America's Most Prominent Socialist Was Jailed for Speaking Out Against World War I, Smithsonian Mag. (June 15, 2018), https://www.smithsonianmag.com/history/fiery-socialist-challenged-nations-role-wwi-180969386/ [https://perma.cc/64ZH-6MXT].

32. Eugene V. Debs, Speech at Nimisilla Park, Canton, Ohio (June 16, 1918), *in* Debs and the War 7, 23 (Nat'l Off. Socialist Party n.d.); see also Eugene V. Debs Is Arrested for Sedition, Richmond Palladium & Sun-Telegram, July 1, 1918, at 11, https://newspapers.library.in.gov/cgi-bin/indiana?a=d&d=RPD19180701.1.11&srpos=2&e=01-07-1918-01-07-1918–en-20–1–txt-txIN-%22Eugene+V+Debs%22 [https://perma.cc/TS5K-PWM9] ("In the Canton speech, Debs declared the purpose of the allies in the war is the same as that of the central powers; he urged his hearers to know that 'they were fit for something better than for cannon fodder' . . . ." (quoting Eugene Debs)).

Court dismissed his First Amendment defense and upheld his conviction on federal charges for obstructing military recruitment and enlistment services.[33] *Debs v. United States* epitomized the migration of the legal suppression of political dissent (here on the grounds of class) from law enforcement officers on the street to Supreme Court Justices in the pages of the U.S. Reports. Debs was sentenced to ten years in prison but continued to run for president behind bars.[34]

In the 1930s and 1940s, similar efforts to suppress the speech of antiwar protesters surfaced, particularly affecting those advocating along lines of race and class.[35] Despite constraints on First Amendment rights, both as applied by police and as conceptualized by judges, the spirit of political dissent would endure throughout this period, reaching an apex again in the aftermath of the arrest of Rosa Parks and the launch of the civil rights movement.[36] Professor Bertrall Ross notes that, as political outsiders, advocates for racial justice had little choice but to assert their constitutional right to freedom of association as a means of advancing the interests of disfavored minorities and intervening in an entrenched two-party system that marginalized their voices.[37] When the reach of

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33. See Debs v. United States, 249 U.S. 211, 216 (1919) (finding the use of speech to obstruct military recruitment an indictable offense when mens rea is established).

34. Trickey, supra note 31.

35. See, e.g., United States v. United Mine Workers of Am., 330 U.S. 258, 305 (1947) (holding that "the course taken by" an antiwar union "carried with it such a serious threat to orderly constitutional government, and to the economic and social welfare of the nation, that a fine of substantial size [was] required in order to emphasize the gravity of the offense"); Herndon v. Lowry, 301 U.S. 242, 256 (1937) ("We sustain[] the power of the government or a state to protect the war operations of the United States by punishing intentional interference with them."). But see Stromberg v. California, 283 U.S. 359, 361 (1931) (striking down a state law that charged defendants for "wilfully, unlawfully and feloniously display[ing] a red flag and banner in a public place and in a meeting place as a sign, symbol and emblem of opposition to organized government" (internal quotation marks omitted) (quoting the information charging the defendants)).

36. See Caitlin Wiesner, Rosa Parks Beyond the Bus Boycott: A Life of Activism, N.Y. Hist. (Feb. 25, 2020), https://www.nyhistory.org/blogs/rosa-parks-beyond-the-bus-boycott-a-life-of-activism [https://perma.cc/4XRQ-JWKL] ("[Rosa Parks's] refusal to surrender a bus seat to a white passenger in 1955 led to her arrest and sparked the 381-day Montgomery bus boycott in Alabama, a pivotal protest of the Civil Rights era that helped turn a young Rev. Martin Luther King Jr. into a national figure."); see also Julian E. Zelizer, Confronting the Roadblock: Congress, Civil Rights, and World War II, *in* Fog of War: The Second World War and the Civil Rights Movement 47 (Kevin M. Kruse & Stephen Tuck eds., 2012) (discussing the surge in political activism around civil rights and the "generational change in Congress that benefitted civil rights" in the aftermath of World War II).

37. See Bertrall Ross, Partisan Gerrymandering, the First Amendment, and the Political Outsider, 118 Colum. L. Rev. 2187, 2194 (2018) (noting that "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"); cf. David L. Hudson, Jr., First Amendment Freedoms Developed During the Civil Rights Movement, Found. for Individual Rts. & Expression, https://www.thefire.org/research-learn/first-amendment-freedoms-developed-during-civil

these constitutional protections came under dispute, the Communist Party and civil rights organizations like the NAACP played crucial roles in challenging the narrow interpretations of the First Amendment that stifled dissent during this epoch.[38]

During the rise of the more liberal Warren Court in the 1950s, and in the shadow of efforts to enforce *Brown v. Board of Education*,[39] the Supreme Court expressed concern about the chilling effect of various legal actions designed to stifle civil rights protesters, both through police practices on the streets and judicial rulings in the courts.[40] In addition to the speech concerns at stake, in *Cooper v. Aaron*, the Court reminded us that its own interests in the supremacy of the U.S. Constitution converged with the associational and equality interests at stake in the fight against interposition.[41]

These debates around speech took place against the political backdrop of mid-twentieth-century American political discourse. For many years, dissenters—whether labor activists, civil rights organizers, or antiwar protesters—faced antidemocratic barriers to participating in fair electoral contests, so they had little to no alternative but to take to the streets.[42] When even their protest speech in the streets faced suppression—and even the Supreme Court did not offer them solace—few would describe the outcome as democratically inclusive.[43]

-rights-movement [https://perma.cc/6BKG-ZDSV] (last updated Sept. 29, 2024) ("'Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association,' the Court wisely went on to observe, 'particularly where a group espouses dissident beliefs.'" (quoting NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958))).

38. See Ross, supra note 37, at 2194–98.

39. 347 U.S. 483 (1954).

40. See Tyler Valeska, First Amendment Limitations on Public Disclosure of Protest Surveillance, 121 Colum. L. Rev. Forum 241, 242 (2021), https://columbialawreview.org/wp-content/uploads/2021/12/Valeska-First_Amendment_Limitations_On_Public_Disclosure_Of_Protest_Surveillance.pdf [https://perma.cc/9YSW-4D9P] ("These cases—beginning in 1958 with *NAACP v. Alabama ex rel. Patterson* and continuing through 2021 with [*Americans for Prosperity Foundation v.*] *Bonta*—set forth a clear doctrinal rule that government action may not unduly chill the exercise of First Amendment associational rights through disclosure.").

41. See 358 U.S. 1, 6 (1958) (reaffirming that "good faith compliance with the principles declared in *Brown* might in some situations 'call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with . . . constitutional principles,'" and that these vital principles can never be disregarded (quoting Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300 (1955))).

42. See Zeynep Tufekci, Do Protests Even Work?, The Atlantic (June 24, 2020), https://www.theatlantic.com/technology/archive/2020/06/why-protests-work/613420/ (on file with the *Columbia Law Review*) ("In the long term, protests work because they can undermine the most important pillar of power: legitimacy. . . . Losing legitimacy is the most important threat to authorities, especially in democracies, because authorities can do only so much for so long to hold on to power under such conditions.").

43. See generally Jason Morgan Ward, Defending White Democracy: The Making of a Segregationist Movement & the Remaking of Racial Politics, 1936–1965 (2011) (outlining

The Warren Court marked a pivotal moment when many core First Amendment cases, brought on appeal following the arrests of civil rights protesters seeking to integrate American institutions, led to decisions that opened space for a fledgling right to protest.[44] The Court's interests in the Supremacy Clause and enforcing *Brown* and the civil rights protesters' interests in fulfilling the promise of equal justice under law had, if only for a moment, finally converged.[45]

Yet, as the civil rights movement evolved into the Black Power movement, and as that transition ushered in more aggressive confrontations with law enforcement and demands for more expansive racial justice remedies than integration alone,[46] the jurisprudential window for lawful protest speech, which advocates had for decades strained to pry open, slammed back shut.[47] The interests of the Court and the protesters no longer converged.

One could argue that this is the state of the law even today. For example, in October 2023, the Supreme Court was asked to intervene in a lawsuit brought in the aftermath of a 2016 Black Lives Matter protest in

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the violent suppression of civil rights activism and the debate over Southern states' democratic status amid the rising specter of, and resistance against, significant non-white political participation).

44. See, e.g., Shuttlesworth v. City of Birmingham, 394 U.S. 147, 149–51 (1969) (holding that a city ordinance that conferred "virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets or public ways" violated the petitioner's First Amendment right to protest civil rights (quoting Birmingham, Ala., Gen. Code § 1159 (1969))); Brown v. Louisiana, 383 U.S. 131, 135–37, 141–43 (1966) (reversing on free speech grounds the "breach of the peace" convictions of five protesters who conducted a peaceful sit-in to protest segregation of their city's public library); Cox v. Louisiana, 379 U.S. 536, 558 (1965) ("[T]he practice in Baton Rouge allowing unfettered discretion in local officials in the regulation of the use of the streets for peaceful [civil rights] parades and meetings is an unwarranted abridgment of appellant's freedom of speech and assembly secured to him by the First Amendment . . . ."); cf. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266–68, 271–78 (1964) (holding that an advertisement in a newspaper is constitutionally protected despite containing an overtly political message).

45. Cf. Bell, supra note 6, at 529 ("For [B]lack[] [people], the goal in school desegregation suits remained the effective use of the *Brown* mandate . . . . These efforts received unexpected help from the excesses of the massive resistance movement that led courts to justify relief under *Brown* . . . on issues of constitutional interpretation.").

46. Sandhya Kajeepeta & Daniel K. N. Johnson, NAACP LDF Thurgood Marshall Inst., Police and Protests: The Inequity of Police Responses to Racial Justice Demonstrations 4–5 (2023), https://tminstituteldf.org/wp-content/uploads/2023/10/Police-and-Protests_PDF-3.pdf [https://perma.cc/BN2F-WE38] ("By the mid-1960s through 1970s, the U.S. experienced a nationwide surge of protests and rebellions against anti-Black police violence. . . . [T]hese protests . . . were often met with more police brutality. A recent study found that racial uprisings in the 1960s and 1970s led to an increase in police killings of civilians . . . .").

47. See Hansford, The First Amendment Freedom of Assembly, supra note 14, at 698 ("*Adderley* [*v. Florida*] signaled the passing of the interest convergence moment, construing the remaining protesters as anti-authoritarian rascals. The jurisprudence towards these protesters shifted with the protestors' newfound Black radical goals and tactics.").

Baton Rouge, Louisiana, led by activist DeRay Mckesson.[48] Mckesson's encouragement of the public's attendance of the gathering via social media came under scrutiny when an officer was injured by an anonymous projectile during the protest.[49] The officer subsequently sued Mckesson, claiming that the foreseeable violence warranted damages exceeding $75,000.[50] Mckesson argued that his protest activity was protected under the First Amendment,[51] but the Fifth Circuit held that he could be held liable for organizing protests that resulted in harm to law enforcement officers if every element of the negligence claim could be proven on remand to the trial court.[52] The Supreme Court denied certiorari,[53] refusing to hear the case and leaving in place the Fifth Circuit's ruling, which one judge described as "reduc[ing] First Amendment protections for protest leaders to a phantasm."[54] While the full implications of *Mckesson* are not yet clear, the U.S. District Court for the Middle District of Louisiana ruled in favor of Mckesson's First Amendment

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48. Petition for a Writ of Certiorari, Mckesson v. Doe, 144 S. Ct. 913 (2024) (mem.) (No. 23-373), 2023 WL 6623643. This was the second time that the Court was asked to intervene in Mckesson's case. In 2020, the Court issued a per curiam decision instructing the Fifth Circuit to certify questions of state tort law to the Supreme Court of Louisiana. Mckesson v. Doe, 141 S. Ct. 48, 51 (2020) (per curiam). The Supreme Court of Louisiana issued an opinion clarifying that Louisiana state law allowed recovery under the facts of Mckesson's case, if he was found liable. Doe v. Mckesson, 339 So. 3d 524, 532–33 (La. 2022) ("Mr. Mckesson's actions, in provoking a confrontation with Baton Rouge police officers through the commission of a crime . . . with full knowledge that the result of similar actions taken by BLM . . . resulted in violence and injury not only to citizens but to police, would render Mr. Mckesson liable for damages . . . .").

49. See Doe v. Mckesson, 945 F.3d 818, 823, 832 (5th Cir. 2019) (outlining appellant-officer's allegation that the protest was "catalyzed on social media" by Mckesson, who "was the prime leader and an organizer of the protest" and who "did nothing to prevent the violence or to calm the crowd" when protesters began throwing rock-like objects at the police (internal quotation marks omitted) (quoting Doe v. Mckesson, 272 F. Supp. 3d 841, 849 (M.D. La. 2017), aff'd in part, rev'd in part 71 F.4th 278 (5th Cir. 2023))), vacated, 141 S. Ct. 48 (2020).

50. See Complaint for Damages at 1, Doe v. Mckesson, No. 3:16-CV-00742-BAJ-RLB (M.D. La. filed Nov. 7, 2016).

51. See *Mckesson*, 71 F.4th at 284 (rejecting "Mckesson's argument that imposing liability in these circumstances would violate the First Amendment" because "[u]nder *Claiborne*, where a defendant 'authorized, directed, or ratified specific tortious activity,' the First Amendment allows state law to impose liability for 'the consequences of that activity'" (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982))).

52. Id. at 299 ("These legal defenses and procedural safeguards confirm that allowing Doe's claim to proceed will not create strict liability for protest leaders every time an errant protestor injures someone. Rather, Mckesson can be held liable only if Doe proves the specific elements of his negligence claim.").

53. *Mckesson*, 144 S. Ct. at 913 (mem.). But see id. at 914 (Sotomayor, J., respecting the denial of certiorari) ("Because this Court may deny certiorari for many reasons, including that the law is not in need of further clarification, its denial today expresses no view about the merits of Mckesson's claim. . . . I expect the[] [lower courts] to give full and fair consideration . . . in any future proceedings . . . .").

54. *Mckesson*, 71 F.4th at 306 (Willett, J., concurring in part and dissenting in part).

speech rights on remand.[55] The officer's appeal is still pending before the Fifth Circuit.[56]

What are we to make of this shifting jurisprudence that aligns with the protesters' interests at certain historical moments while diverging from them at others? When the interests of those in power align with those of protesters, we often witness a favorable opening in the proverbial window of Supreme Court free speech jurisprudence. Conversely, when those interests diverge, that window of protester-friendly jurisprudence tends to close rapidly. And to the extent that patterns of free speech law transcend the bounds of the state, the opening or closing of these windows results in a temperature change in institutions across society, including universities and other locations of power.

This leads me to conclude that although McKesson's arguments have thus far been successful in the lower courts, the Supreme Court's 2024 disposition in the *Mckesson* case[57] and subsequent patterns in universities' responses to student protests nationwide[58] read as a modern-day harbinger for the status of jurisprudence in the area of free speech and race today as an era of a window more closed than open.

What are the implications of this conclusion for free speech and the law of protest today? In the most recent presidential election, many commentators expounded on the relevance of a political agenda called Project 2025 as a precursor to contemporary federal policy.[59] Among Project 2025's many objectives, it aims to restrict free speech for those expressing progressive political viewpoints on issues of identity— particularly by prohibiting the teaching of sensitive issues involving race, gender, and class[60] and by arguing that doing so interferes with parents'

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55. Ford v. Mckesson, 739 F. Supp. 3d 344, 353 (M.D. La. 2024) ("Defendant cannot be held liable in negligence for actions taken while exercising his First Amendment freedoms." (citing Counterman v. Colorado, 143 S. Ct. 2106, 2116, 2117 n.5 (2023))).

56. Ford v. Mckesson, No. 24-30494 (5th Cir. docketed Aug. 7, 2024).

57. See supra note 53 and accompanying text.

58. See Isabelle Taft, How Universities Cracked Down on Pro-Palestinian Activism, N.Y. Times (Nov. 25, 2024), https://www.nytimes.com/2024/11/25/us/university-crackdowns-protests-israel-hamas-war.html (on file with the *Columbia Law Review*).

59. See, e.g., Amber Phillips, Will Trump Enact Project 2025? Here's What's in It., Wash. Post (Nov. 6, 2024), https://www.washingtonpost.com/elections/2024/11/06/project-2025-policies-trump-president/ (on file with the *Columbia Law Review*) ("[I]t's very likely that at least some of Project 2025 will come to fruition in [Trump's] second administration."); see also Project 2025 Website, supra note 8.

60. See Press Release, PEN Am., Analysis: Project 2025 Wants to Censor Government Language With a Hit List of Forbidden Words (Oct. 15, 2024), https://pen.org/press-release/analysis-project-2025-wants-to-censor-government-language-with-a-hit-list-of-forbidden-words/ [https://perma.cc/EY8P-CKKL] ("Despite its explicit claim to champion free speech, . . . Project 2025 instead would do the opposite with proposals that are 'unabashedly hostile' to free expression and the free flow of information . . . propos[ing] banning words and phrases like 'diversity,' 'gender,' 'reproductive health,' and 'sexual orientation' from government documents . . . ." (quoting James Tager & Hadar Harris, Project 2025: Policy Proposal Poses Threats to Freedom of Expression at

rights over their children's education. Instead, it seeks to impose a color-blind interpretation of American history.[61] For advocates of this plan, the goal is to eliminate what they perceive to be critical race theory–driven educational activities.[62] In predicting the likelihood of the success of Project 2025, the question to ask here, as we so often should when analyzing and predicting legal trends, is whose interests converge?

Ironically, an interest-convergence analyst may conclude that this moment presents yet another instance in which the interests of those in power may converge with those of "protesters." The self-styled protesters in this instance—the "parental rights" advocates supporting Project 2025 who have posed as political outsiders to galvanize energy for their agenda—do not share an outsider political identity on the grounds of race, class, or gender.[63]

Home and Abroad, PEN Am. (Oct. 15, 2024), https://pen.org/report/project-2025-part-ii/ [https://perma.cc/39S9-EYP8])); see also Project 2025 Presidential Transition Project, Mandate for Leadership: The Conservative Promise 342–43 (Paul Dans & Steven Groves eds., 2023), https://static.project2025.org/2025_MandateForLeadership_FULL.pdf [https://perma.cc/KF2Q-HWNB] [hereinafter Project 2025 Full Text] ("Those who subscribe to [critical race] theory believe that racism . . . is appropriate—necessary, even—making the theory more than merely an analytical tool to describe race in public and private life. The theory disrupts America's Founding ideals of freedom and opportunity."); Kevin D. Roberts, Foreword to Project 2025 Full Text, supra, at 4–5 (advocating for "deleting the terms sexual orientation and gender identity ('SOGI'), diversity, equity, and inclusion ('DEI'), gender, gender equality, gender equity, gender awareness, gender-sensitive, abortion, reproductive health, [and] reproductive rights . . . out of every federal rule, agency regulation, contract, grant, regulation, and piece of legislation that exists").

61. See Roberts, supra note 60, at 5 ("The noxious tenets of 'critical race theory' . . . should be excised from curricula in every public school in the country. These theories poison our children, who are being taught . . . that the color of their skin fundamentally determines their identity and even their moral status . . . .").

62. Id.

63. See Project 2025 Full Text, supra note 63, at 342–47 (describing policies aimed to restore parental rights). For the position that parental rights activists have "posed" as political outsiders, see Corey A. DeAngelis, The Parent Revolution: Rescuing Your Kids From the Radicals Ruining Our Schools xi–xii (2024) ("Parents haven't forgotten how powerless they suddenly felt in 2020. Power-hungry teachers unions finally overplayed their hand and sparked a parent revolution."); see also id. at xv ("I came to the conclusion that in America, nowhere was the problem of monopoly power more pronounced—and more harmful to our society—than the nation's government-run school system."). Perhaps even more pronounced than the narrative of marginalized parental choice was the narrative of the suppressed voice of uncomfortable students. See, e.g., Jeff Minick, Ending Critical Race Theory for the Children's Sake, Intell. Takeout (Mar. 23, 2021), https://intellectualtakeout.org/2021/03/ending-critical-race-theory-for-the-childrens-sake/ [https://perma.cc/3FG2-ZCCS] ("Now for the hard part. . . . We must risk becoming those parents despised by some teachers and administrators, gadflies who refuse to be denied, who ask questions and demand real answers."); Nearly 70% of Conservative Students Fear Social Repercussions for Opinions, Study Finds, Young Am.'s Found. (July 19, 2023), https://yaf.org/news/nearly-70-of-conservative-students-fear-social-repercussions-for-opinions-study-finds/ [https://perma.cc/K45E-8DAG] (arguing that "[s]ociety has fostered an environment that causes students to shy away from

In material terms, the past and present concentration of financial and political power that rests in their hands would position parental rights advocates as the ultimate political insiders; their narratives of race, class, and gender still serve as the "stock" narratives in American discourse.[64] But disseminating the misinformation that racial justice counternarratives of race, gender, and class have emerged from the margins and entered the center of political discourse and eliciting fear of the political consequences of that eventuality, Project 2025 supporters and parental rights advocates have framed themselves as victims of "woke" culture and political correctness. Their interests have aligned with those in power. The window of interest alignment has opened for them as wide as a bay window on seafront property.

What an extraordinary turn of events. In today's reality, the theory of interest convergence,[65] while perhaps resulting in a disheartening prognostication, continues to serve as an illuminating tool for understanding current and future trends in the areas of free speech, First Amendment law, and in protest law specifically, whether those trends manifest in court or in local school board politics. If protesters, lawyers, professors, and advocates of free speech engage in an unflinching analysis of the converging interests at play during protest-planning moments, if they map the power dynamics at work, and if they articulate the stakes involved to better anticipate how universities, the Supreme Court, police, and others in positions of power will respond to their protest actions, interest convergence can help them predict outcomes and thereby engage in more effective strategic planning.

II. THE MYTH OF "NEUTRALITY"

A second lesson from the critical race theory reading of the moment relates to the parallels between the aspiration of "colorblindness" under more conservative readings of Fourteenth Amendment jurisprudence and the notion of "content neutrality" in the context of the First Amendment.[66] In both cases, the liberal fantasy of fairness through neutral objectivity provides a false sense of security to decisionmakers who seek to avoid the more difficult and uncomfortable questions of power

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exercising their vital rights that they are guaranteed by the First Amendment of the Constitution" and that "young people . . . hold these fears on a daily basis.").

64. Cf. Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411, 2411–16 (1989) (explicating how both ingroups and outgroups tell stories to reinforce their identities, shared understandings, and cohesion and proposing that outgroups can use "counter-storytelling" to challenge oppressive narratives and reveal hidden presumptions).

65. See supra note 6.

66. See Catharine A. MacKinnon, Weaponizing the First Amendment: An Equality Reading, 106 Va. L. Rev. 1223, 1224–25 (2020) (discussing "content neutrality," "gender neutrality," and "racial neutrality (often termed colorblindness)" as "unable to support opposition to the way things are, or to counter and change it").

dynamics that interest convergence uncovers and ignore the relevance of identity to a sound analysis of political trends and legal decisionmaking. In both the First and Fourteenth Amendment contexts, the fantasy of objectivity tends to uphold and reproduce current hierarchies.[67]

As I reflect on my arrest in Ferguson,[68] perhaps the greatest sin of the myth of neutrality is the psychological hold it exerts even on those fighting for change; the difficulty for even those versed in its verisimilitude to fully embrace the vacuity of its promise; the challenge in reminding oneself that, however comforting the temptation of its warm, soft, blanket-like protection, still the myth falls flat before cold reality.

Consider 2023. Columbia University created free speech zones,[69] adhering to a tradition rooted in First Amendment jurisprudence while claiming a stance of neutrality in campus disputes over the politics of Gaza.[70] The president of Harvard University adopted a similar position in a congressional hearing.[71] University officials in both instances, following the mainstream understanding of First Amendment free speech orthodoxy,[72] apparently believed they could rely on the purported safe harbor

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67. See id.; cf. Eduardo Bonilla-Silva, Racism Without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America 233 (6th ed. 2021) (arguing that in the ongoing discussion about race, there is a vast collection of arguments, terms, and stories that white people employ to rationalize and ultimately uphold racial inequalities).

68. See supra notes 2–3 and accompanying text.

69. Sarah Huddleston, Columbia Establishes 'Demonstration Areas' and Times, Alters Disciplinary Procedure for Students in Violation of New Event Policy, Colum. Spectator (Feb. 19, 2024), https://www.columbiaspectator.com/news/2024/02/19/columbia-establishes-demonstration-areas-and-times-alters-disciplinary-procedure-for-students-in-violation-of-new-event-policy/ [https://perma.cc/2PQJ-BUU8].

70. See Layla Saliba, Opinion, Free Speech at Columbia Is a Joke, Colum. Spectator (Apr. 2, 2024), https://www.columbiaspectator.com/opinion/2024/04/02/free-speech-at-columbia-is-a-joke/ [https://perma.cc/SF6C-PL2V] ("Columbia administration has continuously reached new lows throughout this school year as they seemingly work overtime to curb student expression and freedom of speech. It is beyond hypocritical for Columbia to tout their commitment to the First Amendment . . . when those same freedoms are not granted to the Columbia community.").

71. See Holding Campus Leaders Accountable and Confronting Antisemitism: Hearing Before the H. Comm. on Educ. & the Workforce, 118th Cong. 59 (2023) (statement of Claudine Gay, President, Harvard Univ.) ("We are deeply committed to protecting free expression, even of views that we find objectionable and outrageous and offensive.").

72. See id. at 96 (statement of Rep. Aaron Bean) ("You have all testified that you value free speech, so long as it does not interfere with students."); Roni Gal-Oz, Opinion, The Recently Updated Event Policy that Columbia Cited in Its Suspension of SJP and JVP Is in Conflict With Its Claimed Commitment to the First Amendment, Colum. Spectator, https://www.columbiaspectator.com/opinion/2023/12/07/the-recently-updated-event-policy-that-columbia-cited-in-its-suspension-of-sjp-and-jvp-is-in-conflict-with-its-claimed-commitment-to-the-first-amendment/ [https://perma.cc/2XG4-CWJK] ("We embrace the same free speech principles that you have to if you're talking about speakers in the public square. And you don't have to do that as a private university, but we choose to do it." (internal quotation marks omitted) (quoting Lee Bolinger, former President, Columbia Univ.)).

of taking a content-neutral position when caught in one of the most salient human rights controversies of our times.

What did neutrality produce for the presidents of Columbia and Harvard? Their resignations.[73] The loss of these leaders' jobs served as a stark reminder of neutrality's emptiness in high-stakes political disputes involving free speech on campus. The fate of these leaders evoked for me memories of the moment when I felt the iron of police handcuffs secured around my wrists in Ferguson in 2014.[74] Perhaps all three of us—myself, the president of Columbia University, and the president of Harvard University—should have looked to the Sankofa principle.[75] Constitutional notions of content neutrality have never served as a safe harbor when people of color, women, or poor people have sought to navigate moments of unpopular political speech throughout history.[76] This pattern holds even when the speakers occupy positions of authority as university presidents or law professors.[77]

The more challenging question remains: Does the significant gap between First Amendment fantasy and free speech fact unveil content neutrality as less canonical than farcical in substance, in the streets, in congressional hearings, and even in courts, to the extent that critical scholars would be willing to dispose of it as refuse once and for all? If so, then what principles would guide us in predicting legal outcomes in the arena of free speech disputes? Would a power analysis in the field of political speech, similar to the "actual malice" standard deployed when purported victims of defamation occupy positions as public figures or

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73. William Brangham & Courtney Norris, Harvard President Resigns Amid Controversy Over Antisemitism Testimony, Plagiarism Claims, PBS News (Jan. 2, 2024), https://www.pbs.org/newshour/show/harvard-president-resigns-amid-controversy-over-antisemitism-testimony-plagiarism-claims [https://perma.cc/D9JP-5BRM]; Hannah Natanson, Susan Svrluga & Anika Arora Seth, Columbia University President Resigns After Drawing Ire Over Israel-Gaza Protests, Wash. Post, https://www.washingtonpost.com/nation/2024/08/14/columbia-minouche-shafik-protests/ (on file with the *Columbia Law Review*) (last updated Aug. 14, 2024) ("Columbia University President Minouche Shafik has resigned her position, ending a short and turbulent tenure marred by controversy and backlash over how she handled an outbreak of pro-Palestinian protests on campus last spring.").

74. See supra notes 2–3 and accompanying text.

75. See supra notes 15–19 and accompanying text.

76. See MacKinnon, supra note 66, at 1224–25 ("Content neutrality . . . lacks substantive comprehension or direction. . . . [T]his doctrine [is] an instrument of reproduction of the status quo, incapable of reliably distinguishing social dominance from subordination . . . . [It is] unable to support opposition to the way things are, or to counter and change it."); cf. Drew Serres, Here's How Desmond Tutu, Elie Wiesel, Paulo Freire, and MLK Approach Neutrality, Org. Change (May 15, 2013), https://organizingchange.org/here-is-how-moral-leaders-approach-neutrality/ [https://perma.cc/GV8F-NP9M] ("If you are neutral in situations of injustice, you have chosen the side of the oppressor." (internal quotation marks omitted) (quoting Desmond Tutu)).

77. See supra notes 68–72 and accompanying text.

serve as public officials,[78] provide a more transparent and justifiable grounds for analysis than the fragile tissue of formal equality?

What principles should guide us?

Perhaps the free speech controversies of our times have unmasked content neutrality—once thought to serve as a safeguard against bias in the free speech arena—as a tool that only shields and replicates inequality.[79] If we fail to engage with that possibility, we will likely witness universities increasingly align with powerful interests while simultaneously claiming institutional neutrality, even as we now know that neutrality will serve as nothing more than a fig leaf for power. Leaders who bow to the most intimidating exertion of power will survive, while those who genuinely believe in neutrality's protective power will eventually succumb when circumstances shift under their feet. Over time, this will reduce confidence in neutrality's protection for institutional leaders in times of political dispute, and ultimately, more cynicism in our democracy. And this loss of faith in constitutional protections could undermine other elements of the law such as education, economics, and beyond.

CONCLUSION

The conclusions I've reached in this address will not likely leave the listeners with warm and fuzzy feelings. For that reason, I want to end on a hopeful note. After all, the Sankofa bird is far from an emblem of hopelessness—it was meant to communicate the presence of a light at the end of the tunnel.[80]

Hope in this instance exists not based on blind optimism but based on evidence.[81] For example, the process of historical reflection exemplified in this Lecture should inspire us to remember how far we have come as a society, evolving from the harsher history of protest suppression that our ancestors experienced as recently as the nineteenth and twentieth centuries.[82] With these examples of the ever-changing nature of free speech protections fresh in our minds, I hope that the gap between our ideals and current realities would anger us enough to move past apathy without paralyzing us with despair, as change can happen for the better as often as it does for the worse.

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78. See supra note 11.

79. See supra notes 66–67, 76 and accompanying text.

80. See supra notes 15–17 and accompanying text.

81. See Jamil Zaki, Hope for Cynics: The Surprising Science of Human Goodness 7, 9 (2024) ("Cynicism does tune people in to what's wrong, but it also forecloses on the possibility of anything better. . . . [O]ne powerful tool . . . used to fight cynicism [is] skepticism: a reluctance to believe claims without evidence. . . . Cynics imagine humanity is awful; skeptics gather information about who they can trust." (emphases removed)).

82. See supra section I.

As I reflect on my own studies of legal history, I can't find a brighter light to look to during what may seem like dark times than the work of Nelson Mandela. I am reminded that Mandela, also an attorney, began his legal journey during a period of racial realignment and heightened stress in a time of war and controversy in South Africa.[83] During this time, the election of an apartheid government in 1948[84] urged his organization, the African National Congress (ANC), toward a shift in strategy in their campaign for constitutional democracy. It launched the famous Defiance Campaign between 1948 and 1952.[85] It embarked on alternative paths of legal activism and protest that rejected traditional liberal principles of neutrality; acknowledged the prominence of interest-based politics on legal outcomes, even in the context of constitutional disputes in apartheid-era South Africa; and called for adherence to a radical vision of inclusive democracy while understanding that the likely consequences and responses from positions of power in their society would be negative. Indeed, both Mandela and the ANC were banned from making public speeches and meeting in large forums.[86]

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83. See Justin Hansford, Nelson Mandela and the Lawyer as Agent of Social Change, 22 Pro. Law., no. 2, 2014, at 24, 24–25 [hereinafter Hansford, Nelson Mandela and the Lawyer as Agent] (explaining how Mandela attended law school during the advent of apartheid and the widescale marginalization of Black South Africans); Justin Hansford, The Legal Ethics of Nelson Mandela 9 (Jan. 28, 2015) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2556320 [https://perma.cc/SLA8-DBPL] (same).

84. In 1948, the National Party won elections in South Africa and established a system of racial segregation known as apartheid. See AUHRM Project Focus Area: The Apartheid, Afr. Union, https://au.int/en/auhrm-project-focus-area-apartheid [https://perma.cc/U9KD-VV3X] (last visited Feb. 24, 2025). Apartheid was a system of laws that separated non-white South Africans from white people. Id. The system was in place until the early 1990s. Apartheid, Stanford Univ. Martin Luther King, Jr. Rsch. & Educ. Inst., https://kinginstitute.stanford.edu/apartheid [https://perma.cc/76G2-CAQ8] (last visited Feb. 24, 2025).

85. The Defiance Campaign in South Africa, Recalled, Afr. Nat'l Cong., https://www.anc1912.org.za/defiance-campaign-1952-the-defiance-campaign-in-south-africa-recalled/ [https://perma.cc/ZF4D-GBBH] (last visited Feb. 16, 2025) ("The 'Campaign of Defiance against Unjust Laws' . . . was the largest mass action by the newly-formed alliance of the [ANC and the South African Indian Congress], confronting the apartheid regime which had come to power in 1948 and had enacted a series of racist and repressive laws.").

86. Several significant texts exemplified the inspirational paths of South African social justice–oriented lawyers who pursued legal activism in the face of a legal regime which postured toward neutrality while pursuing efforts to centralize power along racial lines. See, e.g., Drucilla Cornell, Comrade Judge: Can a Revolutionary Be a Judge?, *in* Drucilla Cornell & Karin van Marle with Albie Sachs, Albie Sachs and Transformation in South Africa: From Revolutionary Activist to Constitutional Court Judge 9, 9 (2014) (discussing a Constitutional Court of South Africa Emeritus Justice's "history as a participant in the struggle to overthrow apartheid and the attempt to replace it with a just society"). For a discussion of the individual stories and experiences of Black lawyers during the apartheid regime, see generally Kenneth S. Broun, Black Lawyers, White Courts: The Soul of South African Law (2000) (conducting interviews of twenty-seven South African lawyers regarding their efforts to resist apartheid).

Mandela and the ANC's guiding principle was not adherence to the apartheid-based South African constitutionalism of the time. Rather—as he stated in his famous speech from the dock, made while facing the death penalty for his activism[87]—Mandela looked to international human rights law and moral principles derived from philosophy and religion.[88] In the 1950s, his ANC drafted the Freedom Charter,[89] a vision of justice that transcended the oppressive legal structures of apartheid. In the years to come, Mandela reaffirmed his deep knowledge of principles that transcended those conceived in the shadows of interest-based politics and mythical notions of false neutrality reflected in the rhetoric expressed by his nation's constitutional jurisprudence.[90]

The South African experience in broadening constitutional inclusionof human rights norms is not alone. On issues as diverse as gender and the death penalty, hard evidence exists for the possibility of broadening acceptance of more democracy-enhancing principles of law, as debated by scholars and jurists across space and time.[91] On the question of protest law, mechanisms exist both domestically[92] and internationally[93] that provide an ever-growing resource of documentation and legal infrastructure for the protection of peaceful political protests as a living legacy

87. See Nelson Mandela, I Am Prepared to Die, Statement From the Dock at the Opening of the Defense Case in the Rivonia Trial (Apr. 20, 1964), https://www.nelsonmandela.org/uploads/files/Prepared-to-die-20-April-1964-speech-final.pdf [https://perma.cc/UMK6-7PL2] (noting "that the threat of a death penalty for sabotage had now become a fact").

88. See id. at 3, 18 ("We believed in the words of the Universal Declaration of Human Rights, that 'the will of the people shall be the basis of authority of the Government', and for us to accept the banning was equivalent to accepting the silencing of the African people for all time." (quoting G.A. Res. 217(III) A, Universal Declaration of Human Rights art. 21 (Dec. 10, 1948))).

89. The Freedom Charter, Afr. Nat'l Cong., https://www.anc1912.org.za/the-freedom-charter-2/ [https://perma.cc/9WSG-HAZ7] (last visited Feb. 16, 2025) (noting that the Charter was adopted by the ANC on June 26, 1955).

90. See Hansford, Nelson Mandela and the Lawyer as Agent, supra note 83, at 26–27 ("Mandela spent years thinking about the question of justice broadly, and specifically whether his own country's legal system measured up to the standards of equal justice under law.").

91. See Kathryn Sikkink, Evidence for Hope: Making Human Rights Work in the 21st Century 14 (2017) ("[W]e see that there are some human rights issues that have experienced worsening[,] . . . [b]ut there are many other instances where the situation is improving, including . . . a declining use of the death penalty[], and dramatic improvements in equality for women.").

92. See US Protest Law Tracker, Int'l Ctr. for Not-for-Profit L., https://www.icnl.org/usprotestlawtracker/ [https://perma.cc/ZKH7-VCUJ] (last visited Mar. 28, 2025) ("The US Protest Law Tracker follows state and federal legislation . . . that restricts the right to peaceful assembly.").

93. See UN Off. of the High Comm'r for Hum. Rts., Special Rapporteur on Freedom of Peaceful Assembly and of Association, https://www.ohchr.org/en/special-procedures/sr-freedom-of-assembly-and-association [https://perma.cc/5ER6-LX4F] (last visited Mar. 28, 2025) (describing the UN mandate to gather information, make recommendations, and report violations of the right to peaceful assembly).

of communities determined to make their societies more and more humane.

As we look ahead to the United States in 2025 and beyond, there will be an imperative to recognize that the Supreme Court's jurisprudence concerning free speech may become increasingly perplexing. As protesters, our responsibility is to become anchored in international human rights law and moral principles to guide our action, not in the shifting sands of American constitutional doctrine alone. And as lawyers and budding legal scholars, the action step that you have begun today—using your brilliant legal minds to interrogate and imagine the content of fair and just protest law—is the perfect place to start in the process of helping our predicament change for the better.

In this way, together we can foster environments in which genuine principles of democracy and free speech can empower those of conscience to adhere to the highest principles of rule of law and justice with full awareness of the costs of resistance.

I look forward to that day.