THE FRAYING FABRIC OF FREEDOM: CRISIS AND CRIMINAL LAW IN STRUGGLES FOR DEMOCRACY AND FREEDOM OF EXPRESSION

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I. HISTORIC VALUES UNDERLYING FREEDOM OF EXPRESSION

Freedom of expression—speech, press, petition, and symbolic speech—is supported by a web of interrelated values: democracy, the individual need to express and explore ideas, the right to learn and think about a wide range of topics, association with those of common interests, personal autonomy and fulfillment, and no doubt many others. Here, I focus mostly on one of several purposes—democracy-popular sovereignty.[1] Historically, the struggle for democracy involved two themes: the struggle for equality in expanding the

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This Article is based on the author's participation in the 2011 Criminal Law Symposium: *Criminal Law and the First Amendment*, held at Texas Tech University School of Law on April 8, 2011.

1. For scholarly works on the topics discussed, see *infra* notes 5, 79, 147, 217, 276, 485.

franchise and a significant degree of equality in political influence, and a combination of liberty and equality in expanding freedom of expression.[2]

In its origins, freedom of expression was anti-hierarchical. Over time, hierarchies lost some powerful weapons they used to control public opinion, and the right to vote expanded. (It also contracted.) Recently, economic-political elites have employed new weapons: first, to increase their domination and control over democratic discourse, and second, to limit the right to vote. A one-sided discussion, thanks to concentrations of wealth and power, is an example of the first.[3] Gerrymanders that can transform a political minority into a long-lasting majority and voter ID laws and laws restricting voting times and places (all of which tend, in fact, to disenfranchise the poor) are two examples of the second.[4] The history behind the anti-hierarchical values of freedom of expression highlights the risks to these values from further expanding the already great power and influence wealthy corporations and individuals have to dominate discourse.

A. English Background[5]

Demands for broad freedom of expression—speech, press, and petition—were part of the struggle for popular sovereignty, greater democracy, religious toleration, and civil liberty in seventeenth century England.[6] The demand was

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2. *See* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 18-19, 21 (2000) [hereinafter CURTIS, FREE SPEECH].

3. See, for example, current corporate dominance of most modes of mass communication, *infra* Part III.

4. *See*, *e.g.*, Editorial, *They Want to Make Voting Harder?*, N.Y. TIMES, June 6, 2011, at A20 (eliminating early voting opportunities will adversely affect North Carolina's black population). *See generally* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (upholding photo ID requirement to vote); Vieth v. Jubelirer, 541 U.S. 267 (2004) (upholding political gerrymandering).

5. On the English background, see generally, for example, A REMONSTRANCE OF MANY THOUSAND CITIZENS (1646), *reprinted in* LEVELLER MANIFESTOES OF THE PURITAN REVOLUTION 113 (Don M. Wolfe ed., 1967); AN AGREEMENT OF THE FREE PEOPLE OF ENGLAND (1649), *reprinted in* THE LEVELLER TRACTS 1647-1653, at 318 (William Haller & Godfrey Davies eds., 1964); H. N. BRAILSFORD, THE LEVELLERS AND THE ENGLISH REVOLUTION (Christopher Hill ed., 1961); JAMES BURGH, POLITICAL DISQUISITIONS (Vols. 1, 2, 3) (Da Capo Press 1971) (1774); CURTIS, FREE SPEECH, *supra* note 2, at 1-51; JOSEPH FRANK, THE LEVELLERS (1955); PAULINE GREGG, FREE-BORN JOHN: A BIOGRAPHY OF JOHN LILBURNE (1961); LEVELLER MANIFESTOES OF THE PURITAN REVOLUTION, *supra*; COLIN RHYS LOVELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY: A SURVEY (1962); EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988); FREDRICK SEATON SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776 (1965); JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS OR ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS (Ronald Hamowy ed., Liberty Fund 1995) (1720); Michael Kent Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 CONST. COMMENT. 359 (1991) [hereinafter Curtis, *In Pursuit of Liberty*]; David Mayer, *The English Radical Whig Origins of American Constitutionalism*, 70 WASH. U. L. Q. 131 (1992).

6. *See* Curtis, *In Pursuit of Liberty*, *supra* note 5, at 359-61.

championed by a group that their opponents named the "Levellers."[7] The Leveller movement arose during the English Civil War.[8]

Before the Civil War of the 1640s, England was strongly hierarchical. It had a king, a hereditary House of Lords, an oligarchic House of Commons, and a state church, the Church of England, with bishops appointed by the King.[9] The nation had a judiciary that sometimes showed signs of independence, but the judges were appointed by the King and served at his pleasure.[10] Most judges naturally sided with the King.[11] As Chief Justice Hobart announced in 1623, in the courts "everything for the benefit of the king shall be taken largely, as everything against the king shall be taken strictly."[12]

The religious hierarchy reinforced the secular one. Religious conformity and church attendance were mandatory.[13] Periodically, the monarch ordered the clergy to read homilies to the national audience created by required church attendance.[14] One homily, promulgated by Queen Elizabeth, explained that the monarch had been placed on the throne by God.[15] Resistance to the monarch was resistance to God, promising everlasting damnation.[16] Even a bad king must be obeyed because the presence of a bad king was God's punishment for a sinful people.[17] The duty of obedience was gender neutral; God sometimes chose women as queens.[18]

The criminal justice system reinforced the political-economic hierarchy.[19] Criticism of those in power was criminal: seditious libel or treason.[20] Special courts punished religious dissent or political dissent.[21]

The Bible was dangerous because its "democratic" and "socialistic" implications might be misunderstood by "lesser" people inclined to ignore its

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7. *See id.*

8. *See generally An Agreement of the People*, *in* LEVELLER TRACTS, *supra* note 5, at 318-28; BRAILSFORD, *supra* note 5; FRANK, *supra* note 5; GREGG, *supra* note 5; Curtis, *In Pursuit of Liberty*, *supra* note 5.

9. *See* DEREK HIRST, AUTHORITY AND CONFLICT: ENGLAND 1603-1658, at 60-61 (1986); LOVELL, *supra* note 5, at 330.

10. HIRST, *supra* note 9, at 34-35.

11. *See id.*

12. *Id.* at 34.

13. *See id.*

14. *See id.* at 60-61.

15. *An Homily Against Disobedience and Wylful Rebellion* (1570), *in* DIVINE RIGHT AND DEMOCRACY: AN ANTHOLOGY OF POLITICAL WRITING IN STUART ENGLAND 94, 97 (David Wooton ed., 1986).

16. *Id.* at 96-97.

17. *Id.* at 97.

18. *Id.* at 94-98; MICHAEL KENT CURTIS, J. WILSON PARKER, DAVISON M. DOUGLAS, PAUL FINKELMAN & WILLIAM G. ROSS, 2 CONSTITUTIONAL LAW IN CONTEXT 1616-19 (3rd ed. 2010) [hereinafter 2 CONSTITUTIONAL LAW IN CONTEXT] (setting out the Homily and rules related to church attendance and conformity).

19. *See* Curtis, *In Pursuit of Liberty*, *supra* note 5, at 361-62.

20. *See* SIEBERT, *supra* note 5, at 28-29.

21. CURTIS, FREE SPEECH, *supra* note 2, at 28-29; Curtis, *In Pursuit of Liberty*, *supra* note 5, at 361-62; SIEBERT, *supra* note 5, at 29.

divine right passages.[22] An act of 1542 prohibited working class people and most women from reading the Bible.[23]

The struggle for freedom of expression has historically been entwined with technological change. For hierarchy, the printing press was a serious threat. So, the government required a license before a book or newspaper could be published and sought to limit presses.[24] Publishing without a license was a crime, regardless of the contents of the book.[25] Of course, if the book criticized those in power, that was an additional crime: sedition or treason.[26] These rules and institutions regulating the press sought to protect the existing hierarchy.[27] With the English Civil War, the existing hierarchy was for a time displaced.[28] Soon, leaders of the Revolution established a new hierarchy that again instituted press censorship and efforts to limit printing presses.[29]

The hierarchical world was challenged by the Levellers who made extensive use of the printing press to spread their democratic ideas.[30] When censorship was reinstituted, Levellers sometimes successfully sought a license but often spread their message through hidden presses.[31]

The Levellers championed a unicameral parliament (with no King or House of Lords) elected by a much broader suffrage; indeed, many favored universal male suffrage.[32] In a direct challenge to the new hierarchy, Levellers insisted that Parliament was not sovereign; instead, the people were sovereign.[33] Parliaments or government officials were merely agents or trustees, with a fiduciary duty to the people.[34] Legitimate government power was based on the consent of the governed.[35] This turned the old hierarchy upside down, with "the people" at the top.[36]

Levellers proposed to establish this new government by "The Agreement of the Free People," a constitution that limited Parliament and all government officials.[37] It provided for broad (though imperfect) religious toleration and

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22. *See* SIEBERT, *supra* note 5, at 47-48.

23. *Id.* at 48.

24. *Id.* at chs. 1-8 (discussing the monarch and later the Council of State's efforts to control the press); CURTIS, FREE SPEECH, *supra* note 2, at 5, 9-11.

25. SIEBERT, *supra* note 5, at 49.

26. *Id.* at 48, 52, 60 (examples of use of sedition); *id.* at 269-88 (use of seditious libel to suppress criticism of those in power; efforts by Parliament to secure freedom for its debates and punishment of its critics). On the abuses of the crime of treason and its limitation by statute, see LOVELL, *supra* note 5, at 399 (uses of treason and the Treason Trials Act of 1696).

27. *See* SIEBERT, *supra* note 5, at 21-22.

28. *See id.* at 219.

29. Curtis, *In Pursuit of Liberty*, *supra* note 5, at 377, 387.

30. *Id.* at 366, 374-75.

31. *Id.* at 374; *see* BRAILSFORD, *supra* note 5, at 568-71.

32. Curtis, *In Pursuit of Liberty*, *supra* note 5, at 372.

33. *Id.* at 367.

34. *See id.*

35. *Id.* at 368.

36. *See id.*

37. *See id.* at 372.

civil liberties, including many criminal procedure guarantees, such as a protection against self-incrimination, a broad right to jury trial, and a right to a public trial.[38] In the Levellers' struggle, democracy and freedom of expression were linked with protections against unlimited power to search, against power to compel self-incrimination, with guarantees for public trial, with guarantees of the right to counsel, and with other criminal procedure protections.[39]

The Levellers insisted on the right to petition and on broad press freedom.[40] They opposed licensing, rejected the crime of "sedition," and rejected the idea that treason could be based on mere words critical of those in power.[41] Contributions "of the Leveller party to political theory included (1) a written constitution, (2) limited powers, (3) separation of powers, and (4) freedom of the press."[42]

For their erstwhile oligarchic allies in the English Civil War, these Leveller democratic principles were subversive. The oligarchs insisted that democracy would result in economic leveling and equal redistribution of property.[43] Though the Levellers disavowed these ideas, they did expect the wealthy to pay a larger share of the cost of government, a dangerous and subversive idea.[44] When Parliament reinstituted censorship and used it against Levellers as well as Royalists, a Leveller petition reminded Parliament that it owed its success to unlicensed printing and called for revoking all laws against free printing.[45]

> As for any prejudice to Government thereby, if Government be just in its Constitution, and equal in its distributions, it will be good, if not absolutely necessary for them, to hear all voices and judgments, which they can never do, but by giving freedom to the Press; and in case any abuse their authority by scandalous Pamphlets, they will never want able Advocates to vindicate their innocency. And therefore all things being duely weighed[] to refer all Books and Pamphlets to the judgment, discretion, or affection of Licensers, or to put the least restraint upon the Press, seems altogether inconsistent with the good of the Commonwealth, and expressly opposite and dangerous to the liberties of the people . . . .[46]

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38. *See id.* at 372-74.

39. *See id.* at 373-74 (describing the provisions of the proposed Leveller constitution, The Agreement of the People).

40. *See id.* at 374.

41. *See* TO THE RIGHT HONOURABLE, THE SUPREME AUTHORITY OF THIS NATION, THE COMMONS OF ENGLAND (1649), *reprinted in* LEVELLER MANIFESTOES OF THE PURITAN REVOLUTION, *supra* note 5, at 326, 328-29; Curtis, *In Pursuit of Liberty*, *supra* note 5, at 384.

42. SIEBERT, *supra* note 5, at 200.

43. *See* Curtis, *In Pursuit of Liberty*, *supra* note 5, at 378.

44. *See id.*

45. SIEBERT, *supra* note 5, at 200-01.

46. TO THE RIGHT HONOURABLE, *supra* note 41, at 328-29.

The Levellers were defeated and suppressed.[47] But in spite of Royalist restoration and reaction, some more radical ideas continued to percolate in England.[48]

John Trenchard and Thomas Gordon published *Cato's Letters or Essays on Liberty, Civil and Religious, and Other Important Subjects* (*Cato's Letters*).[49] *Cato's Letters* was widely circulated in America before the Revolution.[50] The sixth edition was published in 1755.[51] "Cato" repeated some themes that go back to the Levellers. Those who administer the government are trustees for the public and the public has a right to critical examination of their doings.[52] Because public business was (or should be) transacted on behalf of the public, the public had a right to see whether their business was "well or ill transacted."[53] Honest public measures should be known so they could be commended. "Knavish or pernicious" measures should be known so they could be "publickly detested."[54]

For "Cato," free speech and press played a crucial role. Free speech was a "sacred privilege . . . essential to free government."[55] "Cato" suggested counter speech as a remedy for abuses.[56] In effect, *Cato's Letters* advocated severe limits on the law of libel as applied to matters of public concern.[57] For example, truth, at least, should be a defense against libel charges relating to discussion of public matters.[58] Allegedly libelous speech was entitled to a presumption of innocence.[59] For "Cato," libels were unfortunate, but libels related to public measures were an evil arising from the greater good of printing and writing.[60]

James Burgh's 1774 book, *Political Disquisitions*, went further than most "radicals." He justified manhood suffrage, even for the poor.[61] And he strongly supported broad free speech and press rights. It was the duty of "every subject" to have "a watchful eye on the conduct of Kings, Ministers, and

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47. Curtis, *In Pursuit of Liberty*, *supra* note 5, at 387-88.

48. *See id.* at 388-89.

49. TRENCHARD & GORDON, *supra* note 5.

50. CURTIS, FREE SPEECH, *supra* note 2, at 41-42.

51. Ronald Hamowy, *Introduction* to TRENCHARD & GORDON, *supra* note 5, at xx, xxxv.

52. *See, e.g.*, *Letter No. 15, Of Freedom of Speech: That the Same is Inseparable from Publick Liberty* (Feb. 4, 1720), *in* TRENCHARD & GORDON, *supra* note 5, at 110, 111.

53. *Id.*

54. *Id*. at 114.

55. *Id.* at 110.

56. *See id.* at 114 ("Misrepresentation of publick measures is easily overthrown, by representing publick measures truly . . . . If our directors . . . be not such knaves as the world thinks them, let them prove to all the world, that the world thinks wrong, and that they are guilty of none of those villainies which all the world lays to their charge.").

57. *See Letter No. 32, Reflections upon Libelling* (June 10, 1721), *in* TRENCHARD & GORDON, *supra* note 5, at 228, 228-29.

58. *See id.* at 228.

59. *See id.* at 228-29, 231.

60. *See id.* at 232.

61. *See* 1 BURGH, *supra* note 5, at 38.

Parliament."[62] Men should not be hindered in writing about the conduct of those who undertake the management of public affairs.[63] All had a right to inquire and publish their suspicions concerning these matters.[64] The defense of truth was inadequate, "[f]or if you punish the slanderer, you deter the fair inquirer."[65]

These ideas also turned the hierarchy upside down. They were flatly contrary to English law. Even by 1776, it was still seditious libel to criticize the government or its officials.[66] Truth was no defense: the greater the truth, the greater the libel.[67] Press freedom, Blackstone explained, was merely protection against prior restraint—against being punished for publishing without a license.[68] As Blackstone summarized English law, "in their largest and most extensive sense," libels were any writings or pictures with an "illegal tendency."[69] Malicious defamation of any person, "and especially a magistrate," was defined as something that would expose him to public hatred or contempt.[70] Such writings had a "direct tendency" to provoke a breach of the peace.[71] Whether "the matters of it be true or false" was "immaterial."[72]

Essentially, Blackstone embraced the bad tendency doctrine. Because the doctrine often shaped the intersection of criminal law and free speech, it merits a brief explanation. By the bad tendency doctrine, expression that could produce bad consequences, such as law violation, in the future (including the distant future) could be suppressed.[73]

Still, prior restraint, or requiring a license from the government before a work was printed, was abolished in England in 1694.[74] In the United States (and often also in England after the Glorious Revolution),[75] the practice of press freedom often outran the law; many writers wrote as though the common law of seditious libel did not exist.[76] But, in the United States, Congress soon enacted a ban on seditious libel in 1798.[77]

It is useful to pause here to return to the idea of government officials as agents or trustees, with a fiduciary duty to "the people." This idea recurs in

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62. 3 BURGH, *supra* note 5, at 247.
63. *Id.* at 254.
64. *Id.*
65. *Id.* (emphasis omitted).
66. *See* IV WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 158 (Beacon Press 1962).
67. *See id*. at 158-59.
68. *Id.* at 161.
69. *Id.* at 158.
70. *Id.*
71. *Id.*
72. *Id.*
73. CURTIS, FREE SPEECH, *supra* note 2, at 9-12.
74. *See, e.g.*, *id.* at 29.
75. LOVELL, *supra* note 5, at 399.
76. *See, e.g.*, LEONARD W. LEVY, EMERGENCE OF A FREE PRESS, at x (rev. ed. 1985) (1960); CURTIS, FREE SPEECH, *supra* note 2, at 46.
77. An Act for Punishment of Certain Crimes Against the United States, ch.74, 1 Stat. 596 (1798).

American state constitutions established during the Revolution and can be seen in the Federalist Papers and debates over the Sedition Act.[78] The great threat to fiduciary relations is that agents or trustees will not pursue the interest of their principals (the people), but by financial or other inducements, they will be seduced to pursue other interests in conflict with those of the principal.

B. The Sedition Act of 1798[79]

In 1798, French armies had overrun much of Europe.[80] England and France were at war.[81] The United States, in spite of a prior treaty with the since beheaded French king, had tried to remain neutral and to trade with both England and France.[82] France had attacked shipping bound for England, including American shipping.[83] As a result, the United States was engaged in an undeclared naval war with France.[84]

Federalists feared a pro-French revolutionary faction in the United States.[85] They accused Jeffersonian Republicans of being subversives, "Jacobins," and "disorganizers."[86] Jeffersonian Republicans, in the meantime, accused Federalists of wanting to move the nation toward aristocracy or monarchy.[87] Had not Hamilton supported a senate for life and a president for life, the latter position also once supported by President John Adams?[88]

In that time of crisis and fear, the Federalist-controlled Congress (barely) passed the Sedition Act.[89] The Act made it a crime for any person to write,

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78. *E.g.*, JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 193 (Ohio Univ. Press 1966) (introduction by Adrienne Koch) (Tuesday June 26 in Convention) (referencing the trust obligation of public officials). One effort to deal with the threat of corruption was "to divide the trust between different bodies of men, who might watch & check each other." *Id.*; *see, e.g.*, PA. CONST. of 1776, DECLARATION OF RIGHTS, art. IV (government officials are trustees and servants of the people and accountable to them); VA. CONST. of 1776, DECLARATION OF RIGHTS, § 2; VT. CONST. of 1777, DECLARATION OF RIGHTS, art. V; N.H. CONST. BILL OF RIGHTS, art. VIII (1784); DEL. CONST. of 1776, DECLARATION OF RIGHTS, § 5; R.I. CONST. of 1790, art. II (trustee or servant language); CURTIS, FREE SPEECH, *supra* note 2, at 73 (insufferable servants of the people to prevent inquiries into their conduct).

79. On the Sedition Act controversy, see generally, for example, CURTIS, FREE SPEECH, *supra* note 2, at chs. 2-4 and authorities cited in the notes; LEVY, *supra* note 76, at x; NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL (1986); JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES chs. I-VIII (1956); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983); David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985).

80. CURTIS, FREE SPEECH, *supra* note 2, at 60.

81. *Id.*

82. *Id.*

83. *Id.*

84. *See, e.g.*, CURTIS, FREE SPEECH, *supra* note 2, at 60-63; SMITH, *supra* note 79, at ch. 1.

85. CURTIS, FREE SPEECH, *supra* note 2, at 60-61.

86. *Id.* at 58.

87. *Id.*

88. *Id.* at 59 and authorities cited.

89. *See* An Act for Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596 (1798).

utter or publish any false, scandalous, and malicious writing against the government of the United States, either house of Congress, or the President of the United States—with the intent to defame them, bring them into contempt or disrepute, or to excite against them the hatred of the people of the United States.[90] The Act protected the Federalist President, but not his likely opponent in 1800, Thomas Jefferson.[91] It protected either House of Congress (both dominated by Federalists) but not the Jeffersonian Republican minority.[92] Still, the Act was more protective than English law.[93] Truth was a defense, and the jury would judge not only whether the defendant had uttered words, but also whether they were seditious.[94]

These protections, however, proved illusory. The Act was interpreted to include false opinions.[95] As to the requirement of malice or bad intent, "[i]n every case, the government prosecutors and the judges presumed the bad intent . . . from the bad tendency of the words."[96] The Federalist Secretary of State chose targets, Federalist prosecutors managed prosecutions, Federalist marshals vetted the jury pool, and Federalist judges presided.[97] As applied, the Act was used to jail a Republican congressman and pro-Republican newspaper editors for "false" political opinions as well as occasional false facts.[98] The Act had a sunset provision.[99] It would end at the end of Adams's term.[100] The Federalist Senator Theodore Sedgwick noted that the war with France and the Sedition Act provided a glorious opportunity to destroy faction, meaning the Republican opposition.[101] Federalists made the most of it.[102]

Faced with harsh criticism of the Sedition Act, Federalists defended it: The government had inherent power to protect itself.[103] They cited Blackstone.[104] Press freedom was merely a protection against prior restraint, not protection from punishment after publication.[105] Speech with bad tendencies could be suppressed.[106] The Act only outlawed lying; why were Republicans so worried about that?[107]

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90. *Id.*
91. *See id.*
92. *See* CURTIS, FREE SPEECH, *supra* note 2, at 63.
93. *See id.* at 71.
94. *Id.*
95. *Id.* at 76-77; SMITH, *supra* note 79, at 422.
96. *See* SMITH, *supra* note 79, at 422.
97. *See* CURTIS, FREE SPEECH, *supra* note 2, at 67-68.
98. *Id.* at 64, 80-92; *see, e.g.*, United States v. Cooper, 25 F. Cas. 631, 637-39 (C.C.D. Pa. 1800) (No. 14,865); Case of Lyon, 15 F. Cas. 1183, 1185 (C.C.D. Vt. 1798) (No. 8,646).
99. CURTIS, FREE SPEECH, *supra* note 2, at 63.
100. *Id.*; SMITH, *supra* note 79, at 426.
101. *See* CURTIS, FREE SPEECH, *supra* note 2, at 61.
102. *See id.* at 60-63; SMITH, *supra* note 79, at 9-21.
103. CURTIS, FREE SPEECH, *supra* note 2, at 65.
104. *Id.* at 65, 77.
105. *Id.* at 65, 71, 87.
106. *See* SMITH, *supra* note 79, at 145, 422.
107. *E.g.*, CURTIS, FREE SPEECH, *supra* note 2, at 66.

In addition to federalism arguments that the national government lacked power over speech, the critics of the Sedition Act attacked it as inconsistent with representative government.[108] In representative government, some Jeffersonian Republicans pointed out, criticism of public men and public measures was essential to inform voters.[109] Jeffersonian Republicans insisted that sedition was a crime suitable to England with a hereditary king and House of Lords; it was not suited to America.[110] The Act would have a serious chilling effect on free speech: for fear of prosecution, editors would be afraid to criticize.[111] Because the Act reached false opinions, verdicts would inevitably be political.[112] The political effect would be worse because Federalist marshals would pick the potential jurors for a trial conducted by Federalist prosecutors and judges.[113] Republicans warned that political trials would punish political opponents.[114] So, indeed, it proved to be.[115]

A number of noncitizens, including an Irish newspaper editor, were pro-Republican.[116] An Alien Act extended the time for naturalization from five to fourteen years and allowed the president to deport those aliens "as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government" of the United States.[117] This Act reached "alien friends," who were citizens of a foreign nation with whom the country was not at war.[118] Though the alien was allowed to appear before officers of the executive branch in an effort to prove he was not dangerous, he was not given the evidence of his supposed disloyalty.[119] Congressman Edward Livingston of New York described the Act:

> Miserable mockery of justice! [A]ppoint an arbitrary Judge armed with Legislative and Executive powers . . . ! [L]et him condemn the unheard, the unaccused object of his suspicion; and, then, to cover the injustice of the scene, gravely tell him, you ought not to complain—you need only disprove

108. *See id.* at 72.
109. *See id.* at 69.
110. *E.g.*, *id.* at 72-77, 95-96 (Madison's Report on the Sedition Act for the Virginia legislature).
111. *See id.* at 68-69.
112. *Id.* at 70.
113. *Id.*
114. *Id.* at 66-77 (Jeffersonian Republican arguments against the Sedition Act).
115. *See id.* at 88-94.
116. *Id.* at 80-84.
117. An Act Concerning Aliens, ch. 58, 1 Stat. 570, 571 (1798); Naturalization Act of June 18, 1798, ch. 54, 1 Stat. 566.
118. *See id.* The Alien Enemies Act, on the other hand, authorized the President to arrest and deport any resident alien if his home country was at war with the United States. *See* An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798).
119. An Act Concerning Aliens, 1 Stat. at 571.

> facts that you have never heard—remove suspicions that have never been communicated to you . . . .[120]

As in most cases of repression, the motives behind the Sedition Act and Alien Friends Act were mixed. But the mixture contained a large dose of partisan advantage, a factor easily and conveniently confused with the essential interest of the nation.[121] Supreme Court Justices on circuit upheld convictions under the Act.[122] In the United States, the practice of freedom of expression often had been more liberal than the law; this fact contributed to the unpopularity of the law.[123]

The Sedition Act and the later struggles for freedom of expression show that redundant safety devices are important. Courts, presidents, congresses, governors, or legislators can be crucial checking safety devices, but all often fail or are on the sidelines. In the long run, and sometimes in the short run, public support for freedom of expression is a crucial device.

C. Freedom of Expression After the Sedition Act

The trend toward more press freedom followed, for a time, the demise of the Sedition Act.[124] Jefferson was elected (with the help of the three-fifths clause that counted slaves as three-fifths of a person for purposes of representation in the House and Electoral College), and the Sedition Act expired.[125] It was widely seen as an abuse not to be repeated.[126] In much of the country, political discussion went on with little fear of sedition or libel.[127] Even the Sedition Act accepted truth as a defense.[128] In the nineteenth century, many state constitutions protected truth for "good motives."[129] In the years after the expiration of the Sedition Act, criticism of government or government officials was rarely punished as sedition.[130]

In the years from 1830 to 1868, newspapers and books proliferated, representing a wide spectrum of opinion.[131] A number of nineteenth century commentators expressed a positive and optimistic view of freedom of speech

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120. 1 ANNALS OF CONG. 2012 (1798) (Joseph Gales ed., 1834).

121. *See* CURTIS, FREE SPEECH, *supra* note 2, at 63-66.

122. *See, e.g.*, United States v. Cooper, 25 F. Cas. 631 (C.C.D. Pa. 1800) (No. 14,865); Case of Lyon, 15 F. Cas. 1183 (C.C.D. Vt. 1798) (No. 8,646).

123. *See* CURTIS, FREE SPEECH, *supra* note 2, at 72-77.

124. *See id.* at 115-16.

125. *See id.* at 118-19.

126. *E.g.*, *id.* at 115.

127. *See id.*

128. *See id.* at 114.

129. *See id.*

130. *E.g.*, *id.* at 114-15.

131. *See, e.g.*, PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 107-11 (2005) (factors leading to an expanded media); *id.* at 123-39 (development of cheap and pervasive print).

and press. One was South Carolina native and Ohio lawyer and judge, Frederick Grimke.[132] For Grimke the press was a crucial democratic institution.[133] The great mass of people could acquire useful democratic knowledge "when it is communicated in detail."[134] All sorts of people could also make extremely valuable contributions.[135] "[V]ery obscure men in the inferior walks of life" had made major contributions to democratic social improvement.[136] "The freedom of religion, of suffrage, and of the press . . . was brought about by the very reasonable complaints of men who occupied an inferior position in society."[137] As Grimke's observations suggest, the anti-hierarchical practice of press and speech freedom furthered democracy and religious liberty.[138]

Grimke wrote about the decentralized press of the first half of the nineteenth century, a press representing a range of views, broken up, he said, "into small fragments."[139] The power of opinions depended both on intrinsic value and the publicity they received.[140] For Grimke, the press served to "equalize power throughout all parts of the community."[141] Its power was substantial, but dispersed and checked by the dispersed press.[142]

In 1868, Thomas Cooley noted the importance of the press in reporting matters of public concern.[143] Like Grimke, he wrote that every party had its newspaper organs, which collectively represented every shade of opinion.[144] Writing in 1853, William Seward, Governor of New York and later Lincoln's Secretary of State, also noted that the political press was divided between competing parties, and that its power was dispersed and checked by the press itself.[145]

Grimke, Seward, and Cooley wrote about the world they experienced—a world before the consolidation of books, newspapers, television, and other media in the hands of a few major corporations.[146] But even in the nineteenth

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132. *See* FREDERICK GRIMKE, THE NATURE AND TENDENCY OF FREE INSTITUTIONS 3-6 (John William Ward ed., Harvard Univ. Press 1968) (1848). Grimke, Seward, and Cooley are more extensively discussed in Michael Kent Curtis, *Democratic Ideals and Media Realities: A Puzzling Free Press Paradox*, 2004 J. OF SOC. PHIL. AND POL'Y 385, 398-403 (2004) [hereinafter Curtis, *Democratic Ideals*].

133. Curtis, *Democratic Ideals*, *supra* note 132, at 396-401.

134. *Id.* at 400.

135. *Id.*

136. *Id.*

137. *Id.* at 401.

138. *See id.* at 400-01.

139. *Id.* at 401.

140. *Id.* at 397.

141. *Id.*

142. *Id.* at 403.

143. THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE AMERICAN UNION 455-56 (1868).

144. *Id.*

145. *See* WILLIAM SEWARD, *Notes on New York*, *in* 2 THE WORKS OF WILLIAM SEWARD 36-37 (1853).

146. *See* Edward Wyatt, *F.C.C. Begins Review of Hotly Debated Regulations on Media Ownership*, N.Y. TIMES, May 26, 2010, at B10; *Ownership Chart: The Big Six*, FREE PRESS, http://www.freepress.net/ownership/chart/main (last visited Dec. 19, 2011).

century, the picture is complex. The tradition of freedom of expression and the tradition of suppression have clashed repeatedly in American history. For many years, the South was an outlier.

D. The Crusade Against Slavery[147]

The Constitution had provisions protecting slavery (for example, the fugitive slave clause, the three-fifths clause, and others).[148] Still, the framers never named the loathsome institution, preferring euphemisms. Slavery was, to put it mildly, in serious tension with commitments to liberty. Many hoped and expected that it would die out. Congress prohibited it in the Northwest Territory.[149] But slavery did not die; it thrived. The battle over whether federal territory would be free or slave eventually split the Union.[150]

In the 1830s, there was something approaching a consensus about slavery.[151] It was an evil, but it had been inflicted on innocent Americans by the British.[152] The problem was too complex, dangerous, and disruptive for solution by mere mortals. So people should sit on their hands, button their lips, and wait for Providence to solve it.[153] But newly militant abolitionists sought to put the issue on the nation's agenda.[154] They insisted that slavery was a sin and should be immediately renounced.[155] Americans were responsible for the continuation of slavery, not the British.[156] So abolitionists used speakers (including, gasp, men *and* women *and* escaped slaves such as Frederick Douglass), meetings, pamphlets, and woodcuts of abused slaves to spread the anti-slavery message.[157] Abolitionists hoped to change public opinion so slaveholders would repent.[158] One faction, led by William Lloyd Garrison,

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147. On the battle over free speech about slavery, see generally, for example, GILBERT HOBBS BARNES, THE ANTISLAVERY IMPULSE: 1830-1844 (1933); CURTIS, FREE SPEECH, *supra* note 2, at chs. 6-13 and authorities cited in the notes; CLEMENT EATON, THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH (rev. ed. 1964); LEONARD L. RICHARDS, "GENTLEMEN OF PROPERTY AND STANDING": ANTI-ABOLITION MOBS IN JACKSONIAN AMERICA 3-170 (1970); W. SHERMAN SAVAGE, THE CONTROVERSY OVER THE DISTRIBUTION OF ABOLITION LITERATURE, 1830-1860 (1938).

148. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 3 (Three-Fifths Clause); U.S. CONST. art. IV, § 2, cl. 3 (Fugitive Slave Clause).

149. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 18, 37 (1978).

150. *See id.* at 19.

151. *See* Michael Kent Curtis, *Teaching Free Speech from an Incomplete Fossil Record*, 34 AKRON L. REV. 231, 244-45 (2000) [hereinafter Curtis, *Fossil Record*].

152. *Id.*

153. *Id.*

154. *See id*.

155. *Id.*

156. *See id.*

157. *See id.*; CURTIS, FREE SPEECH, *supra* note 2, at 18.

158. *See generally* CURTIS, FREE SPEECH, *supra* note 2, at ch. 6 and authorities cited. For aspects of the battle for free speech about slavery, see *id.* at chs. 7-13 and authorities cited.

eschewed politics, but soon a rival anti-slavery group coalesced that favored political action against slavery in places within federal jurisdiction.[159]

In their effort to convert slaveholders, abolitionists sent pamphlets and woodcut pictures of abused slaves to the Southern elite.[160] Much of the nation (North and South) reacted with fury.[161] In the North, mobs disrupted abolitionist meetings and destroyed the presses of anti-slavery newspapers.[162] Several senators cheered on the mobs' "peaceful illegality."[163] Mobs also attacked innocent blacks.[164] Congress gagged abolitionist petitions, and the Postmaster General gave the green light to what he conceded were illegal acts of suppression of anti-slavery publications by postmasters in the Southern states.[165]

Of course, individual Southerners attacked anti-slavery expression too. Men broke into the Charleston, South Carolina post office and burned abolitionist pamphlets.[166] Book burning was a tactic in several Southern states, and by 1860, some Republican Party literature was added to the flames.[167] In the 1830s, mobs drove anti-slavery activists and newspaper editors out of Southern states.[168] With the formation of the new Republican Party in 1856, mobs drove Republicans from Southern states as well.[169]

Putting issues on the agenda for public consideration was a central democratic act. Slavery was a major social, economic, and political institution. Could it be appropriate to put discussion of it off limits?

In the 1830s, advocates of suppression answered yes.[170] Slavery was a Southern institution, so it was none of the North's concern.[171] In the South, advocates of suppression also insisted that discussion of the morality of slavery or the wisdom of abolition was too dangerous to tolerate.[172] The discussion would inevitably leak out to the slaves, who, unable to see the wisdom of their plight, would likely revolt.[173] Furthermore, the discussion would polarize the

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159. *See generally* RICHARD H. SEWELL, BALLOTS FOR FREEDOM: ANTISLAVERY POLITICS IN THE UNITED STATES 1837-1860, at 20-21 (1976).

160. Curtis, *Fossil Record*, *supra* note 151, at 245.

161. *See id.*; CURTIS, FREE SPEECH, *supra* note 2, at 141.

162. *See* CURTIS, FREE SPEECH, *supra* note 2, at 141.

163. *Id.* at 141-42.

164. *See id.* at 141.

165. *See id.* at 140-78 and authorities cited (abolitionist postal campaign and the violent response).

166. *See* Curtis, *Fossil Record*, *supra* note 151, at 245.

167. *See* CURTIS, FREE SPEECH, *supra* note 2, at 291 (book burning and calls for book burning).

168. *See id.* at 141-42.

169. *See, e.g.*, *id.* at 145 (mobs and James Birney); *id.* at 223 (Elijah Lovejoy); *id.* at 290 (recalling when a mob drove Professor Benjamin Hedrick from North Carolina for supporting the 1856 Republican nominee); CONG. GLOBE, 36TH CONG., 1ST SESS. 1861 (1860) (discussing when Mr. Underwood was driven from Virginia for discussing slavery and attending the Republican National Convention).

170. *See* CURTIS, FREE SPEECH, *supra* note 2, at 133-36.

171. *See id.* at 151.

172. *See id.* at 152.

173. *See id.*

nation on pro- and anti-slavery lines and eventually lead to civil war.[174] Slave revolts and disunion were bad tendencies indeed. Advocates noted that the Constitution recognized slavery; therefore, criticizing it violated the constitutional compact.[175] In contrast, political scientist Francis Lieber warned John C. Calhoun that suppressing free discussion meant that the slave system could only be (and would be) ended by violence.[176]

Extremists in the slaveholding elite were not satisfied with mobs, and some thought, rightly, they would prove counterproductive.[177] They demanded laws by the Northern states to punish abolitionist speech and press as criminal.[178] Others, however, in the North and in the South pointed out that free speech, press, and petition guarantees of state constitutions and of the Federal Constitution stood in the way.[179]

Abolitionists defended their right to speak, and on this issue, many who opposed abolitionists agreed. Abolitionist Alvin Stewart warned that "[i]f those in power could use the criminal justice system to silence their political critics . . . then the people would be deprived of democratic choice."[180] It would be a replay of the Sedition Act. Had that approach not been defeated, the nation would have seen "scenes of abuse" with "licensed presses, gagged discussion, and mail inquisitors."[181] Stewart said that such violations of freedom of discussion would mean that, "one half of the community could neither speak, write, nor publish anything of their adversaries, under pain of indictments, fine and imprisonment."[182] According to Stewart, such suppression of freedom of discussion was, and should be, beyond legislative power, state or national.[183]

Unitarian minister William Ellery Channing was a critic of abolitionist tactics.[184] But Channing defended their right to speak and to be heard. "Of all powers, the last to be intrusted to the multitude of men is that of determining what questions shall be discussed. The greatest truths are often the most unpopular and exasperating . . . ."[185]

Channing explicitly rejected the bad tendency doctrine.[186] Though he spoke in opposition to lawless force, his rationale went to the heart of the doctrine.[187]

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174. *See id.*
175. *See id.* at 153-57 (arguments for suppression).
176. *See id.* at 193 and authorities cited.
177. *See id.* at 206-07.
178. *See id.* at 207.
179. *See generally id.* at ch. 8.
180. *Id.* at 185-86.
181. *Id.* at 186.
182. *Id.*
183. *See id.* at 185-86.
184. *See id.* at 206.
185. *Id.* at 207 (quoting 5 ANNALS OF CONG. 2140-41 (1798)) and authority cited.
186. *See id.* at 208.
187. *See id.* at 207-08.

> Almost all men see ruinous tendencies in whatever opposes their particular interests or views. . . . So infinite are the connections and consequences of human affairs, that nothing can be done in which some dangerous tendency may not be detected. . . . There is a tendency in laying bare of deep-rooted abuses to throw a community into a storm. . . . Exclude all enterprises which *may* have evil results, and human life will stagnate. . . . [A]ny exposition of slavery . . . may chance to favor revolt. . . . Must we then live in perpetual silence?[188]

Mob suppression of anti-slavery speech helped to fuel a pro-free-speech reaction in the North.[189] When anti-slavery minister Elijah Lovejoy was killed in Alton, Illinois, defending his fourth press from a mob bent on destroying it, the result was a massive protest in the North.[190] As many saw it, slavery was moving its despotic practices to the Northern states.[191] Significantly, critics of the killing of Lovejoy saw it as an attack on the "privilege" of free speech and press guaranteed by the federal and state constitutions.[192] In those days, and for a long time, it was common to refer to rights of speech, press, religion, and assembly as "privileges."[193] Today, the idea that private violence aimed at speech is an attack on the constitutional value is unorthodox.[194]

As the nation acquired more and more territory, westward expansion again and again threatened to put slavery on the political agenda. Would new territories be slave or free?

As opponents of slavery agitated, the slave-power elite made ever more successful and daring demands for the liberty to plant slavery in the national territories.[195] First, the Missouri Compromise banning slavery north of thirty-six degrees, thirty minutes was repealed by Congress in 1854, opening previously free territory to slavery.[196] The repeal produced a political earthquake, decimating the Democratic Party and leading to the formation of the Republican Party.[197] In 1856, under the slogan "Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Frémont,"[198] the new Republican Party lost the election, but captured much of the North.[199]

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188. *Id.* at 208 and authority cited.

189. *Id.* at 217.

190. *Id.* at 227-31 (reaction to Lovejoy's death and invocation of free speech and press principles).

191. *See id.* at 227.

192. *Id.* at 229-30.

193. *Id.* at 229-31, 365-67; *see also* Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1098-118 (2000) (usage from the debates on the ratification of the Constitution to the eve of the Civil War) [hereinafter Curtis, *Historical Linguistics*].

194. *See* CURTIS, FREE SPEECH, *supra* note 2, at 230.

195. *See* FEHRENBACHER, *supra* note 149, at 182-88.

196. *Id.*

197. *Id.*

198. SEWELL, *supra* note 159, at 284.

199. FEHRENBACHER, *supra* note 149, at 188-92.

The Republican Platform proclaimed slavery unconstitutional in the federal territories (as a violation of the Fifth Amendment's Due Process Clause), and it demanded federal legislation banning territorial slavery.[200] But in 1857, in *Dred Scott v. Sandford*, the Supreme Court ruled that slaves or their descendants (free or slave) could never be citizens nor were they entitled to any federal constitutional rights.[201] The Court also held that slaveholders had a due process right to take their slaves to any federal territory and establish slavery there.[202] Under the *Dred Scott* decision, the Republican Platform was unconstitutional.[203]

In 1856 and 1860, Republicans could not campaign in the Southern states, their literature was banned or burned, and mobs drove Southern Republicans into exile.[204] Southern states did not simply rely on mobs and vigilance committees to suppress first anti-slavery speech, and then speech by members of Lincoln's Republican Party.[205] Southern states also made anti-slavery expression a crime, and Southern state laws became ever more repressive.[206] For example, by the 1850s, North Carolina had outlawed any publication with a "tendency" to cause slaves or free blacks to be discontent.[207] In the 1860s, the law was used to convict a minister, who was a Republican and an anti-slavery activist, for distributing a Republican campaign document, Helper's *The Impending Crisis of the South*.[208] The North Carolina Supreme Court upheld the conviction.[209] It was no defense that the book had been given only to whites.[210] Any circulation, the court explained, would have a tendency to reach slaves.[211] In 1860, the North Carolina legislature further amended the state's incendiary publication law, making death the penalty for the first offense.[212]

Faced with suppression of their rights to speech, press, and association in the South, Republicans proclaimed these to be constitutional rights (or "privileges" and "immunities") of citizens that no state should abridge.[213] People should have full liberty to discuss all matters of public concern, including slavery. On the eve of the Civil War, Republicans attacked the

200. REPUBLICAN PLATFORM OF 1856, *reprinted in* NATIONAL PARTY PLATFORMS 1840-1956, at 27 (Kirk H. Porter & Donald Bruce Johnson eds., 1956); REPUBLICAN PLATFORM OF 1860, *reprinted in* NATIONAL PARTY PLATFORMS 1840-1956, *supra*, at 31-32.

201. Dred Scott v. Sandford, 60 U.S. 393, 422-23 (1856).

202. *Id.* at 451-52.

203. *See id.*; sources cited *supra* note 200.

204. *See* CURTIS, FREE SPEECH, *supra* note 2, at 260-63, 281-88.

205. *See id.* at 281-88.

206. *Id.*

207. *See id.* at 293-94; *see generally id.* at 260-63, 281-88.

208. *Id.* at 289-99.

209. State v. Worth, 52 N.C. (7 Jones) 488 (1860).

210. *Id.*

211. *Id.*

212. 1860 N.C. Stat. Laws ch. 23, at 39 (1860).

213. *See* CURTIS, FREE SPEECH, *supra* note 2, at 298-99, 301.

Southern despotism, law, mobs, vigilance committees, and postal censorship that made free speech on the issue of slavery impossible in the South.[214]

With the election of Abraham Lincoln, a Republican president who pledged to ban slavery from the national territories, the South seceded. Led by its slaveholding oligarchy, Southerners spurned Lincoln's offer to support a constitutional amendment to forever ban federal interference with slavery in the South.[215] The Civil War began as a war to save the Union with slavery intact, but it ended as a war for emancipation and Union.[216]

E. The Civil War[217]

Repression is common in times of fear, crisis, and war. One common view (expressed or implied) is that free speech is fine in times of peace and calm but too dangerous to tolerate in time of war or crisis.[218] By this view, suppression is required in the national interest. It is also true, however, that at these politically opportune moments, partisans often use crises for political purposes, hoping to destroy or undermine political opponents. A common tactic, as it was in the controversy over the Sedition Act, is to question the loyalty of the opposition party.[219]

With the outbreak of the Civil War, many thought political parties should dissolve: opposition in time of war was disloyal.[220] Northern critics of the war were often called "traitors" and accused of "treason."[221] Of course, the Constitution's limited definition of treason hobbled any attempt to try and convict war critics of treason in federal court.[222]

What Justice Robert Jackson wrote about wartime is accurate:

> [The war] power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm

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214. *See id.* at 278-88.

215. *See* Abraham Lincoln, *First Inaugural Address*, *in* ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1859-1865, at 215, 222 (Library of America 1984) [hereinafter LINCOLN, SPEECHES].

216. *See* Abraham Lincoln, *Final Emancipation Proclamation*, *in* LINCOLN, SPEECHES, *supra* note 215, at 424, 424; U.S. CONST. amend. XIII.

217. For free speech issues during the Civil War, see, for example, CURTIS, FREE SPEECH, *supra* note 2, at 300-56 and notes cited.

218. Schenck v. United States, 249 U.S. 47, 52 (1919) ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight . . . ."). *Contra* Bond v. Floyd, 385 U.S. 116, 134-35 (1966) (holding a Georgia state representative could not be excluded from his elected office for expressing his admiration for draft resisters and for endorsing a harsh condemnation of the Vietnam War); CURTIS, FREE SPEECH, *supra* note 2, at 334 (noting that the *Chicago Tribune* defended the Vallandigham arrest: in times of peace free speech could be tolerated, but not "in times of war and revolution").

219. *See* CURTIS, FREE SPEECH, *supra* note 2, at 334-35.

220. *See* MARK E. NEELY, JR., THE UNION DIVIDED: PARTY CONFLICT IN THE CIVIL WAR NORTH 7-27 (2002).

221. *Id.* at 12, 21, 60, 74, 108, 191 (war opponents described as traitors and opposition to the war described as treason).

222. *See* U.S. CONST. art. III, § 3, cl. 1.

> . . . consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by the Judges under the influence of the same passions and pressures.[223]

After at first protecting slavery,[224] by 1862 Lincoln announced his intention to emancipate slaves in areas still under Confederate control. He justified partial emancipation as a necessary war measure.[225] Many Democrats supported the war, but many of them opposed the Emancipation Proclamation.[226] Many Northerners were racist, and a number of Northern Democrats, and others, appealed to racism.[227]

In September 1862, two days after issuing the Preliminary Emancipation Proclamation, Lincoln suspended the writ of habeas corpus throughout the nation.[228] At the same time, he provided for military trials and punishments of rebels, insurgents, their aiders and abettors, persons discouraging enlistments, and those "*guilty of any disloyal practice, affording aid and comfort to Rebels.*"[229]

Congress ratified the suspension in 1863, but provided that in areas where battles were not raging and the civilian courts were functioning, persons arrested under presidential authority should, by the end of the term of the grand jury in the district, either be indicted and tried in civilian court or released.[230] Lincoln ignored the limitation where the military made the arrest.[231]

At first, Lincoln pretty much left suppression of speech and press, even in areas outside the war zone, up to generals.[232] Suppression was never general; many harsh criticisms of Lincoln went unpunished, but some generals punished anti-war speech.[233] For example, in Ohio, in June of 1863, General Ambrose Burnside issued Order 38 forbidding, among other things, disloyal sentiments and treason express or implied.[234]

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223. Woods v. Cloyd W. Miller Co., 333 U.S. 138, 146 (1948) (Jackson, J., concurring).

224. *See* Abraham Lincoln, *Proclamation Revoking General Hunter's Emancipation Order*, *in* LINCOLN, SPEECHES, *supra* note 215, at 318, 318.

225. *See* Abraham Lincoln, *Preliminary Emancipation Proclamation*, *in* LINCOLN, SPEECHES, *supra* note 215, at 368, 368-70.

226. *See* CURTIS, FREE SPEECH, *supra* note 2, at 129-30.

227. *E.g.*, JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 159-60 (1988) (racism in the 1856 election); *id.* at 184 (exclusion of blacks from the Declaration of Independence by Stephen Douglas); *id.* at 506-07 (opposition to emancipation as a war aim); *id.* at 685-86 (racist appeals by Democrats in 1863).

228. *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 60 (1998).

229. Abraham Lincoln, *Proclamation Suspending the Writ of Habeas Corpus*, *in* LINCOLN, SPEECHES, *supra* note 215, at 371, 371 (emphasis added).

230. *See* CURTIS, FREE SPEECH, *supra* note 2, at 307 and authorities cited.

231. *See id.*

232. *See id.* at 336.

233. *See id.* at 307-09.

234. *See id.* at 307-08.

Soon, Burnside's troops arrested Clement Vallandigham, a leading anti-war and racist Democratic politician.[235] Vallandigham's "crime" was violating Order 38 by making an anti-war speech.[236] Vallandigham said the war was cruel and unnecessary and was a war to free the slaves and enslave whites.[237] He denounced Order 38 as an unconstitutional usurpation of authority.[238] Still, Vallandigham advised people to obey the law, to seek redress at the ballot box, and to hurl "King Lincoln" from his "throne."[239]

Vallandigham was arrested by the military, tried by a military commission, convicted by the military, and sentenced by the military to imprisonment (changed by Lincoln to exile to the Confederacy).[240] At first, Lincoln seemed to promise Burnside support for his effort to "suppress treason in your Department."[241] In the face of strong public criticism, including criticism from some Republicans, Lincoln became more cautious.[242]

The *Vallandigham* case was not unique (for example, a general in Indiana banned criticism of the war policy of the administration), but other generals did not attack political criticism, so suppression was never systematic.[243] Threats from Burnside helped keep most of the Democratic press in Ohio quiet, but elsewhere, much harsh anti-administration rhetoric (much of it produced by the Vallandigham arrest) went unpunished.[244]

Responding to critics, Lincoln defended the arrest as necessary to the war effort: the military arrested Vallandigham because he labored, with some success, to undermine recruitment and the army.[245] "Must I shoot a simple-minded soldier boy who deserts," he asked in a letter responding to critics of the arrest, "while I must not touch a hair of a wily agitator who induces him to desert?"[246] Based on this justification, Lincoln exiled Vallandigham to the Confederacy for conduct with which he was not charged and which was not supported by evidence at his trial.[247]

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235. *See id.* at 309.

236. *See id.* at 310.

237. *See id.* at 312.

238. *See* REHNQUIST, *supra* note 228, at 65; *see also Ex parte* Vallandigham, 68 U.S. 243, 244-45 (1863).

239. REHNQUIST, *supra* note 228, at 66.

240. *See id.* at 66-67.

241. *See* Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105, 122 (1998) (quoting Craig D. Tenney, *To Suppress or Not to Suppress: Abraham Lincoln and the* Chicago Times, 27 CIV. WAR HIST. 249, 250 n.11 (1981)) [hereinafter Curtis, *Lincoln, Vallandigham*].

242. *See* CURTIS, FREE SPEECH, *supra* note 2, at 315-16, 335.

243. *See generally* DAVID W. BULLA, LINCOLN'S CENSOR: MILO HASCALL AND FREEDOM OF THE PRESS IN CIVIL WAR INDIANA (2008).

244. *See* CURTIS, FREE SPEECH, *supra* note 2, at 321-25.

245. *See id.* at 339.

246. *Id.* at 341.

247. *See id.* at 312-14 (charges against Vallandigham and evidence at his trial).

Critics of the arrest, who included some Republicans, some abolitionists, and many Democrats, invoked multiple strands of the free speech tradition.[248] They insisted that free speech was essential to democracy.[249] Men liable to be drafted faced injury and death, so they and the public had a right to argue about whether the war was wise and just, and if so, how it should be conducted.[250] Elections depended on free speech.[251] If speakers could be silenced and meetings dispersed, critics warned, then elections would be a mockery.[252] Anti-war speech should be answered with counter speech. Though Burnside had banned "'disloyal' sentiments" and "treason, express or implied," critics powerfully insisted that the Constitution did not allow a crime of "implied treason" based on political criticism.[253] The people were the principal and government officials their agents; so criticism was necessary for the people to evaluate the actions of their agents.[254]

George V. N. Lothrop, a former Michigan attorney general and a supporter of the war policy of the administration, responded to the claim that the arrest could be justified by the claim that Vallandigham had been "expressing sympathy for rebels, declaring disloyal sentiments and opinions with a view to weaken the power of the government."[255] Without asking if Vallandigham's words could fairly be described in this way, Lothrop insisted that they could not be made criminal and that he could not be "arrested for any quality of opinions on public affairs[.]"[256] Free speech under the Constitution clearly encompassed "the right to canvass and discuss without reserve public measures and acts."[257] Lothrop rejected the idea that free speech protected liberty but not "license" or expression with an "evil tendency."[258] "The right of expression shall not depend upon . . . the quality of the opinions in the judgment of another. The guaranty means this or it means nothing."[259]

Defenders of the Lincoln administration argued that the war power was immense and overcame, for the time, all guarantees of civil liberties. Free speech was fine for peacetime, but wartime was different. Some supporters said Lincoln was a dictator but that was what was required in the situation.[260]

The record of federal courts on free speech during the war was mixed. A federal court entertained Vallandigham's habeas corpus petition but denied

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248. *See id.* at 314.
249. *See id.* at 323.
250. *See id.* at 321.
251. *See id.* at 323-24.
252. *See id.* at 324.
253. *See id.* at 307-09, 326.
254. *See id.* at 320-26 and authorities cited.
255. Curtis, *Lincoln, Vallandigham*, *supra* note 241, at 140 (quoting Speech of Hon. Geo. V. N. Lothrop, Delivered at the City Hall, Detroit (May 25, 1863), *in* DET. FREE PRESS, June 7, 1863, at 2).
256. *Id.*
257. *Id.*
258. *Id.* at 141.
259. *Id.* at 140-41.
260. CURTIS, FREE SPEECH, *supra* note 2, at 334-37 and authorities cited.

relief.[261] Vallandigham appealed from the decision of the military commission, but the Supreme Court denied relief on technical grounds.[262] Soon afterward, General Burnside suppressed the *Chicago Times* newspaper.[263] A federal judge issued a restraining order forbidding interference with the *Times*, but Burnside ignored the order and his soldiers burned all recently printed copies of the paper.[264]

Again, there were massive protests. A large crowd in Chicago, including many Republicans, protested the closure.[265] Lincoln had the Secretary of War telegraph Burnside to revoke his seizure order, and then sought to recall the instruction to give the matter more thought, but Burnside had complied and Lincoln's second thoughts came too late.[266] The order was revoked, and the *Times* resumed publication.[267]

Republicans in Congress later sought to expel an anti-war Democrat, who, in a speech on the floor of Congress, advocated peace with recognition of the Confederacy.[268] The motion to expel produced an extremely critical reaction from much of the press, including a number of Republican papers.[269] The sponsor changed the motion to expel to a motion to censure, which passed by a largely partisan vote.[270]

After the Vallandigham episode, in the face of wide-spread public protest, Lincoln reined in his generals. As to suppressing newspapers and the like, Lincoln said he should be consulted first.[271] Strong condemnation of suppression of expression during the Civil War helped limit repression.

Only after the war did the Supreme Court hold that trials like that of Vallandigham were illegal.[272] In *Ex parte Milligan*, the Supreme Court held illegal a trial and conviction by a military commission in areas where no combat raged and where the civil courts were functioning.[273] Five justices based their decision on constitutional grounds[274] and four on the ground that the administration had illegally ignored the limits placed by Congress on the suspension of habeas.[275] The Vallandigham conviction was doubly undermined by the decision. Vallandigham was also a civilian arrested far from the war zone in an area where the civilian courts were functioning. In addition, his

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261. *Ex parte* Vallandigham, 28 F. Cas. 874, 924 (C.C.S.D. Ohio 1863) (Case No. 16,816).
262. *Ex parte* Vallandigham, 68 U.S. 243, 251 (1863).
263. CURTIS, FREE SPEECH, *supra* note 2, at 314-15 and authorities cited.
264. *Id.*
265. *Id.*
266. *See id.* at 316-17.
267. *Id.* at 314-18.
268. *Id.* at 343-48.
269. *See id.* at 346.
270. *Id.* at 343-48 and authorities cited.
271. *Id.* at 336.
272. *Id.* at 348.
273. *Ex parte* Milligan, 71 U.S. 2 (1866).
274. *Id.* at 126-27.
275. *Id.* at 141 (Chase, C.J., concurring in judgment).

alleged crime was a speech criticizing the war and the Administration. To the extent that it is followed, *Ex parte Milligan* provides important protection for much political speech and association. As is often the case, the decision came after, not during, the war.

II. AFTER THE CIVIL WAR: THE SUPPRESSION OF FREEDOM OF EXPRESSION (INCLUDING ASSEMBLY AND ASSOCIATION) AND DEMOCRACY IN THE SOUTH[276]

A. Freedom of Expression and Private Suppression

Conventional legal categories can blind us. As a result, we rarely see private violence aimed at speech and political association as a constitutional problem. After all, private persons are not government actors, and guarantees of freedom of expression limit government action. At least if mobs or vigilantes act independently of government, freedom of speech, press, and assembly are simply not on the radar screen. In the case of opponents of slavery and the pre-Civil-War Republicans in the South, mobs and vigilantes were a major threat to freedom of expression.[277] In contrast to our modern categorical understanding, those who sought to protect democracy and free speech (North and South) before the Civil War often saw "private" suppression as an attack on the constitutional rights or privileges of American citizens under the Constitution.[278] Later in the South, during Reconstruction, Klansmen and similar groups continued pervasive "private" suppression of speech and association.[279]

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276. For a survey of methods supporting application of the Bill of Rights to the states, see, for example, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 26-91 (1986) [hereinafter CURTIS, NO STATE SHALL ABRIDGE] and Michael Kent Curtis, *The Bill of Rights and the States: An Overview from One Perspective*, 18 J. CONTEMP. LEGAL ISSUES 3, 13-75 (2009) [hereinafter Curtis, *The Bill of Rights*] and especially the important work of Professors Crosskey and Fairman cited in note 3 of that article; of Akhil Amar, cited in notes 18 and 45; of Richard Aynes, cited in notes 132 and 220; and, of Bryan Wildenthal, cited in note 33. For criticism of the historical basis for application, see, for example, Professor Fairman in note 1 of that article; Raoul Berger in note 10; George Thomas, note 18; James Bond, note 213; as well as the authorities in notes 31 and 110 of that article. For a broad survey, see Symposium, *Incorporation of the Bill of Rights*, 18 J. CONTEMP. LEGAL ISSUES 1 (2009). The survey includes support for application and critiques.

277. *See* CURTIS, FREE SPEECH, *supra* note 2, at 241-70.

278. *See* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 276, at 38-39 (remarks of Representatives Kasson and Farnsworth). *See generally* CURTIS, FREE SPEECH, *supra* note 2, at 232-40, 249, 257-63, 284.

279. On political violence, see, for example, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 279, 342-44, 425-44 (1988) (violence used against Republicans, white and black); VERNON LANE WHARTON, THE NEGRO IN MISSISSIPPI 1865-1890, at 181-206 (1984) (political violence, fraud, and later disfranchisement); Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 83-96 (2008) (displacement of majority rule in the South after the Civil War); Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, a Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381, 1397-1414 (2009) (politically motivated terror in the South during and after Reconstruction) [hereinafter Curtis, *The Klan*].

Leading framers of the Fourteenth Amendment intended for the Amendment to protect Bill of Rights guarantees including, at the very least, freedom of expression against state action. The text of the amendment, read naturally, and in light of historic usage leads to that result: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[280] The words "privileges and immunities" had commonly been used to describe free speech and press as well as other Bill of Rights liberties.[281] This is true in the Revolutionary Era, in the debates over the Constitution, in the Sedition Act debates, in the debates over free speech and slavery, and at the time of debates over the Thirteenth and Fourteenth Amendments.[282] The history of suppression of anti-slavery and Republican speech in the South before the Civil War and the frequent mention of that practice during Reconstruction debates also support application of the liberties to the states. In addition, Republicans frequently recounted private suppression as well as suppression by law as part of a history of suppression of free speech, of free press, and of the right to assemble.[283]

During Reconstruction, terrorist groups like the Ku Klux Klan perpetrated some of the worst violations of freedom of speech, press, assembly, and association in American history. Klansmen and similar groups whipped, beat, and killed people who supported the Republican Party.[284] They also burned their barns and killed their animals.[285] Typically, the motive was political.[286] Congress responded with criminal laws that, among other things, punished those who conspired to deprive citizens of rights, privileges, and immunities secured by the Constitution and laws of the United States.[287]

Though cracks appeared in Republican ranks during debate over anti-Klan laws, most Republicans in Congress supported federal protection against private violence aimed at the exercise of constitutional rights, the state action syllogism notwithstanding.[288] (By the state action syllogism later embraced by the Supreme Court, the Fourteenth Amendment limited only state action, not

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280. U.S. CONST. amend. XIV, § 1.

281. *See generally* Curtis, *Historical Linguistics*, *supra* note 193, at 1094-132 (collecting multiple examples of the historic usage of the words as equivalent to or including rights in the Bill of Rights).

282. *See generally id.*

283. *See, e.g.*, Curtis, *The Bill of Rights*, *supra* note 276, at 46-59.

284. FONER, *supra* note 279, at 426-29.

285. *See generally* Curtis, *The Klan*, *supra* note 279, at 1400, 1416.

286. *Id.* at 1398-99.

287. Force Act of 1870, § 6, 16 Stat. 140 (punishing, among other things, conspiracy by two or more persons to prevent free exercise and enjoyment of any right of privilege granted or secured by the Constitution or laws of the United States); Civil Rights Act of 1871, 17 Stat. 13 (punishing conspiracy by any person to deny any person of the equal protection of the laws or equal privileges or immunities under the laws).

288. *See* Curtis, *The Klan*, *supra* note 279, at 1397-425 (describing alternatives to the state action syllogism and noting that the Klan and similar groups engaged in *politically* motivated terror); Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1386 (2006) (suggesting that the state action doctrine should be limited by democratic principles). For another perspective, see Pamela Brandwein, *A Judicial Abandonment of Blacks? Rethinking the "State Action" Cases of the Waite Court*, 41 LAW & SOC'Y REV. 343, 343-45 (2007).

private action. Klansmen were private actors, not state actors; therefore, they could not be reached by legislation enforcing the Fourteenth Amendment against politically motivated terrorism.) Though Congress passed strong anti-Klan laws, the Supreme Court was another matter.

In the *Slaughter-House Cases* and more clearly in *United States v. Cruikshank*, the Supreme Court rejected application of liberties in the Bill of Rights to the states.[289] If citizens enjoyed any of the liberties in the Bill of Rights, that was simply because states chose to protect them. If protected at all, the rights were privileges of state citizenship, not rights, privileges, or immunities of citizens of the United States.[290] Because rights in the Bill of Rights were simply limits on federal power, states were free to abridge them.[291]

According to *Slaughter-House*, privileges of United States citizens included things such as protection on the high seas and in foreign lands and the right to visit the sub-treasuries and the nation's capital.[292] Southern Republicans (black and white) were assured of protection on the high seas and in Paris, France.[293] The Klan was not active in those places, however.[294]

In addition, the Court soon held that all guarantees in the now decimated Fourteenth Amendment, including due process and equal protection, applied only to state actors. Klansmen were not state actors. Therefore, the guarantees of the Fourteenth Amendment could not be enforced against politically motivated "private" Klan terrorists.[295]

By this state action syllogism, the federal government was stripped of power to protect citizens against "private" politically motivated violence.[296] The Court might have found the Bill of Rights protected by the Fourteenth Amendment. It might have interpreted the Fourteenth Amendment, including the Citizenship Clause and the guarantee of a republican form of government, to let Congress protect victims of politically inspired terror much as it

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289. United States v. Cruikshank, 92 U.S. 542, 550-57 (1876); The Slaughter-House Cases, 83 U.S. 36, 81-82 (1873).

290. *Slaughter-House*, 83 U.S. at 78; *Cruikshank*, 92 U.S. at 554-55.

291. *See Cruikshank*, 92 U.S. at 551-52.

292. *Slaughter-House*, 83 U.S. at 79.

293. *See id.*

294. *See generally* FONER, *supra* note 279, at 425-26 (describing the extreme violence perpetrated by the Klan primarily in the southern United States).

295. United States v. Harris, 106 U.S. 629, 639 (1883); *Cruikshank*, 92 U.S. at 554-55.

296. *See* cases cited *supra* note 295. There is an important qualification to be noted here. At least some early cases indicated that "private" violence motivated by race, but not politically motivated violence (as most Klan violence was) could be reached under equal protection if the state neglected to punish it or could be reached directly under the Fifteenth Amendment, if, again, the motive was race. *See generally* United States v. Yarbrough, 110 U.S. 651 (1884) (protection of the right to vote in federal elections and against racially motivated private violence); United States v. Cruikshank, 25 F. Cas. 707 (C.C.D. La. 1874) (No. 14,897). For a revisionist account of the Court and Reconstruction, see PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (2011). For a less favorable account of the Court, see, for example, Michael Kent Curtis, *Reflections on Albion Tourgee's 1896 View of the Supreme Court: A "consistent enemy of personal liberty and equal right?"* (forthcoming).

interpreted the Fugitive Slave Clause to let Congress punish those private persons who helped an escaping slave.[297] But it did not.[298]

When law students and law professors read cases about free expression, a claim of freedom of expression typically confronts a suppressive law. So it is natural to think of government power as the enemy of free speech, free press, and the right to assemble—natural, but often mistaken.

The problem for anti-slavery speech and Republican speech before and after the Civil War was the absence of effective and continued national power to protect speech, press, assembly, and political association. The black-white Republican coalition in the South, the Populists in the South, and anti-slavery and Republican activists before the war, all typically had their rights to speak, print, and associate suppressed by private action. Our failure to see these as violations of freedom of expression is a tribute to the power of formal legal categories and rules (such as the state action syllogism) to limit thinking and hide the reality of what is going on.

B. Free Speech from the 1870s to the 1920s

Freedom of expression often lost out in the years between 1870 and 1929. Here, I will summarize a few examples.[299]

As David Rabban has shown in *Free Speech in Its Forgotten Years*, until the 1930s, courts typically were not sympathetic to claims of freedom of expression.[300] Courts upheld punishment of expression that included parading behind a red flag of a branch of the Socialist Party; upheld a ban on speaking on the Boston Common; punished people for mailing books dealing with sexual topics and information on birth control; punished criticism of court decisions when the decisions could be characterized as still under consideration; punished labor speech including advocacy of boycotts; and, of course, punished speech advocating violence or revolution.[301] In addition, suppression of anti-war speech during World War I was extensive.[302]

By the dominant approach in these years, expression that could be characterized as having a bad tendency to produce unfortunate results could be

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297. *E.g.*, Ableman v. Booth, 62 U.S. 506, 526 (1859); Prigg v. Pennsylvania, 41 U.S. 539, 620-26 (1842).

298. *Ableman*, 62 U.S. at 526; *Prigg*, 41 U.S. at 620-26.

299. Readers can find good discussions in ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 3-343 (1967), in STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA 153-305 (2008) (a comprehensive survey), in DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 1-393 (1997), and in GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 135-232 (2004). I did a brief summary as well in my discussion of the transition to a more speech protective approach in CURTIS, FREE SPEECH, *supra* note 2, at ch. 17.

300. *See* RABBAN, *supra* note 299, at ch. 8.

301. *Id.* at 144-45, 165-67, 39-40, 132-34, 171-72, 143 (respectively).

302. *See generally id.* at chs. 3, 6-7.

suppressed.[303] The bad results did not need to be imminent; they did not need to come about. Direct advocacy of law breaking was not required.

In a 1914 case, the Massachusetts Supreme Judicial Court considered a state statute that prohibited parading with a red or black flag.[304] The defendant had paraded with a red flag with the inscription "Finnish Socialist Branch, Fitchburg, Mass."[305] The court upheld punishing the expression: the legislature regarded the red flag as a "symbol of ideas hostile to established order," and the court said carrying red flags in parades "would be likely to provoke turbulence."[306]

In another Massachusetts case, Oliver Wendell Holmes, then on the Massachusetts court, refused to recognize a right to speak on the Boston Common, a city owned park.[307] Holmes analogized the city government to a private homeowner.[308] Both had a right to ban expression on their property.[309]

In the 1907 case of *Patterson v. Colorado*, the Court considered the contempt conviction of Patterson, a Colorado newspaper editor and Democratic United States Senator.[310] In his newspapers, Patterson criticized a state court decision that ratified a coup by which the state court had been packed by the lame duck Republican governor before the time set for the appointment of new justices to the expanded Colorado Supreme Court.[311] The expanded court upheld challenges undoing the recent state elections so the apparently elected Democratic governor was replaced by a Republican and apparently elected Democratic lawmakers were also replaced.[312] In addition, the Colorado court found a voter-passed home rule amendment to the state constitution (one opposed by the utility monopoly) unconstitutional.[313]

Patterson's articles and cartoons suggested that the state court was being controlled by the state Republican boss and the utility monopoly.[314] A petition for rehearing was pending at the time of publication.[315] The Colorado court

303. *See id.*

304. Commonwealth v. Karvonen, 106 N.E. 556, 556 (Mass. 1914).

305. *Id.*

306. *Id.* at 557.

307. Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895), *aff'd sub nom.* Davis v. Massachusetts, 167 U.S. 43 (1897).

308. *Id.*

309. *Id.* For an invocation of a public forum right before the civil war, see CURTIS, FREE SPEECH, *supra* note 2, at 244-50 (Boston and the demand for a public forum to protest the killing of Elijah Lovejoy, who was defending his anti-slavery press from a mob).

310. Patterson v. Colorado, 205 U.S. 454, 458 (1907). A lively account of the case can be found in L.A. SCOT POWE, THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA (1992); for an abbreviated account drawing on Powe and a biography of Patterson, see 2 CONSTITUTIONAL LAW IN CONTEXT, *supra* note 18, at 1140-42.

311. 2 CONSTITUTIONAL LAW IN CONTEXT, *supra* note 18, at 1141.

312. *Id.* at 1141-42.

313. *See id.*

314. *Id.* at 1141.

315. *Id.*

cited Patterson for contempt.[316] The judges whom Patterson had criticized ruled on the case and denied his effort to be allowed to prove the charges were true.[317] Because the charge was contempt, not libel, he was denied a jury trial.[318]

Patterson appealed to the United States Supreme Court.[319] Justice Holmes, for the Court, left open the question of whether the Fourteenth Amendment contained guarantees of freedom of the press like those in the First.[320] It did not matter. Justice Holmes cited Blackstone and early American seditious libel cases: free press was merely a protection against prior restraint; truth was no defense against subsequent punishment of items that "may be deemed contrary to the public welfare."[321] Such publications *might* reach the jury and *might* have a tendency to interfere with the impartial administration of justice. That might also be the case for judges when a petition for rehearing was pending.[322]

In 1915, in *Fox v. Washington*, Justice Holmes upheld a conviction of a newspaper editor under a statute that made it a crime to edit or publish anything with "a tendency to encourage or incite the commission of any crime."[323] In an editorial headlined "The Nude and the Prudes," the editor advocated boycotting people who engineered the prosecution of people they had discovered sunbathing nude in a secluded, wooded area.[324]

Some of the most repressive cases involved sex. A book by Ezra Heywood called *Cupid's Yokes* advocated "sexual self-government."[325] The book argued that the institution of marriage enslaved women, demeaned love, and turned men into savages.[326] Marriage robbed individuals of their personal sovereignty.[327] Heywood argued for free love but not licentiousness.[328] "If," Heywood asked, "[g]overnment cannot justly determine what ticket we shall vote, what church we shall attend, or what books we shall read, by what authority does it watch at key-holes and burst open bed-chamber doors to drag Lovers from sacred seclusion?"[329]

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316. *Id.*
317. *Id.* at 1141-42.
318. *See* Patterson v. Colorado, 205 U.S. 454, 459, 462 (1907).
319. *See id.* at 454.
320. *See id.* at 462.
321. *Id.* at 461-62.
322. *See id.* at 462-63.
323. Fox v. Washington, 236 U.S. 273, 275-76 (1915).
324. *See id.* at 276-78.
325. EZRA H. HEYWOOD, CUPID'S YOKES: OR, THE BINDING FORCES OF CONJUGAL LIFE; AN ESSAY TO CONSIDER SOME MOREAL AND PHYSIOLOGICAL PHASES OF LOVE AND MARRIAGE, WHEREIN IS ASSERTED THE NATURAL RIGHT AND NECESSITY OF SEXUAL SELF-GOVERNMENT (1876), *reprinted in* SEX, MARRIAGE AND SOCIETY 1, 21 (Charles Rosenberg & Carroll Smith-Rosenberg eds., 1974).
326. FELDMAN, *supra* note 299, at 220-21 (containing a description of the book and the case); RABBAN, *supra* note 299, at 34-35.
327. *See* RABBAN, *supra* note 299, at 34-35.
328. *See* HEYWOOD, *supra* note 325, at 19.
329. *Id.* at 21.

Actually, the government was concerned with what books people read. Under an assumed name, Anthony Comstock, the anti-pornography crusader, got Heywood to mail him a copy of *Cupid's Yokes* and then had Heywood prosecuted under the federal law against mailing obscene items.[330]

According to David Rabban, *Cupid's Yokes* contained some sexually explicit references to birth control, a few references to sexual activity, and nothing that was sexually exciting.[331] The book criticized Anthony Comstock and the anti-obscenity law he inspired.[332] Following the approach used in early repressive English seditious libel cases, the trial judge held the only issue for the jury was whether Heywood had mailed the book (which he had).[333] Heywood was not permitted to explain the purpose and philosophy of the book to the jury; the jury could convict if any part of the book had an immoral tendency.[334] Heywood was convicted and sentenced to two years in prison.[335]

In early twentieth century labor cases, according to Stephen Feldman, the results were similarly dismal from the perspective of egalitarian freedom of expression.[336] "[C]ourts consistently emphasized the contract and property rights of employers and management to the neglect of any potential free-expression rights."[337] Worse was to come.

Many people opposed the United States' entry into World War I. Socialists and radicals were particularly vocal. Once Congress declared war, President Wilson asked Congress for statutes to suppress dissent.[338] Congress did not give Wilson all he sought, but what it gave proved enough.[339] The 1917 Espionage Act made it a crime "to willfully cause or attempt to cause insubordination, disloyalty, mutiny . . . in the military or naval forces" or to "willfully obstruct the recruiting or enlistment [in the military services of the United States]."[340] A 1918 amendment expanded the statute to punish language "intended to bring the form of government of the United States . . . into contempt, scorn, contumely, or disrepute."[341]

World War I proved that congressional legislation and punishment in civilian courts could result in remarkably pervasive and largely unjustified suppression. In the end, nearly 2,000 people, including pacifists, socialists, and

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330. *See* FELDMAN, *supra* note 299, at 211-12, 221.
331. RABBAN, *supra* note 299, at 34.
332. *See* FELDMAN, *supra* note 299, at 221.
333. *See* RABBAN, *supra* note 299, at 36.
334. *Id.*
335. *Id.*
336. *See* FELDMAN, *supra* note 299, at 228-33.
337. *Id.* at 228.
338. *See id.* at 241.
339. *See id.* at 241-42.
340. Espionage Act of 1917, ch. 30, § 3, 40 Stat. 217, 219 (codified as amended at ch. 75, 40 Stat. 553 (1918)).
341. Sedition Act of 1918, ch. 75, § 3, 40 Stat. 553, 553.

labor union activists, were prosecuted under state and federal acts for sedition and related offenses for opposition to World War I.[342]

In his influential book, *Free Speech in the United States*, Harvard law professor Zechariah Chafee noted that federal courts typically invoked bad tendency to support convictions.[343] As one summary of Chafee explains:

> [T]he bad tendency test allowed conviction for any words whose indirect effect was to discourage enlistment and the war spirit—provided the defendant had the intent to achieve that result. But, as Chafee note[d], courts told juries that intent could be inferred from the indirect injurious effect of the words, because people intend the natural consequences of their acts. Furthermore, it was not necessary that the remarks be addressed to a soldier; it was enough that they might eventually reach one.[344]

Convictions under these statutes included one of a man for telling a woman "knitting socks for soldiers, that no soldier would ever see them"; one for telling people "I am for the people and the government is for the profiteers" (that conviction was reversed on appeal); one "for urging broader exemptions for conscientious objectors"; and one "for screening a movie about the American Revolution because one scene" showed a massacre by British soldiers.[345] Under a state statute, a man was sentenced to ten years in prison for refusing to kiss the flag and saying that it was just paint and cloth and might be covered with microbes.[346]

In *Schenck v. United States*, Schenck, a Socialist, had distributed a leaflet (to draftees among others) that said conscription was a violation of the Thirteenth Amendment.[347] The leaflet warned against unlimited power being turned over to "Wall Street's chosen few" and urged political action against the war and the draft, including writing congressmen and exercising rights to "free speech, peaceful assemblage and petitioning the government for a redress of grievances."[348]

Schenck was charged with conspiring to violate the 1917 Espionage Act "by causing and attempting to cause insubordination . . . in the military and naval forces of the United States, and to obstruct . . . recruiting and enlistment."[349] In upholding the conviction, Justice Holmes said, "[T]he document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it

342. FELDMAN, *supra* note 299, at 254.
343. *See* CHAFEE, *supra* note 299, at 50.
344. CURTIS, FREE SPEECH, *supra* note 2, at 390; *see* CHAFEE, *supra* note 299, at 50.
345. CURTIS, FREE SPEECH, *supra* note 2, at 390; *see* CHAFEE, *supra* note 299, at 51-56.
346. CURTIS, FREE SPEECH, *supra* note 2, at 390; CHAFEE, *supra* note 299, at 286.
347. Schenck v. United States, 249 U.S. 47, 49-50 (1919).
348. 2 CONSTITUTIONAL LAW IN CONTEXT, *supra* note 18, at 1148 (Schenck's leaflet).
349. *Schenck*, 249 U.S. at 48-49.

out."[350] (One possible effect would be to cause readers to write their congressmen and to engage in the other forms of peaceful protest as the leaflet suggested.)

The defendant claimed that even if the circular had a tendency to obstruct recruiting, it was still protected by the First Amendment to the Constitution.[351] Justice Holmes admitted "that in many places and in ordinary times . . . saying all that was said in the circular would have been" constitutionally protected.[352] "But the character of every act depends upon the circumstances in which it is done."[353] Free speech and press would not "protect a man in falsely shouting fire in a theatre and causing a panic."[354] Invoking a theme that had been used by defenders of suppression of speech during the Civil War, Holmes insisted wartime was different.[355] "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight . . . ."[356]

The Court's opinion seemed to be simply another bad tendency case. But Holmes also said more. First, retreating from his statement in *Patterson*, he admitted that free press might not be limited to a protection against prior restraint.[357] In addition, he wrote:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[358]

Holmes wrote a second opinion during World War I, this time upholding the conviction of labor leader and Socialist candidate for President, Eugene Debs, for making anti-war speech.[359] Debs had said that the master class declared wars but the working class had to fight them, that the working class had their lives to lose, and that his listeners were fit for something better than cannon fodder.[360] The jury had been instructed to find the defendant guilty only if the natural and reasonably probable effect of the words would be to obstruct recruiting.[361] Justice Holmes disposed of the First Amendment with a citation to *Schenck*.[362]

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350. *Id.* at 51.
351. *Id.*
352. *Id.* at 52.
353. *Id.*
354. *Id.*
355. *See id.*
356. *Id.*
357. *See id.*
358. *Id.*
359. Debs v. United States, 249 U.S. 211, 214-17 (1919).
360. *Id.* at 213-14.
361. *Id.* at 216.
362. *See id.* at 215.

In 1917, Judge Learned Hand wrote an opinion construing the Espionage Act as limited to actual incitement to violate the law.[363] So long as one did not counsel violating the law, the speech was protected.[364] Judge Hand overturned a post office decision banning the magazine *The Masses* from the mail as violating the Espionage Act.[365] His opinion was in turn reversed on appeal.[366]

Several scholars were critical of the Court's World War I decisions. Professor Zechariah Chafee of Harvard was particularly influential. Chafee's *Harvard Law Review* article *Free Speech in Wartime* and his book *Free Speech* (first published in 1920) graphically illustrated the danger the bad tendency test had for the democratic function of free speech.[367] Chafee's case studies showed abuse after abuse.[368] Finally, Chafee creatively found enfolded in Justice Holmes's "clear and present danger" language a strongly speech-protective test.[369] He said the Holmes test made punishment for "remote bad tendency impossible."[370] In addition, Chafee suggested joining the Holmes test to Judge Hand's *Masses* test, requiring actual advocacy of law violation.[371]

In 1919, Justice Holmes and Justice Brandeis began to dissent from cases punishing speech. Justice Brandeis later wrote a series of opinions (joined by Justice Holmes) that emphasized the importance of free speech to democratic government.[372] In 1927, concurring in the result in *Whitney v. California*, Justice Brandeis provided the most robust statement of the clear and present danger test to date, together with a clear, though implicit, rejection of the bad tendency doctrine.[373] Charlotte Whitney had been convicted of violating the California Criminal Syndicalism Act, which punished becoming a knowing member of a group that advocated change by unlawful force or violence.[374] Justice Brandeis eloquently set out the reasons for broadly protecting speech.[375] The framers believed in reason "as applied though public discussion" and had "eschewed silence coerced by law."[376]

Justice Brandeis's version of the clear and present danger test was robust indeed. Fear of serious injury was not enough.[377] There needed to be a reasonable basis to fear a serious injury and the injury needed to be

363. Masses Publ'g Co. v. Patten, 244 F. 535, 540-42 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).
364. *See id.* at 540.
365. *See id.* at 543.
366. *See Masses Publ'g Co*., 246 F. at 39.
367. *See* CURTIS, FREE SPEECH, *supra* note 2, at 392-94.
368. *Id.* at 394.
369. *Id.* at 393.
370. *Id.*
371. *See id.*
372. *See id.* at 395-98.
373. *See* Whitney v. California, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring).
374. *Id.* at 359 (majority opinion).
375. *See id.* at 374-76 (Brandeis, J., concurring).
376. *Id.* at 375-76.
377. *Id.* at 376.

imminent.[378] Denunciation of existing law was not enough.[379] Nor was expression of approval of law violation.[380] Propagating the criminal state of mind by teaching syndicalism was not sufficient.[381] Even advocacy of law violation was not enough to justify "denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on."[382]

> To courageous, self-reliant men, . . . no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.[383]

The Brandeis version garnered only the votes of Justice Holmes and Justice Brandeis.[384] But the acorn clear and present danger test of *Schenck* would grow into an oak. To be really effective, the Chafee–Brandeis test simply needed to be grafted onto a majority opinion.

In the 1930s and continuing to the 1960s (with backsliding in the 1950s), the Court began to issue a remarkable series of speech-protective decisions. The decisions emphasized the crucial importance of free speech to democratic government. As Justice Hughes wrote for the Court in 1931: "The maintenance of the opportunity for free political discussion to the end that government may be respons[ible] to the will of the people [is] . . . a fundamental principle of our constitutional system."[385] Hughes's statement epitomizes the popular sovereignty and anti-hierarchical function of free speech.

In the 1930s, the Court held government was no longer to be treated as a private landowner who could ban speeches and leafleting from its sidewalks and parks; instead, states and the federal government held streets, sidewalks, and parks in trust for the people.[386] These were places where the people had a free speech easement to speak, leaflet, and parade.[387] In addition, in another case, Chief Justice Hughes held that injunctions against future publication of books or newspapers were prior restraints to be upheld only in very limited circumstances.[388]

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378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.*
382. *Id.* at 377.
383. *Id.*
384. *See id.* at 380.
385. Stromberg v. California, 283 U.S. 359, 369 (1931).
386. *See* Hague v. Comm. Indus. Org., 307 U.S. 496, 515-16 (1939); Schneider v. New Jersey, 308 U.S. 147, 163-65 (1939).
387. *See* cases cited *supra* note 386.
388. *See* Near v. Minnesota, 283 U.S. 697, 715-16 (1931).

In 1937, in *Herndon v. Lowry*, the Court explicitly rejected the bad tendency test.[389] Herndon was an organizer for the Communist Party, and state officers found him in possession of literature calling for a separate state for Americans of African descent in the South.[390] The statute under which Herndon had been prosecuted was written in response to the fear of anti-slavery agitation.[391] The Supreme Court explained the reach of the statute as construed by the Georgia court: the jury could convict the defendant if he "should have contemplated that any act or utterance of his in opposition to the established order or advocating a change in that order, might, in the distant future, eventuate in a combination to offer forcible resistance to the state," or if the jury believed "that his words would have 'a dangerous tendency' [toward that result,] then he may be convicted."[392] If Herndon could prophesy "that as a result of a chain of causation, following his proposed action a group may arise at some future date which will resort to force, he is bound to make the prophesy and abstain, under pain of punishment, possibly . . . execution."[393] This, the Court explained, impermissibly put all who agitated for change in the form of government at risk of being convicted of the offense of inciting insurrection.[394]

In 1941, in *Bridges v. California*, with Justice Hugo Black writing for the Court, the Court struck down contempt convictions of both a labor leader and of an anti-union newspaper for comments alleged to have a "tendency" to interfere with the administration of justice in pending matters.[395] *Patterson v. Colorado* was overruled.[396]

In the 5–4 decision in *Bridges*, the Court held that "[w]hat finally emerge[d] from the 'clear and present danger' cases [was] a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[397] This principle was the minimum compulsion of the Bill of Rights.[398] The Court considered the practical negative effect of a long series of moratoria on discussion of public issues.[399] Under the clear and present danger test, neither "inherent tendency" nor the "reasonable tendency" to interfere with the administration of justice was "enough to justify a restriction of free expression."[400]

The Court cited the clear and present danger test and went beyond it in 1943 in *West Virginia Board of Education v. Barnette*.[401] In this World War II

389. Herndon v. Lowry, 301 U.S. 242, 257-59 (1937).
390. *Id.* at 247, 251-52.
391. CURTIS, FREE SPEECH, *supra* note 2, at 398.
392. *Herndon*, 301 U.S. at 262.
393. *Id.*
394. *Id.* at 263-64; *see* CURTIS, FREE SPEECH, *supra* note 2, at 399; RABBAN, *supra* note 299, at 375.
395. Bridges v. California, 314 U.S. 252, 258-59, 267-70 (1941).
396. *See id.* at 267-68 & n.13.
397. *Id.* at 263.
398. *Id.* at 262-63.
399. *Id.* at 269.
400. *Id.* at 273.
401. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 633-34, 641-42 (1943).

decision, the Court held that Jehovah's Witness school children could not be punished for their refusal to salute the flag and say the Pledge of Allegiance.[402] Justice Jackson wrote for the Court:

> 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. If there are any circumstances which permit an exception, they do not now occur to us.[403]

The recognition that the Fourteenth Amendment protected the rights in the First Amendment, first suggested in dicta in the 1920s was, the Court explained, well established.[404] Furthermore, the demise of economic substantive due process did not imperil the protection of these Bill of Rights liberties against the states.[405] The Court explained that incorporation of the First Amendment made the due process command much more specific than the Due Process Clause alone.[406]

The acorn of Holmes's clear and present danger language in *Schenck* germinated, and with a powerful graft on its sprout by Professor Chafee and Justice Brandeis, grew into a mighty oak. But the hurricane of world Communism and the fear it engendered seemed to blow over the oak. Leaders of the Communist Party U.S.A. were convicted under the Smith Act for conspiring to organize the Communist Party to teach the duty and necessity of overthrowing the government as soon as circumstances would permit.[407] Conviction was nearly impossible under the *Bridges* understanding of the clear and present danger test because conspiring to teach the doctrine hardly made revolution imminent. So, a new test was needed.

The new test embraced by Justice Vinson's plurality opinion in *Dennis v. United States* was the gravity of the evil discounted by its improbability.[408] Because the evil was very great, the probability could be small.[409] Seriousness and imminence were for the court to decide, and the jury was left merely to decide if the defendants had conspired to organize the party to teach these matters.[410]

Justice Frankfurter filed a remarkable concurrence. First, he found that advocacy of revolution was, like obscenity, speech of low value.[411] But mixed with the low-value advocacy of revolution was speech pointing out defects in

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402. *See id.* at 628-30, 642.
403. *Id.* at 642.
404. *See id.* at 637-40.
405. *See id.*
406. *Id.* at 639.
407. Dennis v. United States, 341 U.S. 494, 497-98 (1951) (Vinson, C.J.) (plurality opinion).
408. *Id.* at 510.
409. *See id.* at 510-11.
410. *Id.* at 514-16.
411. *See id.* at 544-45 (Frankfurter, J., concurring).

our society.[412] Silencing advocates of overthrow would inevitably silence some critics who also spoke about the defects the Communists pointed out. For Frankfurter, however, that was not the Court's problem. The question was whether Congress had a reasonable basis for the choice it made; Frankfurter said it did, so the Court should defer to Congress.[413]

The rule in *Dennis* was at least limited to punishing those who advocated revolution, not those who advocated democratic change that was merely thought to have bad tendencies. Cases like *Vallandigham*, *Schenck*, *Debs*, and a host of World War I cases should, by this understanding of the rule, have come out in favor of the speaker. The Court soon limited the Smith Act by construction.[414]

By the 1960s, new appointments had produced a new court. In 1964, in the midst of the Civil Rights struggle, the Court considered an advertisement supporting Dr. Martin Luther King, the sit-ins, and the Civil Rights Movement.[415] The ad harshly criticized unnamed Alabama officials and Southern violators.[416] Some of the statements were not accurate.[417]

L. B. Sullivan, the Montgomery, Alabama commissioner who oversaw the police department, sued the *Times* for running the ad and sued the ad's sponsors.[418] He won a half-million dollar verdict.[419] In the 1964 case of *New York Times v. Sullivan*, the Court reversed.[420] Criticism of government actions could not be libel.[421] Sullivan would have had to prove intentional falsity or reckless disregard of the truth *and* that the ad was about him.[422] As a matter of law, the Court held he had done neither.[423]

In overturning the verdict against the *Times*, the Court relied on James Madison and other critics of the Sedition Act of 1798.[424] Remarkably, over one hundred and sixty years after it was passed, the Court decided that the 1798 Sedition Act was unconstitutional, a negative precedent, and an example of what government must not do.[425]

The *New York Times* case was a strong statement of the integral relation of free speech and democratic government. Just as government officials had a duty to govern and therefore needed protection against libel judgments, so

412. *See id.* at 549.
413. *Id*.
414. Noto v. United States, 367 U.S. 290, 297-99 (1961); Yates v. United States, 354 U.S. 298, 310-12 (1957).
415. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256-57 (1964).
416. *See id.* at 256-58.
417. *See id.* at 258-59.
418. *See id.* at 256.
419. *Id.*
420. *Id.* at 292.
421. *See id.*
422. *See id.* at 279-82.
423. *See id.* at 279-80, 283, 285-91.
424. *See id.* at 273-76.
425. *Id.* at 274-75.

members of the public had a duty to perform their governing role, including criticism, and similarly needed protection so they could do their civic duty.[426]

The *New York Times*'s statement of democratic free-speech principles was the most comprehensive statement the Court had issued up to that time, or since:

> [T]hat freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 [(1954)]. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." Stromberg v. California, 283 U.S. 359, 369 [(1931)]. . . . The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." . . .
>
> Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . .[427]

In 1966, early in the Vietnam War, at a time when the war still enjoyed considerable public support, the Court decided *Bond v. Floyd*.[428] Julian Bond, a recently elected black legislator, had endorsed a statement of the Student Non-Violent Coordinating Committee.[429] The statement said the U.S. was murdering peasants in South Vietnam; it denounced the war as aggression designed to squash liberation movements; and it expressed sympathy for the men who were unwilling to respond to the draft that would compel them to contribute their lives to United States' aggression in Vietnam.[430] Bond had not directly advocated draft resistance or violation of any law.[431] He said he simply admired those with the courage to resist.[432] The Georgia legislature refused to seat Bond.[433]

The Court held Julian Bond must be seated; his statements could not support a criminal prosecution.[434] Furthermore, under the First Amendment,

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426. *See id.* at 282.
427. *Id.* at 269-70.
428. Bond v. Floyd, 385 U.S. 116 (1966).
429. *See id.* at 118-23.
430. *See id.* at 119-21.
431. *See id.* at 122.
432. *Id.* at 124.
433. *Id.* at 125.
434. *See id.* at 133-37.

"legislators [must] be given the widest latitude to express their views on issues of policy."[435] Debate on public issues was to be wide open.[436]

In 1971, in *New York Times Co. v. United States*, the Court held that the Executive Branch could not enjoin the newspaper publication of the Pentagon Papers, a classified and often uncomplimentary government-commissioned study of the history of the war in Vietnam.[437] The Court also protected protest, including symbolic speech advocating peace. In the 1974 case of *Spence v. Washington*, Spence, a young college student, had attached a peace symbol with removable tape to his flag and hung it upside down out of his apartment window.[438] At his trial, Spence explained that the flag was "a protest against the invasion of Cambodia and the killings at Kent State University."[439] Police officers saw the flag and arrested Spence for violating a state statute that prohibited placing a picture or design on the United States flag.[440] The Court held that Spence's symbolic protest was constitutionally protected.[441]

There were exceptions.[442] But all in all, the Court's cases during the Vietnam War provided the greatest protection for anti-war speech in American history.

Still, the fact that the Court was generally protective of dissent did not mean that all was well in those times. The Nixon Administration was planning to use the criminal justice and tax systems to attack its political critics.[443] It arranged to burglarize Daniel Ellsberg's psychiatrist's office. Daniel Ellsberg had leaked the Pentagon Papers to the *New York Times* and *Washington Post*, and the burglary was an effort to find derogatory information that the administration could plant with friendly journalists in hopes of prejudicing jurors in his upcoming trial.[444] In general, the Nixon Administration used or planned a host of repressive tactics against critics.[445] But the Court's record is impressive compared to the cases before and shortly after World War I.

In 1969 in *Brandenburg v. Ohio*, the Court considered a conviction under a criminal syndicalism statute similar to that involved in *Whitney v. California*.[446] The statute made it a crime to advocate the propriety of using

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435. *Id.* at 136.

436. *See id.* at 135-36.

437. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971).

438. Spence v. Washington, 418 U.S. 405, 406 (1974).

439. *Id.* at 408.

440. *See id.* at 406-07.

441. *See id.* at 415.

442. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 382 (1968) (upholding punishing for burning a draft card).

443. *See generally, e.g.*, STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON 102-25 (1990) (discussing use of the tax system among other plans); J. ANTHONY LUKAS, NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS 68-108 (1976) (discussing use of the criminal justice system).

444. *See* LUKAS, *supra* note 443, at 90-104.

445. *See* sources cited *supra* note 443.

446. *See* Brandenburg v. Ohio, 395 U.S. 444, 445-48 (1969) (per curiam).

crime or violence to seek political change.[447] A handful of Klansmen held a Klan rally on a supporter's farm where they burned a cross.[448] The Klansmen said that if the President, Congress, and the Court continued to oppress the white race, "it's possible that there might have to be some revengeance [sic] taken."[449] Though most of the words spoken could not be understood, loathsome comments made at the rally included: "This is what we are going to do to the niggers"; "A dirty nigger"; "Send the Jews back to Israel"; and "Bury the niggers."[450]

The Court reversed the conviction, holding that the statute was unconstitutionally overbroad and that the speech was constitutionally protected.[451]

> [T]he constitutional guarantees of free speech and free press 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.[452]

During the 1960s and in the early 1970s, the Court often supported a broad reading of freedom of expression,[453] as it had usually done in the late 1930s and 1940s.[454] The approach was general. Court decisions sometimes supported speech rights of racists, and sometimes supported those of advocates of integration, labor, or more militant perspectives. The consistent thread was a fairly broad protection of free expression. Black demonstrators in South Carolina were protected by a speech decision won by a racist.[455] The NAACP in Mississippi was protected by the *Brandenburg* decision.[456] Professor Harry Kalven noted that huge gains had been made for racial equality without limiting

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447. *See id.* at 445.

448. *Id.*

449. *Id.* at 446.

450. *Id.* at 447 n.1.

451. *See id.* at 448-49.

452. *Id.* at 447.

453. *See, e.g.*, Cohen v. California, 403 U.S. 15, 18-19 (1971) (overturning a conviction for wearing a "Fuck the Draft" jacket because the writing on the individual's jacket was protected speech); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-81 (1964) (setting a knowingly/recklessly standard of conduct for libel involving a public figure).

454. *E.g.*, Thornhill v. Alabama, 310 U.S. 88, 105-06 (1940) (ruling that peaceful labor picketing was protected by the First Amendment); Schneider v. New Jersey, 308 U.S. 147, 163 (1939) (holding that a leafleting ban violated the First Amendment); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515-16 (1939) (deeming public streets and parks to be protected places to engage in speech); Herndon v. Lowry, 301 U.S. 242, 262-64 (1937) (rejecting the bad tendency test); Stromberg v. California, 283 U.S. 359, 369-70 (1931) (holding a statute that forbid the display of a red flag violated the First Amendment because it infringed on peaceful political dialogue); Near v. Minnesota, 283 U.S. 697, 715-16 (1931) (holding injunctions against future publications were generally impermissible prior restraints).

455. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 934 (1982); Edwards v. South Carolina, 372 U.S. 229, 238 (1963) (relying on Terminiello v. Chicago, 337 U.S. 1 (1949)).

456. *Claiborne Hardware Co.*, 458 U.S. at 927.

speech.[457] In contrast, critics fault the decisions for being insufficiently protective of the groups targeted by hateful speech.[458]

The Court has relied on the *Brandenburg* principle.[459] Still, speech has often suffered during wartime, so it is likely to be at risk in an endless "War on Terror." So far only one major terrorism-speech case has reached the Supreme Court. In *Holder v. Humanitarian Law Project*, the Court considered a federal statute that made it a crime to offer material support to groups that the United States government designated as terrorists.[460] Material support includes expert advice and assistance.[461] The plaintiffs wanted to cooperate with the Kurdistan Workers Party (PKK) and with the Liberation Tigers of Tamil in order to teach the groups about human rights law, how to make human rights complaints, and how to use peaceful ways to resolve disputes.[462] The Court found that such activity was banned by the statute and not protected by the First Amendment.[463] The case was difficult not only because the activity involved cooperation with members of groups designated as terrorists, but also because the statute punished peaceful means used in an attempt to achieve peaceful ends.[464] Still, the majority found that type of activity could promote the terrorist cause and upheld the statute.[465] Domestic groups or people could speak on these issues—even presumably advocating terrorism—but could not cooperate with foreign groups in an effort to promote peaceful resolution of disputes.[466]

As Justices Breyer, Ginsburg, and Sotomayor noted in dissent, the decision is in some tension with the Communist cases that limited the Smith Act, and it is in tension with *Brandenburg*.[467] They would have construed the statute to avoid the constitutional question.[468] *Humanitarian Law Project* is unique among modern free speech cases. So far it is the only modern case to uphold punishment of speech seeking peaceful ends by peaceful means.

So far I have focused on free speech and democracy. Sexually explicit materials may seem to be an entirely different matter.

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457. *See generally* HARRY KALVEN, THE NEGRO AND THE FIRST AMENDMENT 10-11 (1965).
458. *See generally id.* at 11-12.
459. *See* Texas v. Johnson, 491 U.S. 397, 409-10 (1989); *Claiborne Hardware Co.*, 458 U.S. at 927-28; Cohen v. California, 403 U.S. 15, 18-19 (1971).
460. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2712-13 (2010).
461. *Id.* at 2713.
462. *See id.* at 2713-14, 2720-21.
463. *See id.* at 2730-31.
464. *See id.* at 2725, 2729.
465. *See id.* at 2729.
466. *See id.* at 2728-29.
467. *See id.* at 2737 (Breyer, J., dissenting).
468. *See id.*

C. Sexually Explicit Publications

The Court held obscenity was not protected speech in the 1957 case of *Roth v. United States*.[469] Obscenity was not protected because it was supposedly utterly without redeeming social value.[470] The test was whether the material appealed to a prurient, morbid, or sick interest in sex—as opposed, presumably, to a healthy red-blooded American interest in sex.[471]

Still, *Roth* had protective aspects. The work had to be judged as a whole; sexual content was not enough. The prior practice of convictions based on isolated passages was out. Sex—which the Court noted had been a subject of interest to people through the ages—and obscenity were not identical.[472] Instead, all ideas "having even the slightest redeeming social importance" were generally protected—including "unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion."[473] In 1959, the Court held that the Constitution protects—among other things—material that "attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry," including advocacy that adultery may sometimes be proper.[474]

In *Memoirs v. Massachusetts*, the plurality opinion further narrowed the scope of obscenity; the material had to be utterly without value, had to appeal to a prurient interest in sex, and had to offend national contemporary community standards with reference to depictions and descriptions of sex.[475]

The scope of sexual expression that could be made criminal expanded after President Nixon's appointments to the Court. The items now had to have "serious" value, not just some; standards could be local, and printed books as well as pictures were in the shooting gallery.[476] Still, either under the standards of 1959, the 1960s, or the more restrictive ones of *Miller v. California* and *Paris Adult Theatre I v. Slaton*, *Cupid's Yokes*, and much more would still be safe.[477]

In 2010, in *United States v. Stevens*, the Court held that the value required to protect sexually explicit material must indeed be *really* serious.[478] At the same time, outside of "obscene" expression, the Court insisted that the First Amendment protects much that lacks serious value.[479] An effort to ban videos

469. Roth v. United States, 354 U.S. 476, 492 (1957).
470. *See id.* at 485.
471. *See id.* at 487.
472. *See id.*
473. *Id.* at 484.
474. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 688-89 (1959).
475. Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).
476. *See* Kaplan v. California, 413 U.S. 115, 120-22 (1973); Miller v. California, 413 U.S. 15, 24-25 (1973).
477. *Miller*, 413 U.S. 15; Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973); HEYWOOD, *supra* note 325.
478. *See* United States v. Stevens, 130 S. Ct. 1577, 1590 (2010).
479. *See id.* at 1591.

of people torturing helpless animals failed in part because a serious value requirement was too repressive.[480] But bans on pictures of consenting adults having sex (if the item is judged to be prurient and to violate community standards) can be saved by value only if it has *really* serious value. It is a puzzle.

In a zoning case (where an ordinance required adult bookstores not to sell books or magazines that depicted sexual activities if they also exhibited sexually explicit videos), Justice Souter's dissent made a crucial, but neglected point: Censoring adult speech is censoring a viewpoint.[481] "Adult speech refers not merely to sexually explicit content, but to speech reflecting a favorable view of being explicit about sex and a favorable view of the practices it depicts; a restriction on adult content is thus also a restriction turning on a particular viewpoint . . . ."[482] If Justice Souter is correct, the connection of sexually oriented expression to democracy is much closer than might at first seem to be the case. Indeed, a favorable or tolerant view of consenting adults engaging in oral sex, anal sex, or gay sex, and being explicit about these matters, challenged the views of the ruling hierarchies. And, to a remarkable extent, public understanding of these issues changed.[483]

At any rate, in recent cases the Court has strongly limited regulation of sexual material that does not meet the test for obscenity.[484] The Court's remarkably vague and potentially quite repressive test has functioned to limit even worse tests—a silver lining to the cloud of censorship of sexually explicit materials.

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480. *See id.*

481. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 457 (2002) (Souter, J., dissenting).

482. *Id.* The ordinance required that the items be a substantial portion of the store's stock in trade. *Id.* at 431 (majority opinion).

483. The matter is complex, of course. *Cf., e.g.*, Michael Kent Curtis & Shannon Gilreath, *Transforming Teenagers into Oral Sex Felons: The Persistence of the Crime Against Nature After* Lawrence v. Texas, 43 WAKE FOREST L. REV. 155, 215-18 (2008) (statistics from the Centers for Disease Control on the percentages of people in various age groups engaging in oral or anal sex); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding a homosexual sodomy statute unconstitutional for violating a consenting individual's right to privacy under the Fourteenth Amendment); Commonwealth v. Wasson, 842 S.W.2d 487, 496 (Ky. 1992) (holding a homosexual sodomy statute violated an individual's right to privacy under the state constitution). The First Presidential Commission on Obscenity and Pornography noted a study that found "that after exposure [to erotic materials,] persons became more tolerant in reference to other persons' sexual activities although their own sexual standards did not change." COMMISSION ON OBSCENITY & PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 26 (1970).

484. *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002) (holding that "virtual child pornography" that did not involve real children did not meet the definition of obscenity); United States v. Playboy Entm't Grp., 529 U.S. 803, 811 (2000) (holding that although some adults would consider Playboy's content "highly offensive," it was not obscene); Reno v. ACLU, 521 U.S. 844, 885 (1997) (restating that even indecent material is protected by the First Amendment, so long as it is not obscene).

III. POLITICAL SPEECH AND EQUALITY FROM THE 1930S TO THE PRESENT[485]

In 1945, toward the end of the New Deal years, the Court upheld the application of the anti-trust laws to the AP-telegraph monopoly.[486] Justice Hugo Black, a champion of a broad reading of First Amendment freedoms, wrote:

> Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom of the press from governmental interference . . . does not sanction repression of that freedom by private interests.[487]

The AP-telegraph monopoly had lasted from 1866 until 1945.[488]

In the New Deal and Great Society years, the Court also upheld a Fairness Doctrine that, with all of its shortcomings, did require some balance and did allow otherwise stilled voices to be heard.[489] In *Red Lion Broadcasting Co. v. FCC*, a unanimous Court held:

> There is nothing in the First Amendment which prevents Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.[490]

The Court said that the right of reply enhanced, rather than abridged, freedom of speech.[491] The people as a whole had a right to have broadcasting function consistent with the purposes of the First Amendment.[492] "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[493] The Fairness Doctrine was killed during the Reagan years.[494] As the print and

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485. For a few of the many very fine works on more recent free speech issues, including general surveys, see STONE, *supra* note 299, at 528-57; FELDMAN, *supra* note 299, at 463-72; works cited in the notes to this Article and those cited in CURTIS, FREE SPEECH, *supra* note 2, at ch. 17; and see also RABBAN, *supra* note 299, at 381-93. For a brilliant, prize-winning book on the system of freedom of expression in reality, see STARR, *supra* note 131, at 385-402.

486. Associated Press v. United States, 326 U.S. 1, 7 (1945).

487. *Id.* at 20. *See generally* C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 915-17 (2002).

488. STARR, *supra* note 131, at 175-77.

489. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 377-78 (1969).

490. *Id.* at 389.

491. *Id.* at 375.

492. *See id.* at 389-90.

493. *Id.* at 390.

494. *See* Peter J. Boyer, *Praise and Denunciation Greets Ruling by FCC*, N.Y. TIMES, Aug. 5, 1987, at C26.

broadcast media became ever more concentrated in fewer and fewer corporate hands, a doctrine, that sought to secure some diversity, was obliterated. Corporate hierarchies with strong political allies had found new avenues of control.

In the later 1930s and in the New Deal years, the Court was concerned with protecting and expanding the public forum in streets, sidewalks, and parks in the interest of insuring that less well-financed views could be heard.[495] In 1946, in *Marsh v. Alabama*, the Court held that a town entirely owned by a company could not ban free speech from what would otherwise be a public forum.[496] Again, less well-financed causes and labor could have access to the public on the same terms as the corporation. In 1968, after most of the downtown business districts with their public forums had moved to private shopping centers, the Court held common areas of "private" shopping centers were like the sidewalks of the downtown business districts, open to free speech.[497] Labor, consumers, and other less well-financed causes had somewhat equal access to the forum with corporate interests. The decisions were consistent with the anti-hierarchical origins and purposes of freedom of expression. The decisions expanded liberty of speech by expanding the number of those who could exercise it. They promoted liberty of speech and equality of opportunity to speak.

But in 1976, in *Hudgens v. NLRB*, the Nixon Court found people had no right to handbill anywhere on "private" shopping center property.[498] In these and subsequent years, the Court also limited the public forum to public streets, sidewalks, and parks.[499] Advertising slots on public buses could be closed to political speech and preserved for commercial speech.[500] Ads for snowmobiles and Hummers would be okay, but not ads calling for government action for conservation or fuel efficiency.[501] A public utility commission could not require a utility periodically to include in its billing envelope material from environmental groups supporting conservation or alternative energy, though the regulated utility was free to provide its side of the case in envelopes paid for by

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495. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141, 146 (1943) (referring to the poorly financed causes of little people); *see also* Schneider v. State, 308 U.S. 147, 163 (1939) ("[T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 702, 709 (1992) (Kennedy, J., concurring) (referring to how plenary power to limit the public forum would allow "the government to tilt the dialogue heard by the public, to exclude many, more marginal, voices" and recognizing how a ban on the sale of literature would "close the marketplace of ideas to less affluent organizations and speakers").

496. *See* Marsh v. Alabama, 326 U.S. 501, 509 (1946).

497. *See* Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 338-39 (1968).

498. *See* Hudgens v. NLRB, 424 U.S. 507, 520-23 (1976).

499. *E.g.*, United States v. Kokinda, 497 U.S. 720, 726-27 (1990); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

500. Lehman v. City of Shaker Heights, 418 U.S. 298, 303-04 (1974).

501. *See id.* at 304.

the ratepayers.[502] Again, the Court sided with corporate hierarchy and against multiple perspectives. For many, it restricted practical and functional freedom of expression.

Though the public forum was strictly limited to public sidewalks, streets, and parks, not even all public sidewalks qualified as safe places for free speech.[503] So a sidewalk immediately surrounding a post office (as opposed to the one along a public street) was treated as a proprietary sidewalk, and the Court upheld a jail sentence for activists who insisted on their right to sell and distribute political literature there.[504]

The Nixon Court protected corporate power in other areas. Nixon appointees ruled that states could not keep for-profit corporations from spending corporate treasury funds on ballot measures.[505] The result was often a political monologue, where one side got to be heard for many, many hours and the other for a few minutes. On important occasions, corporate messages have utterly overwhelmed the other side. In referendums on universal health coverage and public power held in Oregon and California, corporate interests outspent proponents by $1.3 million to $70,000 and $2.7 million to $50,000.[506]

When the Fairness Doctrine was in force, broadcast stations were required to give significant time to discussion of issues of public importance and to the underfunded side of the debate.[507] The rule no longer exists and, of course, the rule would not have limited cable without further legislation, and that legislation itself would have faced a serious constitutional challenge. A constitutional amendment probably would be required.[508]

Recently the Court, by 5-to-4 margins, has decided cases that further entrenched the political influence of corporate power and concentrated wealth and further enhanced the remarkable power huge, for-profit corporations already had over the political process.[509] Professor Charles Lindblom has summarized some of the differences between corporations and individuals:

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502. *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 4, 15 (1985); *see also* Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530 (1980).

503. *See Kokinda*, 497 U.S. at 732-34.

504. *Id.* at 735-37.

505. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 795 (1978).

506. *See* Tim Christie, *Health Care Plan Gets Little Backing from Oregon Voters*, THE REGISTER GUARD (Eugene, Or.), Nov. 7, 2002, at D1; Chuck Finnie & Susan Sward, *PG&E Spends Big to Defeat Prop. D*, S.F. CHRON., Oct. 29, 2002, at A1; James Mayer & Michelle Cole, *Oregon Voters Make Policy Choices at Polls*, THE OREGONIAN, Nov. 6, 2003, *available at* 2002 WLNR 11983858; Lance Williams, *Ethics Boss Raps Worker for Revealing PG&E Error*, S.F. CHRON., Jan. 10, 2002, at A1; Peter Wong, *Spending in Recent Election Broke Records*, STATESMAN JOURNAL (Salem, Or.), Dec. 6, 2002, at 1C. *See generally* Curtis, *Democratic Ideals*, *supra* note 132, at 410-13.

507. *See* Robyn R. Polashuk, *Protecting the Public Debate: The Validity of the Fairness Doctrine in Ballot Initiative Elections*, 41 U.C.L.A. L. REV. 391, 405 (1993) (citing BETTY H. ZISK, MONEY, MEDIA, AND THE GRASS ROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS, at 93-95, 198-99 (1987)).

508. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974) (holding a "right to reply" statute unconstitutional because it impermissibly compelled newspapers to publish speech).

509. *See* Citizens United v. FEC, 130 S. Ct. 876 (2010); Davis v. FEC, 554 U.S. 724 (2008). Doubters should, for example, watch the documentary film INSIDE JOB and look at efforts in the House of

> Through their spending and their relations with government officials [corporations, more precisely those few who rule the corporation with little effective check,] exercise much more power than do citizens. Their power swamps the power of all but a few enormously wealthy citizens.[510]
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> . . . .
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> . . . They can draw on "public" funds while members of other groups must spend out of their own incomes. These public funds they throw into political activity are public in the sense that they are drawn from the receipts of the enterprise, thus from customers and stockholders rather than from the personal income of enterprise executives.[511]
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> . . . .
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> . . . The effect of granting the enterprise a citizen's rights [to electoral speech, for example] . . . is to confer great special powers on groups of enterprise executives, who can make use of corporate assets and personnel in addition to exercising the rights and powers they enjoy as individual citizens.[512]

In 2010, in *Citizens United*, the Court struck down a congressional statute banning use of union or corporate treasury funds to support or oppose candidates for federal office in ads broadcast within a specified time of the election.[513] The decision overruled several prior cases and further undermined over a century of efforts to limit corporate political speech. So the few who rule giant for-profit corporations may, so long as they do not coordinate with candidates, use vast treasury funds to support or oppose candidates for public office. In effect, the few who control the corporation can use other people's money (without their consent or an effective way to opt out beyond selling all one's mutual funds) for political causes. Because corporations and their ownership are often multi-national, the development further degrades the agency or trustee relation between public officials and citizens. Foreign ownership of these artificial-corporate-free speech persons attenuates the relation of free speech to democratic citizenship. Nor is the decision good news for most corporations. Corporations seeking to expand alternative energy, for example, lack the huge resources of oil, gas, and coal corporations. Because of inadequate disclosure rules, vigorously protected by congressional beneficiaries of their largess, corporate executives can use front groups (the chamber of

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Representatives to defund the moderate effort to regulate big banks and the rest after their reckless conduct caused the Great Recession. INSIDE JOB (Representational Pictures 2010).

510. CHARLES E. LINDBLOM, THE MARKET SYSTEM: WHAT IT IS, HOW IT WORKS, AND WHAT TO MAKE OF IT 237 (2001).

511. *Id.* at 238.

512. *Id.* at 239.

513. *Citizens United*, 130 S. Ct. at 916-17. For a discussion of *Citizens United* and *Davis v. FEC*, see Michael Kent Curtis, Citizens United *and* Davis v. FEC *in Context:* Lochner *on Steroids and Democracy on Life Support* (Wake Forest Univ., Legal Studies Paper No. 1,685,459), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1685459#%23 (forthcoming).

commerce for the health insurance industry and the NRA for gun manufacturers) to conceal the identity of those funding the ads.[514]

For the majority in *Citizens United*, the vast speech inequality between a few giant corporations (or rather corporate executives using corporate funds) and most natural persons was no more significant than the inequality between the rich corporation and the poor worker was to many courts in the *Lochner* era. We have a new Gilded Age Court. For it, protecting a degree of equality in access to public discourse even by spreading the liberty to more citizens and preventing a corruption of the political process (short of outright bribes or the appearance of direct bribery) is not a compelling (or even constitutionally permissible) governmental interest.[515] The effect of huge sums of money on the political process is to undermine the agency, trust, or fiduciary relationship between government officials and citizens. This helps to explain many of the awful and incredible results of the corrupted political process.[516]

Corporations are expected to pursue and do pursue corporate profit. When corporate profit conflicts with the public good, the corporation, of course, pursues profits. So tobacco companies naturally opposed regulations of their product in the interest of health and attempted to mislead the public on the smoking–health connection—because the knowledge and regulation would impair corporate profits.[517] Oil companies favor continuing dependence on fossil fuels.[518] Drug companies oppose regulations banning using antibiotics to fatten farm animals, though that practice produces antibiotic resistant organisms and is opposed by almost every medical group.[519] The framers, of course, hoped for Presidents, Representatives, and Senators who would pursue the interest of "we the people," and not be seduced to pursue anything else.[520] The agency or trustee problem with politicians (directly or indirectly) financed by the most powerful and richest corporate interests (including corporations with

514. *See* David D. Kirkpatrick, *Lobbies' New Power: Cross Us, and Our Cash Will Bury You*, N.Y. TIMES, Jan. 22, 2010, at A1.

515. *See Citizens United*, 130 S. Ct. at 904 (equality is generally not an appropriate goal of campaign finance regulation); *id.* at 908 (the only corruption of the process justifying regulation is the direct, quid pro quo bribe).

516. See, for example, the prize-winning documentary, INSIDE JOB (Representational Pictures 2010) and the current effort to undermine even the inadequate regulation that was the congressional response to the reckless and if not illegal conduct by banks that produced the Great Recession.

517. *See* DAVID MICHAELS, DOUBT IS THEIR PRODUCT: HOW INDUSTRY'S ASSAULT ON SCIENCE THREATENS YOUR HEALTH 4 (2008) (public relations campaign by tobacco interests to cast doubt on the relation between smoking and health).

518. *See id*. at 201 (public relations campaign by American Petroleum Institute to cast doubt on climate change and the contribution of fossil fuels to the problem). Of course, campaign contributions have similar objectives.

519. *See* Donald Kennedy, *Cows on Drugs*, N.Y. TIMES, April 18, 2010, at WK11.

520. JAMES MADISON, *supra* note 78, at 193 (concern with public officials not being true to their trust relation with the people); THE FEDERALIST NO. 62, at 346 (James Madison) (Clinton Rossiter ed., 1999) (fear of corruption by foreign interests; fear of corruption by public decisions to serve private wealth because of dependent relationships); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 348-54, 355-62, 370, 374, 376 (2009).

substantial foreign ownership) or by the wealthiest is obvious. It interferes with the fiduciary relation between the people and their representatives, an interest our founders considered fundamental.[521] Public financing of political campaigns is an attempt to deal with this difficult problem.

Though unions have nothing like the concentrated economic power of corporations, they do provide counter speech in elections. So it is no surprise that we are currently seeing a concerted effort to destroy unions, and with it, their political voice.[522]

Court decisions operate in a real-world context. The Court has upheld a state law that workers must opt in before their union funds may be spent for political purposes[523] and has held that in union shops they must be allowed to opt out.[524] No such rules limit corporations. The effect of such one-sided regulation is to further entrench a corporate free speech hierarchy.

The First Amendment and the Fourteenth were drafted with little thought of vast corporations. James Madison referred to his bill of rights as protecting the "great rights of mankind."[525] He thought of free speech and press as rights belonging to the people.[526] His initial version provided, "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[527] Though the form of the amendment changed, there was no indication that the rights were understood to be anything beyond the rights of natural persons. The Fourteenth Amendment in particular seems to leave corporations out. It seeks to protect persons born or naturalized in the United States.[528] Subsequent references to persons in the same section would ordinarily have the same meaning. Privileges and immunities of citizens had long been held to exclude corporations.[529] Still, with little attention to text or

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521. *See* sources cited *supra* note 520.

522. For example, Governor Scott Walker of Wisconsin recently signed a bill that would strip public employee unions of most of their rights, including the right to bargain collectively and the right to strike. Mark Trumbull, *Walker Signs Bill. What Happens to Wisconsin Unions Now?*, CHRISTIAN SCI. MONITOR (Mar. 11, 2011), http://www.csmonitor.com/USA/Politics/2011/0311/Walker-signs-bill.-What-happens-to-Wisconsin-unions-now. Furthermore, the bill would make union dues voluntary, further weakening the funds that those public sector unions can devote to political ads. *Id.*

523. Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 184 (2007).

524. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977).

525. ANNALS OF CONGRESS, 1ST CONG., 1ST SESS. 449 (1789).

526. *See House of Representatives Debates*, *May-June, 1789*, *in* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1026 (Bernard Schwartz ed., 1971) (James Madison's speech in the debate over the Bill of Rights).

527. *Id.*

528. *See* U.S. CONST. amend. XIV, §1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . .").

529. *See* Bank of Augusta v. Earle, 38 U.S. 519, 570 (1839) (corporations are not protected by the privileges and immunities clause of Article IV, § 2); *accord* Paul v. Virginia, 75 U.S. 168, 177-78 (1868).

precedent, in the *Lochner* era the Court made the corporation a constitutional person.[530]

Huge corporations and trusts had proliferated. Perhaps, in making the corporation a person with civil liberties, the courts were simply keeping the Constitution up with the times—in the first Gilded Age. At any rate, the courts of the *Lochner* era tended to treat the corporation and the worker as simply two persons. One might be far richer and one far poorer, but that was "natural."[531] Courts were too often hostile to laws that interfered with the freedom of the huge, artificial, government-created construct and the lone worker to work out a bargain.[532] Some even struck down laws requiring workers to be paid in cash rather than scrip redeemable only in the company store or for company housing.[533] Laws seeking to protect the right of workers to join unions were struck down as interfering with liberty of contract.[534] Of course, the law had allowed people to combine into corporations, but that, supposedly, was a different matter.

In this earlier *Lochner* era, as in the present one, more than equality was at stake. Liberty was also undermined. A worker paid only in scrip redeemable in the company store had his practical liberty and his ability to bargain seriously circumscribed. A worker discharged for joining a union had her practical freedom of association undermined.

Freedom of expression functions in a much different world from that of the framers of the Bill of Rights or of the Fourteenth Amendment. The media is largely corporatized and centralized in a handful of corporations.[535]

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530. *See* Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1896) (The statement from the bench prior to oral argument foreclosed argument on the issue. The case was ultimately decided on state law grounds; the dicta lite appears only in the reporter's notes). For a fine discussion, see David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past and Uncertain Future of Corporate Personhood in American Law*, CONST. ACCOUNTABILITY CTR. (2010), http://www.theus constitution.org/upload/fck/file/File_storage/A%20Capitalist%20Joker(1).pdf.

531. *See* Coppage v. Kansas, 236 U.S. 1, 26 (1915) (striking down a law protecting employees from being discharged for union membership and rejecting inequality of bargaining power between the corporation and the lone worker as justifying regulation). "No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances." *Id.* at 17; *cf.* 2 KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES 124 (5th ed. 1966) ("Freedom . . . defeats itself, if it is unlimited. Unlimited freedom means that a strong man is free to bully one who is weak and to rob him of his freedom. . . . Now . . . these considerations, originally meant to apply to the realm of brute-force, of physical intimidation, must be applied to the economic realm also. . . . [otherwise,] the economically strong is still free to bully one who is economically weak, and to rob him of his freedom.").

532. *See, e.g.*, *Coppage*, 236 U.S. at 18. *See generally* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 38 (1991) (noting that "[b]y the turn of the century state and federal courts had invalidated roughly sixty labor laws").

533. *See* Godcharles v. Wigeman, 113 Pa. 431 (1886), *cited with approval in* Lochner v. New York, 198 U.S. 45, 63 (1905). *Contra* Knoxville Iron Co. v. Harbison, 183 U.S. 13, 20 (1901) (upholding a state statute that required employees to be paid in money rather than scrip if the employee wished).

534. *See, e.g.*, *Coppage*, 236 U.S. at 12-13; Adair v. United States, 208 U.S. 161, 174-75 (1908).

535. *See generally, e.g.*, DEAN ALGER, MEGAMEDIA: HOW GIANT CORPORATIONS DOMINATE MASS MEDIA, DISTORT COMPETITION, AND ENDANGER DEMOCRACY (1998); ROBERT W. MCCHESNEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES (1999).

We live in a new Gilded Age in which income and wealth are increasingly concentrated at the very top.[536] And those figures ignore the biggest and wealthiest political actors of all, the corporations whose wealth dwarfs all except a few of the very most wealthy. Administrations, increasingly attentive to the very wealthy, have cut their taxes.[537] Administrations, attentive to huge corporations, have undermined anti-trust laws and allowed increasing corporate concentration.[538] After a few institutions too big to fail helped to produce the Great Recession by deregulated behavior of remarkable recklessness and profitability (for those in charge),[539] they were combined into even fewer big institutions with even greater political power to resist regulation, which, aided by congressmen who have benefited from their largess, they are doing with a vengeance.[540]

In the first half of the nineteenth century, Grimke, Seward, Cooley, and others wrote about the decentralized and variegated press.[541] Safety for freedom of expression lay in dispersal of press power.[542] That day is gone. Today, a few media companies control almost all of the commercial media—television, newspapers, books, and movies.[543] The Internet remains, for the moment, a vibrant free speech forum.

Television (including cable) has become pervasive. In spite of the Internet, Americans still spend lots of time watching television.[544] Candidates need substantial resources to get their ads on television.[545] Typically, a candidate without substantial resources to get on television is not viable.[546] Though there are exceptions, television ads do make a difference.[547] Candidates are trapped. If they are insufficiently attentive to corporate interests, as expressed by a few powerful corporate executives, or to the interests of the very wealthy, they may find themselves lacking adequate funds

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536. *See* LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 6-19 (2008).

537. *See* Ray D. Madoff, Op-Ed., *America Builds an Aristocracy*, N.Y. TIMES, July 11, 2010, at A19.

538. For a case that made it significantly more difficult to prove a violation of the monopoly provision of the Sherman Act, see *Brooke Group v. Brown & Williamson*, 509 U.S. 209 (1993). For an analysis of *Brooke Group*, see David F. Shores, *Law*, *Facts and Market Realities in Antitrust Cases After* Brooke *and* Kodak, 48 SMU L. REV. 1835 (1995).

539. *See, e.g.*, GRETCHEN MORGENSON & JOSHUA ROSNER, RECKLES$ ENDANGERMENT: HOW OUTSIZED AMBITION, GREED, AND CORRUPTION LED TO ECONOMIC ARMAGEDDON (2011).

540. *See, e.g.*, Eric Lichtblau, *Ex-Regulators Lobby to Shape Overhaul*, N.Y. TIMES, July 28, 2010, at B1; Eric Lichtblau & Edward Wyatt, *Pro-Business Lobbying Blitz Takes on Obama's Plan for Wall Street Overhaul*, N.Y. TIMES, Mar. 28, 2010, at A19.

541. *See* Curtis, *Democratic Ideals*, *supra* note 132, at 402.

542. *See, e.g.*, GRIMKE, *supra* note 132, at 396.

543. *See supra* note 535 and accompanying text.

544. Watching television was a very time-consuming leisure activity in 2009. During that year, the average American over the age of fifteen spent about 2.8 hours per day watching television. *See American Time Use Survey*, BUREAU OF LABOR STATISTICS (2010), http://www.bls.gov/news.release/atus.nr0.htm (last visited Dec. 16, 2011).

545. *See* Curtis, *Democratic Ideals*, *supra* note 132, at 409.

546. *Id.*; BEN H. BAGDIKIAN, THE MEDIA MONOPOLY 191-94 (1983).

547. *See* BARTELS, *supra* note 536, at 119-20.

to campaign. They may also find themselves being overwhelmed by negative ads run by front groups, but funded by a few powerful corporate executives using money that does not belong to them or negative ads funded by billionaires and millionaires using their "own" resources; or negative ads directly funded by corporations.

On issues of public concern, consolidated corporate television has frequently ceded discussion to paid thirty-second spots, with corporate spots dominating the discourse. The result is very close to a corporate "free speech monologue." That was true of the ill-fated McCain tobacco bill, the initiatives for comprehensive health insurance in Oregon, and public power (after the Enron fraud) in California.[548] The result has been millions of corporate or wealthy dollars and massive messages on one side and paltry sums and almost no response on the other. Nor have television networks devoted much time to examining either the issue or the one-sided debate their lucrative "market" has often created.[549]

Flying banners of free speech, the Court has rejected plans to increase diverse speech while leaving the wealthy free to purchase vast amounts of broadcast speech. In *Davis v. FEC*, the Court considered the "Millionaires' Amendment" to the McCain-Feingold Campaign Reform Act.[550] That Amendment applied to a candidate of more modest wealth opposed by a very wealthy candidate who was spending large sums of his own money.[551]

Under the Millionaires' Amendment, when the millionaire or billionaire candidates spent over $350,000 of their own money, the opponent was allowed to receive contributions larger than those otherwise allowed.[552] The candidate facing the self-financed millionaire could raise up to $6,900 per contributor rather than $2,300—but, in effect, at best only up to the point of matching the millionaire or billionaire.[553]

The Court decided that the amendment burdened and chilled the millionaires' and billionaires' First Amendment rights to spend unlimited amounts of their personal funds.[554] The Millionaires' Amendment did so by increasing (to a limited degree) the opponent's opportunity to counter the millionaire's or billionaire's speech.[555] As the majority saw it, this fundraising assistance for the less well-financed candidate produced a "drag" on the billionaire's right to spend his or her personal funds and might deter some from doing so.[556] The threat of being answered, with the help of increased

548. *See* Curtis, *Democratic Ideals*, *supra* note 132, at 410-11; *see also id.* at 410-11 (drug companies paying for ads purportedly from Citizens for Better Medicare).

549. *See id.* at 413.

550. Davis v. FEC, 554 U.S. 724 (2008).

551. *Id.* at 728-30.

552. *Id.* at 729.

553. *See id.*

554. *See id.* at 737-38.

555. *Id.* at 729.

556. *Id.* at 739. "[T]he vigorous exercise of the right to use personal funds to finance campaign speech

contributions limits, had an impermissibly chilling effect! Speech was impermissibly chilled by the risk of counter speech—albeit counter speech made possible by relaxing contributions limits for those facing self-funded "millionaires."

The Court rejected the Government's main justification for the statute, which was to "level electoral opportunities [mostly speech opportunities] for candidates of different personal wealth."[557] A better and more accurate rationale would have been to increase the speech available to citizens. Instead, the majority insisted that "[o]ur prior decisions . . . provide no support for the proposition that this is a legitimate government objective."[558] Curiously, government action to enable more speech and more diverse speech was not a permissible objective because it would tend to equalize opportunity to participate in the aptly named "marketplace" of ideas and expand the practical liberty of the underfinanced candidate.[559] The only legitimate objectives were preventing corruption of the outright bribe variety and the appearance of corruption.[560] Why the "appearance of corruption" is invisible to those observing our current political system is a puzzle. The solution is that the only type of corruption that counts is the outright bribe.

The Government had justified the provision as one dealing with the "natural advantage" the millionaire or billionaire would otherwise have.[561] The Court quoted the argument and italicized the word "natural."[562] To view disparities of wealth as a natural phenomenon overlooks a lot. Of course, acquisition of great wealth is not like the weather—it is quite often the result of laws, rules, and governmental decisions. In his book *Wealth and Democracy*, Kevin Phillips explores the ways that the very rich and the politically powerful have used political power to perpetuate and create economic privilege, often at the expense of the public interest and often to the detriment of the middle and lower classes.[563]

Charles Lindblom makes a related point clearly in his book, *The Market System*:

> Market systems require two sets of decisions or determinations. One set consists of market transactions. The other consists of those "prior" determinations of the distribution among people of assets and skills that are

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produces fundraising advantages for opponents in the competitive context of electoral politics. The resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Id.* (citation omitted).

557. *Id.* at 741 (alteration in original) (quoting Brief for Respondent-Appellee at 34, Davis v. FEC, 554 U.S. 724 (2008) (No. 07-320), 2008 WL 742921).

558. *Id.* at 741-42.

559. *See id.* at 755 (Stevens, J., dissenting).

560. *See id.* at 737 (majority opinion).

561. *Id.* at 741.

562. *Id.*

563. *See generally* KEVIN PHILLIPS, WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH (2002).

> then offered in market transactions. These prior determinations come from custom, law, and historical accident; and they are largely compulsory. . . .
>
> Market transactions cannot be undertaken until these prior determinations have been made. Market transactions do not start from scratch. Until it has been somehow decided, by custom and law on property, that certain assets are yours, you cannot offer them in the market.
>
> . . . .
>
> . . . What each of us inherits, aside from genetic factors, is in large part shaped by a long, long history of war, conquest, looting, deceit, and intimidation, and law on property and inheritance.[564]

Justices Stevens, Souter, Ginsburg, and Breyer dissented.[565] Justice Stevens wrote that:

> [T]he twin rationales at the heart of the Millionaire's Amendment—reducing the importance of wealth as a criterion for public office and countering the perception that seats in the United States Congress are available for purchase by the wealthiest bidder—are important Government interests.[566]
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> . . . .
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> . . . The Millionaire's Amendment quiets no speech at all. On the contrary, it does no more than assist the opponent of a self-funding candidate in his attempts to make his voice heard; this amplification in no way mutes the voice of the millionaire, who remains able to speak as loud and as long as he likes in support of his campaign. Enhancing the speech of the millionaire's opponent, far from contravening the First Amendment, actually advances its core principles. If only one candidate can make himself heard, the voter's ability to make an informed choice is impaired.[567]

The *Davis* Court's decision imperiled public finance statutes with a limited catch-up provision for those who opt in and are outspent. Indeed, *Davis* cited with approval a case striking down a catch-up arrangement that allowed additional contributions for outspent, publically financed candidates.[568]

In contrast, the First Circuit's response to an action to strike down Maine's catch-up provision is equally relevant to the philosophy behind *Davis* and to the Court's more recent destruction of the most effective form of public finance. The plaintiffs in the Maine case challenged the limited, public-funded matching provision on the ground that it chilled and punished the speech of non-

564. LINDBLOM, *supra* note 510, at 169-71. *See generally id.* at 244.
565. *Davis*, 554 U.S. at 749.
566. *Id.* at 752-53 (Stevens, J., dissenting).
567. *Id.* at 753-54.
568. *See id.* at 739 (majority opinion) (citing Day v. Holahan, 34 F.3d 1356, 1359-60 (8th Cir. 1994)).

participating candidates and those wishing to make independent expenditures on behalf of a candidate.[569] The First Circuit thought this claim

> [M]isconstrue[s] the meaning of the First Amendment's protection of their speech. [Plaintiffs] have no right to speak free from response[—]the purpose of the First Amendment is to "secure the widest possible dissemination of information from diverse and antagonistic sources." ([T]here exists no right to speak "free from vigorous debate[.]") The public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech . . . .[570]

Sure enough, in 2011, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,[571] the Court struck down a public finance plan much like the Maine plan that had been upheld by the First Circuit. Once again, the threat of a limited amount of additional public funds to enable an outspent publicly funded candidate to respond to (but never to exceed and often not to equal) the speech of a self-financed candidate or an independent group was held a violation of the First Amendment.[572] The Court held that the additional publicly funded responsive speech would dilute what would otherwise be the undiluted effect of the speech of the self-funded candidate or independent group outspending the publicly financed candidate.[573] This was clear the Court said: an unanswered commercial is more effective than one that is answered.[574] So a compelling state interest was required to support the statute, and the Court found none.[575] Free speech doctrine had moved a long way from the time when it celebrated speech from multiple perspectives, practical opportunities for the less well off, and speech answering speech.

IV. CONCLUSION: FREE SPEECH, PRACTICAL LIBERTY, EQUALITY, AND DEMOCRACY

In its origins, freedom of expression was anti-hierarchical. A host of extraordinary people, such as the Levellers, employed speech, press, and petition to contest the near monopoly on political power, on speech, and on press enjoyed by the hierarchy of the rich and powerful. The Levellers were suppressed, but the democratic idea persisted. At first, free speech, free press, greater democracy, and free exercise of religion were all anti-hierarchical. For example, they empowered abolitionists (aided by rich donors to be sure) to

569. *See* Dagett v. Comm'n on Gov'tal Ethics and Election Practices, 205 F.3d 445, 463-64 (1st Cir. 2000).

570. *Id.* at 464 (citations and internal quotation marks omitted).

571. Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).

572. *See id.* at 2828-29.

573. *See id.* at 2827-28.

574. "All else being equal, an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted." *Id.* at 2824.

575. *See id*. at 2821-29.

contest the ruling hierarchy of the much wealthier and more powerful Slave Power.

Technological advances, at first, advanced an anti-hierarchy regime. Printing presses made wider and cheaper distribution possible. In England, government at first responded by press licensing, but control was difficult, and by the early eighteenth century, licensing the press was defunct. Subsequently, control moved to punishment for publication. That, in turn, was limited in much later years.

Of course, technology and the market, which, of course, is constructed by laws and regulations, were not always anti-hierarchical. The telegraph was a natural monopoly, and in the United States, the main telegraph company made a deal with a select group of newspapers (the Associated Press) to carry their wire service and to exclude others.[576] The monopolistic deal survived for many years.[577] In England, the government took over the telegraph (supported by all parties as a free trade measure), and it carried rival wire services—liberal, labor, and conservative.[578] Today the Internet is a vast domain for diverse expression. Because of corporate ownership of the pipes and the means that transmit it, and the corporate claim that they may exclusively control content, there is no guarantee that it will stay that way.

In the United States, much government action fostered freedom of expression. The post office carried communication and subsidized newspapers with free or reduced charges in the early years.[579] The policy expanded liberty. Public education, which was widespread outside the South, produced a literate public, while also vastly expanding democratic liberty.[580] Of course, at times the post office, like its private counterpart the telegraph, engaged in censorship, but government censorship was challenged under the free speech tradition.[581] In the 1830s, Congress refused to ban anti-slavery publications from the mails, and such a ban was widely seen as unconstitutional.[582] Though the Postmaster General under Andrew Jackson considered such censorship illegal, he encouraged local postmasters to do it, and they did.[583] The Court was slow to view the post office as a channel of free expression protected by the First Amendment, but eventually it did.[584]

James Harrington, the seventeenth century political thinker much admired by some leaders in the new republic, Alexis de Tocqueville, and Daniel

576. STARR, *supra* note 131, at 16.
577. *See id.* at 176-77.
578. *See id.* at 176-79.
579. *See id.* at 16.
580. *See id.* at 15-17.
581. *See id.* at 240-41.
582. *See id.*
583. *See id.*
584. *See* CURTIS, FREE SPEECH, *supra* note 2, at 407-08 and authorities cited.

Webster all thought that economic arrangements shape political ones.[585] For de Tocqueville, democracy in America was created by changes in laws of inheritance in the United States and the end of primogeniture.[586] The point can be generalized: laws that abolish inheritance taxes,[587] laws that get rid of the rule against perpetuities,[588] changes in the tax laws that facilitate great concentrations of income and wealth,[589] changes in anti-trust laws that facilitate business consolidation,[590] and degradation of benefits for middle and poorer classes—all contribute to the rise of oligarchy. The moral of this story is simply that great combinations of power, including private combinations, can threaten practical democracy and freedom of expression.

Government power can also support freedom of expression. Sadly, at crucial times in American history, failure to exert government power undermined democracy and freedom of expression. This was so, for example, in the case of the Klan suppression of the black-white Republican coalition after Reconstruction, a suppression that undermined democracy and majority rule.[591] It was the case later in North Carolina for the violent suppression of the state's Republican-Populist coalition.[592] It was the case when a violent coup and race riot displaced the elected government in Wilmington, North Carolina.[593] It was the case in the toleration from 1866 to the 1940s of the telegraph monopoly.

Conversely, the right to vote was restored to Americans of African descent in the South by national governmental action in the 1965 Voting Rights Act.[594] The Civil Rights Act of 1964 underminded the racial caste system, limiting "private" power.[595] The view that government power is problematic and evil and private or corporate power is benign leaves out a lot of the story.

At one time, government was allowed to prevent free speech on its parks and sidewalks. Later, constitutional interpretation created a free speech

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585. *See* JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS 11-12 (J.G.A. Pocock ed., 1992) (1656). Daniel Webster wrote, "The freest government, if it could exist, would not be long acceptable, if the tendency of the laws were to create a rapid accumulation of property in few hands, and to render the great mass of the population dependent and penniless." DANIEL WEBSTER, FROM FIRST SETTLEMENT OF NEW ENGLAND (1820), *reprinted in* POLITICAL THOUGHT IN AMERICA 199, 200 (Andrew M. Scott ed., Rinehart 1959).

586. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 34–35 (Harvey C. Mansfield trans., University of Chicago Press 2000) (1838).

587. *See* Madoff, *supra* note 537.

588. *See id.*

589. *See* Carl Huse, *Estate Tax Is Expiring, but Death Won't Last*, N.Y. TIMES, Dec. 17, 2009, at A20.

590. For a case that made it significantly more difficult to prove a violation of the monopoly provision of the Sherman Act, see *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). For an analysis of *Brooke Group*, see Shores, *supra* note 538, at 1849-59.

591. *See* Curtis, *The Klan*, *supra* note 279, at 1398-414.

592. *See* PAUL D. ESCOTT, MANY EXCELLENT PEOPLE: POWER AND PRIVILEGE IN NORTH CAROLINA 1850-1900, at ch. 10 (1985).

593. *See generally* H. Leon Prather, Sr., *We Have Taken a City*, *in* DEMOCRACY BETRAYED: THE WILMINGTON RACE RIOT OF 1898 AND ITS LEGACY 15 (David S. Cecelski & Timothy B. Tyson eds., 1998).

594. Voting Rights Act, 79 Stat. 437 (1965) (current version at 42 U.S.C. § 1973 (2006)).

595. *See* Curtis, *The Klan*, *supra* note 279, at 1425-26.

easement. Still later, with governmental approval and assistance, much of the downtown business district moved to private enclaves—large shopping malls. These centers of private power could and did ban free speech on their sidewalks. Court action (a form of government action) for a time created a free speech zone in "private" shopping centers, but later court action shut it down.

The unregulated telegraph in the U.S. created a private monopoly that censored press competitors. Since copyright laws (a government regulated monopoly) did not at first apply to the press, the monopoly power was mitigated.[596] The government created the Internet, and then privatized it.[597] Now those who own the pipes and devices that deliver it claim that they have the same private right of censorship long enjoyed by the telegraph and currently enjoyed by shopping malls.[598] The owners of the pipes also provide content and look forward to transforming the Internet into a form of for-profit cable television.[599]

At one time, fearful of the anti-hierarchical nature of free press, the government created a monopoly on printing and required licenses to print. Now on the tremendously influential medium of television, a refashioned hierarchical system is too often at work, with a quasi-monopoly purchased by wealth rather than decreed by government.

In earlier cases, the Supreme Court has written eloquently about the system of freedom of expression, a system designed so that government can be responsive to the will of the people. It has written about the importance of diverse information from multiple perspectives. But these ideals confront the world of ever more concentrated economic power. That power translates into political power and undermines the agency or trust relationship between the people and their government. The *Davis*, *Citizens United*, and *Arizona Free Enterprise* cases are landmarks of our new Gilded Age Court. But, they have not created the problem; they have merely exacerbated it.

The democratic function of free speech is being eclipsed by a "market" for speech, in which wealth is increasingly concentrated in fewer hands, and much speech in the most crucial political media of television and radio belongs to those who buy it. Campaign finance undermines the agency or fiduciary relation of congressmen and public officials to the people they are supposed to represent. The anti-hierarchical purpose historically served by freedom of expression, one served by the currently and temporarily largely free Internet, is fraying under a sustained and multi-pronged assault.

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596. *See* STARR, *supra* note 131, at 121.
597. *See* MCCHESNEY, *supra* note 535, at 129-30.
598. *See id.* at 146-59.
599. *See id.*