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Civil Liberties and the Dual Legacy of the Founding

John W. Compton

In the area of civil liberties, the American framers bequeathed a dual legacy. On the one hand, they authored and ratified constitutions with strikingly open-ended guarantees concerning the freedom of speech, the freedom of religion, the right to trial by jury, and various aspects of criminal procedure. On the other hand, the same Americans who spoke of "inalienable" rights endorsed a range of inherited laws and customary practices that sharply limited the practical consequences of these abstract guarantees. Most of the newly independent states enforced laws against blasphemy, for example, even as their constitutions promised to respect the freedom of speech. Many states also criminalized Sunday labor and barred non-Protestants from holding office, even as their constitutions prohibited religious establishments and promised to respect the freedom of religion. And virtually no one involved in the drafting of the state or federal constitutions believed that civil liberties provisions indicated any change in the legal status of slaves, women, or other subordinate classes of Americans.

There can be little doubt that the authors of Founding-era rights provisions sincerely hoped to protect citizens from the sorts of abuses – from warrantless searches to the forced quartering of soldiers – that had transformed the imperial crisis into a revolution. But most of them were equally determined to guard against the collapse of customary forms of authority that they deemed essential to social stability. Thus, while civil liberties principles certainly played a central role in the American Revolution, it is not at all clear that they occupied a preeminent position in the constitutional order that emerged in its aftermath. Far from elevating civil liberties above inherited forms of authority, the founding generation superimposed the former on the latter, leaving it to future generations to work out the precise nature of the resulting relationships.

This chapter will argue that the framers' dual legacy in the area of civil liberties has cast a long historical shadow. Since the early republic, Americans have invoked constitutional civil liberties provisions to challenge customary forms of authority. Yet establishing the abstract legitimacy of one's claim – that it comports with a particular conception of religious liberty or the freedom of

speech, for example – has typically been insufficient to prevail in the courts. In addition, rights claimants have regularly been asked to overcome a competing set of normative commitments – to federalism, to patriarchal family relations, to religiously inspired social mores – that give entrenched authority its own distinct claim to constitutional legitimacy. The most obvious practical effect of this duality, particularly in the early years of the republic, was the frequent subordination of civil liberties to illiberal forms of authority. Yet even as illiberal authority structures have eroded over time, the framers' dual legacy has continued to shape constitutional development in ways both subtle and profound.

Indeed, it is noteworthy that even as Americans have adopted ever more expansive conceptions of particular constitutional liberties, they have continued to disagree, often bitterly, about precisely which forms of inherited authority are so arbitrary or oppressive as to run afoul of these guarantees. They have also disagreed, just as bitterly, over the state's proper role in mitigating the social and political effects of illiberal social authority. Should civil liberties provisions be regarded as purely negative guarantees, offering protection against government action only, and thus not incompatible with social arrangements that, while illiberal, are not clearly underpinned by official authority? Alternatively, do government actors have an affirmative duty to dismantle inherited social structures that render civil liberties all but meaningless for some citizens? And if such an obligation exists, how does one calculate (and justify) the resulting tradeoffs between liberty and equality? If consensus on these questions has proved elusive, it is at least in part because the Constitution, owing to its dual nature, cannot settle the matter.

This chapter divides the history of civil liberties into four periods. The first section covers the period from the founding through the late nineteenth century – a time when a broad moral consensus rooted in Protestant Christianity was said to demarcate a boundary between "liberty" and "license" and when open-ended civil liberties provisions were rarely interpreted in ways that undermined customary patterns of authority. The second section examines the early decades of the twentieth century, a transformative period when the collapse of the Protestant moral consensus, together with the rise of social movements bent on undermining entrenched hierarchies, left the traditional theory of civil liberties in tatters.

The chapter's third section documents the emergence, in the middle decades of the twentieth century, of a new theory centered on promoting individual autonomy and protecting a robust marketplace of ideas. Crucially, the mid-century Supreme Court harnessed its civil liberties jurisprudence to an egalitarian theory of American democracy, aggressively scrutinizing laws that appeared to perpetuate systemic inequality while adopting a deferential approach in cases where state action seemed designed to mitigate flaws in the nation's representative system of government.

The chapter's final section covers the modern period (1970s to the present), an era when the justices have sorted themselves into competing ideological camps,

with each camp at times embracing an expansive conception of civil liberties – albeit for very different reasons. In some cases, a "liberal" bloc advocating an uncompromising approach to civil liberties is pitted against a "conservative" bloc advocating deference to traditional mores and local majority sentiment. In others, the ideological valence of civil liberties is reversed, with the conservative bloc adopting an absolutist conception of individual rights and the liberal bloc advocating deference to lawmakers who are purportedly acting to remedy structural inequalities. Because case outcomes have often turned on the vote of a single "swing" justice, modern civil liberties doctrine has grown increasingly incoherent: decisions proclaiming the inviolability of civil liberties principles are followed, often in the same term, by decisions calling for deference to tradition or for subordinating civil liberties to the goal of fostering a more egalitarian society. These doctrinal tensions become comprehensible when viewed in the light of the framers' dual legacy.

CIVIL LIBERTIES IN THE LONG NINETEENTH CENTURY

At first glance, it may seem that the individual rights today referred to as "civil liberties" have always been a core concern – perhaps *the* core concern – of American constitutionalism. Certainly, no subject featured more prominently in the ratification debate of 1787–1788.[1] Most of the delegates tasked with evaluating the Philadelphia Convention's handiwork hailed from states whose constitutions recognized a range of "natural," "inalienable," or "inherent" rights, including the freedom of the press, the freedom of religion, and the right to trial by jury. The bill (or declaration) of rights was typically placed at the head of these documents, thus ensuring, at least in theory, that the new state governments would not lose sight of the higher ends for which they were formed. It is hardly surprising, then, that many delegates cried foul when it was discovered that the proposed federal constitution lacked such protections. In the end, James Madison and other leading Federalists, fearing that the Constitution might go down to defeat, agreed to amend the document. The resulting guarantees, now known collectively as the Bill of Rights, included the freedoms of press and speech; the rights of petition and assembly; the free exercise of religion; a ban on religious establishments; the right to bear arms; and a range of criminal procedure guarantees including, among other things, the right to a fair and speedy trial, a ban on warrantless searches, and a prohibition against "cruel and unusual" punishments.

But for all the ink they spilled in defense of civil liberties, it is far from clear that founding-era Americans understood these guarantees in the same way as twenty-first-century Americans. Indeed, many of the same state convention delegates who demanded a federal bill of rights were alarmed to find that the

[1] See, for example, Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (New York: Simon and Schuster, 2010).

proposed Constitution explicitly banned the use of religious test oaths for federal officeholders. This provision raised the specter that "pagans, deists, Mahometans" and even the "pope of Rome" might "obtain offices among us."[2] Although Federalist writers conceded the force of the objection, they rushed to assure skeptical delegates that the Constitution would not interfere with the states' ability to punish "profane swearing, blasphemy . . . professed atheism" and other "gross immoralities and impieties."[3]

What should we make of Americans who demanded expansively worded rights guarantees while simultaneously insisting that Catholics be barred from public offices and blasphemy punished as a crime? Two broadly shared convictions allowed Americans to proclaim allegiance to the idea of civil liberties while simultaneously embracing inherited social structures that sharply limited the real-world effects of these written guarantees. First, it was widely agreed that republican government was unlikely to survive in the absence of a morally virtuous citizenry.[4] From this it followed that a Protestant-derived moral consensus marked, or ought to mark, the boundary between liberty and license. Second, even as Americans embraced the Lockean language of natural rights, the enduring force of the common law ensured that they would continue to view their own society in broadly hierarchical terms. Thus James Kent and other early American legal commentators depicted a society composed not of coequal rights-bearing citizens but of legally enforceable relationships featuring dominant and subordinate partners: husbands and wives, masters and servants, guardians and wards.[5] To the limited extent that these writers addressed the tension between inherited legal prerogatives and the Lockean ideal of universal rights, they insisted that the very possibility of republican government presumed a well-ordered society. And a well-ordered society, in turn, presupposed the existence of hierarchically organized subunits, such as families and workplaces.[6]

[2] Neil H. Cogan, ed., *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* (New York: Oxford University Press, 1997), 63, 67. The quotations are from the North Carolina ratifying convention.

[3] Oliver Ellsworth, "A Landholder, No. 7." In Cogan, ed., *The Complete Bill of Rights*, 78.

[4] Although James Madison arguably believed that a well-designed constitutional system could thrive even in the absence of virtuous officeholders, few of his contemporaries seem to have shared this conviction. Nor is it entirely clear that Madison held the amoral view of political society that is often attributed to him. See, for example, Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Ithaca: Cornell University Press, 1998), 247.

[5] James Kent, *Commentaries on American Law*, Vol. 2 (New York: O. Halstead, 1827).

[6] As William Novak has put the point, the particular bundle of rights to which a nineteenth-century American could lay claim was "highly particularized [and] dependent upon [an] individual's personal pattern of residence, jurisdiction, office, job, service, organization, association, family position, age, gender, race, and capacity." "The Legal Transformation of Citizenship in Nineteenth-Century America," in Meg Jacobs, William J. Novak, and Julian E. Zelizer, eds., *The Democratic Experiment: New Directions in American Political History* (Princeton: Princeton University Press, 2009), 85–119, 95. See also, William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

To see this moralized and particularized conception of rights in action, we need only examine a few illustrative cases involving religious liberty and the freedom of the press. Consider the case of John Ruggles, a resident of New York who in 1811 appealed his blasphemy conviction to his state's highest court. At first glance, Ruggles had a strong case. He pointed out that New York's constitution guaranteed the freedom of conscience and barred the establishment of an official religion. Moreover, blasphemy was not explicitly mentioned as a criminal act in any statute enacted by the state legislature. And yet Judge James Kent, in the face of these apparently mitigating facts, affirmed Ruggles's conviction. Although Kent acknowledged that New York had "discarded religious establishments," he insisted that it had not repealed those parts of the common law that served to "inculcate moral discipline" and "bind society together."[7] Blasphemy would continue to be punished as a crime in New York not because it offended "the rights of the church" but because it "tend[ed] to corrupt the morals of the people, and to destroy [the] good order" that was the essential prerequisite of republican government.[8]

If the rights of conscience belonged in the first instance to Protestant Christians, the duties that corresponded to these rights fell disproportionately on nonbelievers and religious minorities. This was nowhere more evident than in early appellate cases involving Sunday labor. In *Commonwealth* v. *Wolf* (1817), the Pennsylvania Supreme Court dismissed a Jewish tradesman's constitutional objections to a state law that criminalized nonessential labor on the Christian Sabbath. Although the state's constitution guaranteed the free exercise of religion, the Court reasoned that Wolf's rights had not been infringed, since nothing in (its reading of) the Jewish sacred texts *commanded* Jews to labor on Sundays. Wolf was free to forego labor on Saturdays, but the state constitution did not guarantee his right to make up for lost time by working on the day when "the great mass" of the state's citizens believed God had commanded them to rest.[9] An 1886 decision of the Georgia Supreme Court employed the same line of reasoning, noting that protections for religious liberty would be but "paper guarantees, unless protected and enforced by legal sanctions," including Sunday closing laws, that ensured a quiet and wholesome environment for "religious worship."[10]

[7] People v. Ruggles, 8 Johns. 290, 296, 294 (1811). Most early American commentators accepted John Locke's argument that secular authorities, whose primary responsibility was to safeguard citizens' liberty and property, had no business either prescribing or proscribing particular articles of faith or forms of worship. This conception marked a significant break with English practice in that it generally barred the state from persecuting citizens whose only crime was to belong to an unpopular sect. Yet as Kent's *Ruggles* opinion makes clear, most judges were nonetheless supportive of laws that cultivated respect for religion (read: Protestant Christianity) in the abstract. For Locke's conception of religious liberty, see "A Letter Concerning Toleration," in Ian Shapiro, ed., *Two Treatises of Government and a Letter Concerning Toleration* (New Haven: Yale University Press, 2003), 211–56.

[8] 8 Johns (N.Y.) 290 (1811). [9] 3 Serg. & Rawle 48; 1817 Pa. LEXIS 10 at 51.

[10] The Trustees of the First Methodist Episcopal Church, South v. The City of Atlanta, 76 Ga. 181, 191, 194–95 (1886).

Similar assumptions governed early interpretations of constitutional free speech provisions. Most commentators agreed that the common law definition of freedom of the press, which barred only the "prior restraint" of speech, was insufficiently protective of individual liberty. And many were also critical of the English doctrine of seditious libel, under which virtually any speaker who criticized a government official in print could be prosecuted, so long as the state acted after the offensive material was published.[11] By the early nineteenth century, most of the states had formally declared – whether by constitutional amendment, judicial decision, or statute – that speakers who, in the judgment of a jury, published factual information with upstanding motives would be guilty of no crime.[12]

Yet even as antebellum Americans enthusiastically exercised the right to criticize officeholders, they steadfastly resisted any suggestion that this newfound freedom implied a broader right to challenge the legitimacy of entrenched authority in the private or "domestic" sphere. This much became clear in the mid-1830s, when President Andrew Jackson authorized US postmasters to destroy the antislavery literature that Northern abolitionists had recently begun mailing to Southern addressees.[13] Jackson's Postmaster General, Amos Kendall, went further, urging Southern states to enact their own laws to prevent the dissemination of abolitionist literature. According to Kendall, neither the First Amendment nor any other provision of the Constitution had disturbed the slave states' right to "fence and protect their interest in slaves by such laws and regulations as, in their sovereign will, they may deem expedient."[14]

Chief Justice Roger Taney's majority opinion in the 1857 *Dred Scott Case* erased any remaining doubt that the scope of constitutional speech rights was determined by an individual's position in a broader matrix of legally enforceable interpersonal relationships. Although the case primarily concerned the legal status of chattel slavery in the territories, Taney went out of his way to declare that even *free* blacks were excluded from the privileges and immunities of

[11] Writing in 1789, Thomas Jefferson expressed hope that Americans would "not be deprived or abridged of their right to speak, to write, or otherwise to publish any thing but false facts affecting injuriously the life, property or reputation of others or affecting the peace of the confederacy with foreign nations." Thomas Jefferson to James Madison, August 28, 1789. In Neil H. Cogan, ed., *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, 2nd ed. (New York: Oxford University Press, 2015), 181.

[12] For the most influential statement of this rule, see Judge James Kent's opinion in People v. Croswell, 3 Johns. Cas. 337 (N.Y. 1804).

[13] Jackson used his 1835 Annual Message to Congress to urge passage of "such a law as will prohibit, under severe penalties, the circulation in the Southern States . . . of incendiary publications intended to instigate the slaves to insurrection." Stephen M. Feldman, *Free Expression and Democracy in America: A History* (Chicago: University of Chicago Press, 2009), 130.

[14] Amos quoted in Michael Kent Curtis, *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History* (Durham, NC: Duke University Press, 2000), 138.

national citizenship. To recognize free blacks as full citizens, Taney reasoned, would entail the unimaginable consequence that

> persons of the negro race, who were recognized as citizens in any one State of the Union, [would enjoy] the right to enter every other State whenever they pleased ... *and it would give them the full liberty of speech in public and in private upon all subjects upon which [a state's] own citizens might speak ... [and] to hold public meetings upon political affairs* ... And all of this would be done in the face of the subject race of the same color ... and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.[15]

For Taney, it was simply "impossible to believe" that the Southern framers "could have been so forgetful or regardless of their own safety" as to endorse the existence of rights whose contours were unaffected by their impact upon preexisting authority structures.[16]

One finds the same line of reasoning in countless nineteenth-century cases where an asserted constitutional right of free speech collided with entrenched social hierarchies. Authority relations within the family, for example, remained largely unaffected by developments in the realm of constitutional law. Women in the early republic were regularly prevented from speaking in public, particularly to mixed audiences. State and federal obscenity laws – known as Comstock Laws, after their chief proponent – barred discussion of contraception and family planning. And although women raised constitutional objections to these restrictions (and many others), their pleas typically fell on deaf ears. As Justice Joseph P. Bradley explained in 1873, in a case involving the Illinois state bar's refusal to admit a woman, "the law of the Creator" had decreed that women were to enjoy only those rights that were essential to "fulfill[ing] the noble and benign offices of wife and mother."[17]

Nor did civil liberties provisions significantly interfere with authority relations in the workplace. As nineteenth-century workers who invoked the freedom of speech in defense of the right to organize quickly discovered, the legal prerogatives of the employer trumped – or rather defined the limits of – the constitutional rights of the employee.[18] In some cases, employers and anti-union officials suppressed labor organizing by relying on ordinances that

[15] 60 U.S. 393, 416–17 (1857).

[16] Ibid. at 417. Even the most explicit constitutional guarantees, such as the First Amendment right to "petition the Government for a redress of grievances," had little practical effect when the subject in question was slavery. In 1836, the US House adopted a rule – informally known as the "gag rule" – that automatically tabled all slavery-related petitions. See Curtis, *Free Speech: "The People's Darling Privilege,"* 138, 175–81.

[17] Bradwell v. Illinois, 83 U.S. 130, 142 (1873). Bradley, J., concurring.

[18] Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (New York: Cambridge University Press, 1991), 92. As Orren puts the point, "The employee lived in a divided political world. One section was governed by public representatives of his own choosing, in rituals festooned and celebrated with the ballyhoo of party politics, peopled by silver-tongued orators and war heroes. The other was sealed off from the public, disciplined and drab, its governance located finally in the somber and mystifying routines of the courtroom."

limited street speaking to certain (typically inconvenient) times and places. In others, they arrested organizers on vague charges that included vagrancy and disturbing the peace. But the most powerful tool in the anti-union arsenal was the labor injunction: a court order that enjoined workers and organizers from picketing, boycotting, or otherwise interfering with the operations of a particular business. Although constitutional free speech provisions were generally understood to bar "prior restraints" of speech, judges reasoned that labor demonstrations, by threatening the employer's property interest in the peaceful operation of his business, crossed the line that divided peaceful advocacy from harmful conduct.[19]

The Union victory in the Civil War is often described as marking a fundamental shift in American thinking about constitutional rights. It is certainly true that Lincoln and his fellow Republicans vehemently contested Justice Taney's assertion that the preservation of slavery trumped all constitutional claims that might be asserted on behalf of free blacks or other residents of free states and territories. Moreover, by the war's end, most northern Americans were convinced that chattel slavery was an affront to the ideals of liberty and equality. And to ensure slavery's demise, all agreed, it would be necessary to nationalize at least some constitutional rights. Thus, the Fourteenth Amendment, adopted in 1868, vested Congress and the courts with the formal authority to ensure that no state denied its residents equal protection of the laws; deprived them of life, liberty, or property without due process; or abridged the "privileges and immunities" of US citizens. But while the Reconstruction amendments granted a measure of liberty to the former slaves, they did not fundamentally alter the definition of liberty itself.

Indeed, many of the same commentators who denounced slavery as a moral evil remained steadfastly supportive of the legally enforced hierarchies that ordered the home and the workplace. Many of them also envisioned a future in which African Americans and other racial minorities would occupy a subordinate position in society. And nearly everyone agreed that traditional standards of personal morality should continue to delimit the boundary between liberty and license. Thus, Thomas M. Cooley reminded readers of his influential *Constitutional Limitations* that the right to publish true statements concerning public affairs did not protect one who published a factually accurate account of a criminal trial where the subject matter was "such as to make it improper that the proceedings should be spread before the public, because of their immoral tendency, or of the blasphemous or indecent character of the evidence exhibited." Nor did religious liberty provisions protect citizens who

[19] David M. Rabban, *Free Speech in Its Forgotten Years* (New York: Cambridge University Press, 1997), 171–72; Feldman, *Free Expression and Democracy in America*, 228–30, 235. As the Supreme Court explained in Gompers v. Bucks Stove & Range Co. (1911), printed material backed by the threat of union activity acquired "a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become ... verbal acts, and as much subject to injunction as the use of any other force whereby property is unlawfully damaged." 221 U.S. 418, 239 (1911).

dared to labor on the Christian Sabbath. Although Sunday labor bans were admittedly less than fair to Jews, nothing in the Constitution barred lawmakers from requiring that a certain amount of "deference ... be paid ... to the ... religious convictions of the majority."[20]

THE BIRTH OF MODERN CIVIL LIBERTIES, 1900–1937

Three developments paved the way for a fundamental shift in Americans' thinking about civil liberties. First, as the nation grew more ethnically and religiously diverse, and as urban elites grew increasingly skeptical of customary moral strictures, it became ever more difficult to maintain that a broad moral consensus defined the boundary between liberty and license. At the same time, activists from traditionally marginalized segments of American society began to challenge the legitimacy of entrenched hierarchies, aggressively asserting novel rights claims both in the courts and in the forum of public opinion. Finally, a major political realignment opened the halls of power – and ultimately the courts – to precisely those Americans who had the most to gain from a more expansive conception of civil liberties.

During the first three decades of the twentieth century, internal divisions within American Protestantism gradually reduced the liberty-license distinction to a shambles. Although the split between modernists (or liberals) and fundamentalists was triggered by theological differences, it was exacerbated by disagreements over the state's role in policing the moral and religious convictions of the citizenry.[21] Liberals, while nominally supportive of efforts to cultivate public morality, tended to adopt a dynamic view of morality and to oppose enforcement of morals laws that appeared out of step with contemporary opinion and intellectual trends.[22] Fundamentalists, in contrast, favored vigorous enforcement of traditional moral and religious prerogatives. Thus, when fundamentalists in Tennessee and elsewhere banned the teaching of evolution in public schools, liberal Protestants condemned the laws as an affront to scientific inquiry and academic freedom.[23] Similarly, in 1930, when the birth control advocate and sex educator Mary Ware Dennett was brought up on federal obscenity charges, mainline

[20] Thomas M. Cooley, *A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union*, 5th ed. (Boston: Little, Brown, 1883), 554, 591.

[21] George M. Marsden, *Fundamentalism and American Culture* (New York: Oxford University Press, 2006); David A. Hollinger, *After Cloven Tongues of Fire: Protestant Liberalism in Modern American History* (Princeton: Princeton University Press, 2013).

[22] On mainline Protestant criticism of traditional morals laws, see John W. Compton, "Evangelical Reform and the Paradoxical Origins of the Right to Privacy," *Maryland Law Review* 75 (2015): 362–82.

[23] P. C. Kemeny, "Power, Ridicule, and the Destruction of Religious Moral Reform Politics in the 1920s," in Christian Smith, ed., *The Secular Revolution: Power, Interests, and Conflict in the Secularization of American Public Life* (Berkeley: University of California Press, 2003): 216–68, 230–32.

Protestant groups including the Federal Council of Churches and the Young Men's Christian Association (YMCA) leaped to her defense.[24] The debacle of national prohibition offered further evidence of a disintegrating moral consensus. Although the Eighteenth Amendment was generally welcomed in rural and small-town America, it met stiff resistance not only from the nation's growing Irish and Italian ethnic communities but also from many well-heeled urban WASPs, who were by now accustomed to living without the moral supervision of their neighbors.

Walter Lippmann provided a trenchant analysis of these developments in *A Preface to Morals*, one of the best-selling books of the late 1920s. Reflecting on events such as the Scopes Monkey Trial, the splintering of American Protestantism, and the evident failure of prohibition, Lippmann concluded that the "acids of modernity" had "dissolve[ed]" the traditional belief systems to which Americans had "habitually conformed." What was worse, it seemed highly unlikely that there would develop "a new orthodoxy into which men can retreat." Whatever boundaries might henceforth be established to constrain individual liberty would not be based on custom or religion but rather on careful deliberation concerning the material needs of society. In the new age of moral relativism and personal freedom, Lippmann concluded, it had become "impossible for the moralist to command. He can only persuade."[25]

At the same time that the illusion of moral consensus was crumbling, various groups of outsiders were beginning to detach the Constitution's civil liberties provisions from their traditional moorings in custom and common law. Reimagined as abstract guarantees, civil liberties could be turned against the very social structures that had long been thought to mark the outer limits of individual liberty in a republican society. Jews and Catholics, for example, began to use constitutional arguments to oppose Protestant proselytizing in the public schools. In several states, elected officials responded by directing public funds to parochial schools, thus implicitly endorsing the right of Catholic children to receive a publicly funded education that did not conflict with the tenets of their faith.[26] Moreover, five state judiciaries – most of them in states with significant Catholic populations – had by 1920 declared that Protestant Bible reading in the public schools amounted to an unconstitutional establishment of religion.[27]

[24] By this point, these pillars of the Protestant establishment had concluded that scientifically based sex education, rather than blanket censorship, provided the surest route to a morally upstanding citizenry. Constance M. Chen, *"The Sex Side of Life": Mary Ware Dennett's Pioneering Battle for Birth Control and Sex Education* (New York: The New Press, 1996), 299. Dennett's conviction was eventually overturned in a landmark federal court ruling that substantially narrowed the definition of obscenity under federal law. U.S. v. Dennett, 39 F.2d 564 (1930).

[25] Walter Lippmann, *A Preface to Morals* (New York: Transaction Publishers, 1960), 318, 19–20.

[26] Steven K. Green, *The Bible, the School, and the Constitution: The Clash That Shaped Modern Church-State Doctrine* (New York: Oxford University Press, 2012).

[27] Michael J. Klarman, "Rethinking the Civil Rights and Civil Liberties Revolutions," *Virginia Law Review* (1996): 1–67, 50.

Around the same time, labor activists began to exchange polarizing appeals to class struggle for the more anodyne language of civil liberties.[28] In the early 1920s, the novelist and labor organizer Upton Sinclair declared that there was "one platform upon which it should be possible to get every true American" to stand with labor "for the purpose of bringing about industrial changes." That platform was "free discussion," an "ideal ... carefully embodied by our forefathers in the fundamental law of our nation and of every one of our separate states."[29] In 1920, a group of attorneys and academics with pro-labor sympathies formed the nation's first major civil liberties organization, the American Civil Liberties Union (ACLU), with the primary aim of securing constitutional protection for pickets, boycotts, and other organizing activities. In conjunction with the Industrial Workers of the World (IWW) and other groups from the labor movement's radical wing, the ACLU worked to reframe anti-organizing measures as affronts to the constitutional liberties of average Americans.[30] A particularly successful strategy involved having labor activists who were barred from speaking under local ordinances or injunctions read the Bill of Rights in a public setting, such as a park, with the aim of being arrested. The jailing of citizens whose only apparent crime was to read the Constitution aloud in public led many Americans to conclude that constitutional rights were, in fact, at stake on both sides of the picket line.[31]

The racial order was also undergoing unprecedented changes as large numbers of African Americans began to migrate northward in search of greater economic opportunity in the nation's urban centers. With expanded economic opportunity came the growth of an African American middle class, which in turn facilitated the founding of organizations, such as the NAACP, that were dedicated to publicizing the evils of segregation and funding legal challenges to Jim Crow.[32] In addition, the sudden enfranchisement of large numbers of African Americans, many of them concentrated in a handful of

[28] See, for example, Ken I. Kersch, "How Conduct Became Speech and Speech Became Conduct: A Political Development Case Study in Labor Law and the Freedom of Speech," *U. Pa. J. Const. L.* 8 (2006): 255–97, 273–77.

[29] Quoted in Paul L. Murphy, *The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR* (Westport, CT: Greenwood Press, 1972), 158–59.

[30] See, generally, Murphy, *The Meaning of Freedom of Speech*, 117–30; Michael J. Klarman, "Rethinking the Civil Rights and Civil Liberties Revolutions," *Virginia Law Review* (1996): 1–67, 39–40; Laura M. Weinrib, "Civil Liberties outside the Courts," *Supreme Court Review* 2014 (2014): 297–362, 309–11.

[31] In 1922, for example, the moderate Republican editor William Allen White, after being briefly jailed for defying an industrial court order prohibiting discussion of that year's national railroad strike, penned a Pulitzer prize–winning column on the subject of free speech. Murphy, *The Meaning of Freedom of Speech*, 162–63.

[32] Doug McAdam, *Political Process and the Development of Black Insurgency, 1930–1970*, 2nd ed. (Chicago: University of Chicago Press, 2010); Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2005).

pivotal swing states, conferred increased political influence and, ultimately, a more favorable reception from the judiciary.[33] Although the Supreme Court would not begin seriously to engage with the problem of racial segregation until the 1940s and 1950s, the NAACP and its allies could by the 1920s point to a handful of Supreme Court decisions that, at the very least, cast doubt on the constitutionality of racial disenfranchisement, residential segregation, and mob-dominated criminal trials.[34]

In the midst of this atmosphere of social upheaval, Justices Oliver Wendell Holmes, Jr., and Louis D. Brandeis penned a series of (mostly dissenting) Supreme Court opinions that are widely seen as marking the birth of modern civil liberties. Word War I and the Red Scare of the early 1920s provided the immediate context for the great Holmes and Brandeis dissents. In 1917, Congress had enacted the Espionage Act, the first federal law since the Sedition Act of 1798 to impose explicit limitations on political speech. As the war drew to a close, and as Russia fell to the Bolsheviks, several states enacted similar anti-syndicalism laws that imposed criminal penalties on speakers who advocated the overthrow of the American political or economic systems. The Supreme Court upheld both types of restrictions, reasoning that the First Amendment did not protect speakers who intended to sow social discord. Holmes and Brandeis, writing in dissent, argued that restrictions on political speech should be upheld only in the event of a "clear and present danger" to an important governmental interest – something that was lacking in cases like *Abrams* v. *U.S.* (1919), where the speaker in question had, according to Holmes, merely thrown a few "silly" anarchist leaflets from a Manhattan rooftop.[35]

Arguably more important than this doctrinal innovation, however, was the secular theory of political society on which it was based. In sharp contrast to nineteenth-century commentators, Holmes doubted that it was possible, on the basis of objective criteria, to distinguish morally worthy ideas from those that were false or dangerous. American society, after all, was currently riven by moral disagreement. And the problem of identifying objective moral principles became even more vexing when one considered the evolution of moral ideas over time. American history was replete with examples of activities and forms of property – from slavery to liquor to lotteries – that were widely accepted or even celebrated in one era only to be condemned as immoral in the next (or vice versa).[36] When one considered that "time ha[d] upset many fighting faiths," it was unclear why notions of morality should play any role at all in the process of

[33] Kevin J. McMahon, *Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown* (Chicago: University of Chicago Press, 2010).

[34] Buchanan v. Warley, 245 U.S. 60 (1917); Moore v. Dempsey, 261 U.S. 86 (1923); Nixon v. Herndon, 273 U.S. 536 (1927).

[35] 250 U.S. 616, 628 (1919), Holmes, J., dissenting.

[36] Americans' evolving attitudes toward liquor and lottery regulation had a particularly significant impact on Holmes's thinking about the nature of constitutional rights. See John W. Compton,

constitutional interpretation.[37] Better, Holmes reasoned, to interpret the Constitution without regard to the historical "accident of our finding certain opinions natural and familiar or novel and even shocking."[38]

But how would judges delimit the boundaries of free speech, if not by reference to broadly shared mores? Drawing on an argument first advanced by the English philosopher John Stuart Mill, Holmes answered that there was no need for lawmakers or judges to concern themselves with the social effects of particular ideas or creeds. Indeed, censorship was counterproductive, since governments were so often mistaken in their judgments about which ideas were so dangerous or wrongheaded as to justify suppression. And in an open exchange of views, ideas that were socially beneficial would generally triumph over those that were false or dangerous. "[T]he best test of truth," Holmes asserted, was "the power of the thought to get itself accepted in the competition of the market."[39]

Brandeis, in addition to endorsing Holmes's "marketplace" theory of speech, proposed that civil liberties provisions were fundamentally concerned with protecting individual autonomy. The framers of the Bill of Rights, he wrote in an oft-quoted dissent, hoped to "secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect ... They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred ... the right to be let alone – the most comprehensive of rights, and the right most valued by civilized men."[40] Nineteenth-century commentators thus had the relationship between conventional morality and republican government exactly backward: to reach their full potential, what citizens most needed was not the moral tutelage of the law but rather a constitutionally protected private sphere. In addition, an expanded conception of civil liberties would benefit society by allowing citizens to boldly assert their views – whatever they might happen to be – in the public arena, thereby developing their deliberative faculties and stimulating others to do the same. It was not the heterodox thinker who was the "menace to freedom," but rather the "inert" citizen who blindly conformed to inherited mores.[41]

Although the Holmes and Brandeis dissents stimulated a great deal of discussion in academic circles, few of their fellow justices expressed much enthusiasm for the idea that courts should adopt a more assertive stance in civil liberties cases. To be sure, a majority of the Court held for the first time in *Gitlow* v. *New York* (1925) that the freedom of speech was among the rights protected from state interference by the due process clause of the Fourteenth

The Evangelical Origins of the Living Constitution (Cambridge, MA: Harvard University Press, 2014), 136–41.

[37] Abrams v. U.S., 250 U.S. 616 at 630, Holmes, J., dissenting.

[38] Lochner v. New York, 198 U.S. 45, 76 (1905), Holmes, J., dissenting.

[39] Abrams v. U.S., 250 U.S. 616, 630 (1919). Holmes, J., dissenting.

[40] Olmstead v. U.S., 277 U.S. 438, 478 (1928), Brandeis, J., dissenting.

[41] Whitney v. California, 247 U.S. 357, 375–76 (1927), Brandeis, J., concurring.

Amendment.[42] But even as the Court "incorporated" the First Amendment's free speech clause, it declined to expand the substantive definition of "free speech."[43]

Political and intellectual elites were similarly ambivalent. Conservative commentators, while supportive of judicially enforced economic rights, generally opposed enhanced protection for civil liberties, at least where the liberties in question could be claimed by labor organizers.[44] Progressives, while generally supportive of labor organizing, were skeptical of attempts to expand judicial authority at a time when the courts seemed reflexively hostile to economic regulation.[45] The latter group was particularly alarmed by a string of decisions in which the Court had blocked attempts to regulate the wages and hours of workers. In the most notorious of these rulings, *Lochner* v. *New York* (1905), the Court found that a law limiting the working hours of bakery employees was not a legitimate health or safety regulation but rather an unconstitutional interference with the "liberty of contract," a liberty ostensibly enshrined in the Fourteenth Amendment's due process clause.[46] If the justices were simply reading their laissez-faire policy preferences into the Fourteenth Amendment – and progressives were convinced this was case – then it made little sense to provide the Court with yet another doctrinal tool that could be used to thwart the will of democratic majorities.

Skepticism of judicial authority remained de rigueur among left-leaning Americans in 1932, when Franklin D. Roosevelt won the presidency in what would come to be seen as a realigning election. Between 1937 and 1943, Roosevelt would appoint eight justices to the Court. Precisely how this unprecedented personnel turnover would impact constitutional doctrine was unclear, however. On the one hand, as Michael J. Klarman has pointed out, FDR's electoral victories were underwritten by "an extraordinary assemblage of traditional outgroups," including organized labor, religious and ethnic minorities, and, eventually, African Americans.[47] Roosevelt's presidency therefore conferred a degree of political influence on precisely those groups who stood to gain from a more assertive construction of the Constitution's civil liberties provisions. On the other hand, most New Dealers – and even many labor leaders – were initially reluctant to

[42] 268 U.S. 652.

[43] 268 U.S. 652 at 658. Thus, the *Gitlow* Court found that the Constitution offered no protection to a speaker who advocated "revolutionary mass action" for the purpose of overthrowing the capitalist economic system.

[44] For an insightful discussion of the conservative libertarian defense of free speech, see Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (Berkeley: University of California Press, 1990), 17–49.

[45] One major exception to the rule was Zechariah Chaffee, whose writings on the freedom of speech are thought to have influenced Justice Holmes. See, for example, Chafee's *Freedom of Speech* (New York: Harcourt, Brace and Howe, 1920).

[46] 198 U.S. 45 (1905).

[47] Klarman, "Rethinking the Civil Rights and Civil Liberties Revolutions," 44–45.

augment the Court's authority at a moment when the Democratic Party had a stranglehold on the levers of legislative authority.[48] Moreover, even if the reconstituted Court could be trusted to interpret the Constitution in ways that comported with the programmatic goals of the Democratic regime, it was unclear how, at the level of doctrine, the justices could simultaneously devalue economic rights *and* expand civil liberties protections. To many observers, including future Supreme Court Justice Felix Frankfurter, it seemed that the wiser stance was an across-the-board policy of judicial deference.

Justice Harlan Fiske Stone's majority opinion in *U.S.* v. *Carolene Products* (1938) pointed the way out of this theoretical thicket.[49] In the opinion's famous Footnote Four, Stone offered a pair of theories to explain why an expansive conception of civil liberties was not incompatible with a deferential approach to economic regulation. First, he pointed out that the individual rights enshrined in the "first ten amendments" had a firmer basis in the text than economic due process rights. Where the early-twentieth-century Court had relied on a series of judicially created doctrines – including the "liberty of contract" – to obstruct the rise of the regulatory state, the post–New Deal Court would confine its scrutiny of democratically enacted laws to those that violated textually grounded rights, including the freedoms of speech and religion. Second, Stone noted that in cases where the democratic process had been corrupted or where "discrete and insular minorities" had been singled out for negative treatment, judicial enforcement of individual rights could not fairly be described as undermining democratic principles. True, the exercise of judicial review in such cases would have the effect of overturning laws that reflected (at least superficially) the will of the majority, but in so doing the Court would be preserving the integrity of the underlying democratic system – something that could not be said of the pre–New Deal Court's decisions invalidating broadly popular economic regulations.

When combined with the earlier opinions of Holmes and Brandeis, Stone's *Carolene Products* footnote provided the blueprint for a radically new approach to civil liberties. Instead of relying on inherited mores or religious views to mark the boundary between liberty and license, the Court would now read the Constitution's civil liberties provisions as demanding maximum scope for the free play of ideas and the self-development of individual citizens. And instead of assuming that longstanding inegalitarian features of American society were essential to the survival of republican government and thus deserving of judicial deference, the Court would take a skeptical view of laws that worked to the disadvantage of "discrete and insular minorities." For the next three decades, the First Amendment and other civil liberties provisions would be at their most potent in precisely those cases that Justice Taney and the

[48] On organized labor's skeptical attitude towards the judiciary, see Weinrib, "Civil Liberties outside the Courts," 311–15.

[49] 304 U.S. 144 (1938).

Dred Scott majority had rejected as "impossible" to take seriously – that is, cases pitting marginalized citizens against entrenched patterns of state and local authority.

THE RIGHTS REVOLUTION, 1938–1973

Between the late 1930s and the early 1970s, the Supreme Court presided over a "rights revolution" that stood the nineteenth-century theory of the constitutional order on its head. By the end of this period, it was generally accepted that the freedom of speech, the free exercise of religion, and most of the other individual rights enshrined in the Bill of Rights were (1) enjoyed equally by all Americans; (2) binding on all levels of government; and (3) more or less inviolable, save in the event of a compelling threat to public safety or basic governmental functions. The net effect of the new way of thinking was to elevate civil liberties claims above the traditionally superior claims of domestic and local authority. Long relegated to a peripheral position in American constitutional law, civil liberties now became the "fixed star" around which the constitutional system was said to revolve.[50]

If a single decision can be said to epitomize the Court's new approach to civil liberties, it is *West Virginia* v. *Barnette*, a 1943 case involving a group of Jehovah's Witness children who were expelled from public school for refusing to salute the flag.[51] Only three years before, the Court, in an opinion by Justice Frankfurter, had upheld a similar compulsory flag salute law on the grounds that efforts to promote a patriotic citizenry were well within the traditional bounds of state and local authority.[52] But now three justices, perhaps influenced by widespread reports of officially sanctioned mob violence against Jehovah's Witnesses, had come to see the matter differently, and the Court reversed its earlier ruling.[53]

Writing for the *Barnette* majority, Justice Robert Jackson made two key points. First, he denied that the scope of the Constitution's civil liberties guarantees was in any way affected by the admittedly "delicate and highly discretionary functions" of local government. Perhaps he was thinking of the Witnesses' well-publicized travails. Or perhaps he was thinking of several recent cases that had drawn attention to other abuses of local authority, including the routine denial of basic criminal procedure protections to Southern blacks and the use of facially neutral licensing schemes to obstruct labor organizing.[54] In any event, Jackson concluded that "small and local authority," far from serving as the essential guardian of citizens' liberties, was comparatively more likely than national authority to

[50] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[51] 319 U.S. 624, 642 (1943). [52] Minersville School District v. Gobitis, 310 U.S. 586 (1940).

[53] On the possibility that the justices in the *Barnette* majority were influenced by reports of mob violence, see Kevin J. McMahon, *Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown* (Chicago: University of Chicago Press, 2010), 140–41.

[54] See, for example, Powell v. Alabama, 287 U.S. 45 (1932); Norris v. Alabama, 294 U.S. 587 (1935); Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939).

threaten them. Instead of deferring to the edicts of "village tyrants," the Court would henceforth be especially diligent in scrutinizing their activities.[55]

Second, Jackson laid to rest the nineteenth-century understanding of the relationship between religious and moral orthodoxy on the one hand and republican government on the other. In sharp contrast to James Kent and the countless nineteenth-century commentators who had defended the constitutionality of blasphemy laws, Jackson's reading of history indicated that attempts to achieve "[c]ompulsory unification of opinion" in matters of religion were destined to fail or else to achieve "only the unanimity of the graveyard." Nor was there any credible evidence to suggest that allowing citizens the "freedom to be intellectually and spiritually diverse" would "disintegrate the social organization."[56] Henceforth, the First Amendment would be understood to require that common convictions be arrived at voluntarily or not at all.

But if *Barnette* indicated that the Court would not hesitate to dismantle entrenched authority in the name of universal rights, it provided little in the way of a broader theory that might delineate a new boundary between individual liberty and official authority. Unable to invoke the idea of a society-wide moral consensus for this purpose, the mid-century Court relied instead on Holmes's marketplace metaphor and Brandeis's autonomy ideal. The marketplace metaphor provided the rationale for a series of decisions that effectively stripped state and local governments of their longstanding authority to regulate public discourse. Laws punishing subversive speech were now unconstitutional in the absence of a "clear and present danger" to an important governmental interest (or, in the later, more stringent formulation, where the speaker seemed likely to unleash "imminent lawless violence").[57] Laws that indirectly restricted speech in the interest of public safety or convenience had to be narrowly tailored and neutral with respect to the viewpoint of the speaker. Requiring licenses of speakers was permissible in certain limited cases (as when a group sought to hold a parade on a busy public street), but license laws were to be purely administrative in nature, leaving officials powerless to discriminate against particular ideas or speakers.[58] The Court's critics – including internal ones like Frankfurter – warned that the new doctrines would leave states and municipalities powerless to combat the social unrest that inevitably accompanied extremist speech making. But a majority of the justices were willing to run the risk of occasional disorder if in so doing they prevented an even greater evil – namely, the "standardization of ideas" by "dominant political or community groups."[59]

[55] In addition, Jackson reasoned that constitutional violations at the local level were more likely escape detection, since the "agents of publicity" were typically less diligent in reporting on them. 319 U.S. 624 at 637–38.

[56] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

[57] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[58] Cantwell v. Connecticut, 310 U.S. 296 (1940); Saia v. New York, 334 U.S. 558 (1948).

[59] Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

In decisions involving constitutional challenges to nineteenth-century morals laws, the Court regularly invoked some version of Brandeis's "right to be let alone," a right that extended beyond spatial privacy to include a guarantee of decisional autonomy with respect to (among other things) matters touching upon sex and reproduction. In *Stanley* v. *Georgia* (1969), for example, the Court invalidated a state law making it a crime to possess obscene material. Writing for the majority, Justice Thurgood Marshall reasoned that "a State has no business telling a man, sitting alone in his own home, what books he may read or what films he may watch."[60]

Century-old laws restricting the sale, distribution, and use of contraceptives met a similar fate in *Griswold* v. *Connecticut* (1965) and *Eisenstadt* v. *Baird* (1972).[61] Although rarely enforced, contraception bans were determined by the Warren-era justices to violate a constitutionally enshrined right to reproductive privacy, a right eventually found to be lodged in the Fourteenth Amendment's due process clause. The underlying problem was that Comstock-era contraception laws inserted "the machinery of the criminal law" into the heart of citizens' most intimate relationships and personally consequential decisions.[62] "If the right of privacy means anything," the Court declared in *Eisenstadt*, it was that citizens were "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[63]

Autonomy rationales also figured prominently in a series of contemporaneous decisions that dismantled many longstanding symbols of Protestant cultural hegemony. Writing for the Court in *Everson* v. *Board of Education* (1947), Justice Hugo Black found that the authors of the First Amendment had intended to erect a "high and impregnable" "wall of separation" between church and state.[64] The case turned on the question of whether a local government could use public funds to offset the cost of transporting students to Catholic schools, and a bare majority of the Court answered in the affirmative. But it was Black's reading of the Establishment Clause – as opposed to the rather incongruous holding – that marked the real turning point. Henceforth, the First Amendment would preclude not only the recognition of a national church but virtually any official act that might be construed as encouraging citizens to adopt a particular point of view concerning religion. By the early 1960s, the Court had prohibited teacher-led prayer and Bible reading in the public schools on the

[60] Even if legitimate reasons for policing personal morality existed (which Marshall doubted), the "philosophy of the First Amendment" would not permit the state to pursue its goals by policing "private thoughts" or the "private consumption of ideas and information." 394 U.S. 557 at 556–57.

[61] 381 U.S. 479 (1965); 405 U.S. 438, 453 (1972).

[62] Poe v. Ullman, 367 U.S. 497, 553 (1961) Harlan, J., dissenting; Griswold v. Connecticut, 318 U.S. 479 (1965).

[63] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). Emphasis added.

[64] Everson v. Board of Education, 330 U.S. 1, 18 (1947). The phrase "wall of separation" was borrowed from Thomas Jefferson's 1802 letter to the Danbury Baptist Association.

grounds that these practices exerted "coercive pressure" on children to adopt the religious views of the majority.[65] A similar logic underpinned a subsequent series of religious free exercise decisions that granted religious believers the right to demand exemptions from generally applicable laws. Under the doctrine announced in *Sherbert* v. *Verner* (1965), citizens whose ability to practice their chosen faith was "substantially burdened" by a state or federal law were entitled to relief unless the government could demonstrate that granting an exemption would endanger a compelling governmental interest.[66]

In keeping with the theory of the *Carolene Products* footnote, the mid-century Court was at its most assertive – and creative – in cases where an individual or group could plausibly claim to have been silenced or disenfranchised by structural inequalities or flaws in the nation's representative system of government. Indeed, what gives the period's major civil liberties decisions a sense of coherence, even in the face of bitter disagreement over particulars, is that the Court tended to read both the marketplace and autonomy ideals through the lens of *Carolene Products*. Without necessarily taking a position on the relative importance of liberty and equality as constitutional values, the Court insisted that its *institutional role* demanded a more robust response to alleged civil liberties violations involving traditionally subordinated Americans. Because judicial authority was most legitimate, and thus most potent, in cases where the democratic processes had gone awry, it was incumbent upon the Court to pay careful attention to how authority – whether public, private, or a fusion of the two – was actually experienced by citizens. This would ensure that the marketplace and autonomy ideals were realized in fact, not just in theory.

The guarantee of an unfettered ideological marketplace, for example, demanded more than formal state neutrality with respect to a speaker's identity or message. Even facially neutral speech regulations now posed First Amendment problems when their practical effect was to diminish expressive opportunities for traditionally subordinated groups. Ordinances banning the distribution of handbills were struck down in part because they outlawed a mode of communication favored by labor organizers, Jehovah's Witnesses, and other advocates of "poorly financed causes."[67] State laws banning picketing or

[65] Even if children were permitted to opt out of such programs, there remained "an obvious pressure upon the child to attend," and those who refused would likely "have inculcated in them a feeling of separatism." Engel v. Vitale, 370 U.S. 421 at 431; McCollum v. Board of Education, 333 U.S. 203 at 227.

[66] This rule applied even to measures, such as compulsory education laws and unemployment compensation programs, where there was no reason to believe that the state had intended to burden religious practice. As Justice Brennan explained in his opinion for the *Sherbert* majority, the First Amendment did not permit the state to "pressure" a person "to choose between following the precepts of her religion" on the one hand and obeying the law (or receiving benefits) on the other. Sherbert v. Verner, 374 U.S. 398, 404 (1963). Also see Wisconsin v. Yoder, 406 U.S. 205 (1972).

[67] Martin v. Struthers, 319 U.S. 141, 146 (1943). Also see Schneider v. The State, 308 U.S. 147 (1939).

requiring labor organizers to register with the state were similarly problematic, since their practical effect was to silence the traditionally disadvantaged side in an ongoing debate over "the destiny of modern industrial society."[68]

The Court's egalitarian reading of the First Amendment also played a critical role in dismantling the South's racial caste system. As late as the early 1960s, Southern officials had at their disposal a range of legal tools that appeared well suited to turning back challenges to white supremacy. These included statutes regulating the activities of out-of-state corporations, statutes barring outside groups from organizing or funding litigation, and the long-established right of public officials to bring libel suits against groups or individuals who damaged their reputations. Although most of these tools were well within the traditional limits of state and local authority, the Court used the First Amendment to block each of them in turn. In *NAACP* v. *Patterson* (1958), it held that a state could not force a civil rights group to disclose its membership rolls where there was reason to believe that group members would face "economic reprisal, loss of employment, [and the] threat of physical coercion."[69] Similarly, in *NAACP* v. *Button* (1963), the Court refused to "close [its] eyes to the fact" that facially neutral laws targeting champerty and barratry – in essence, the stirring up of frivolous lawsuits – were being used to deprive African Americans of the "sole practicable avenue" by which they might seek redress for injuries suffered at the hands of the "politically dominant [white] community."[70] A final landmark decision, *New York Times* v. *Sullivan* (1964), eviscerated the common law of libel as it applied to public officials.[71] In addition to setting aside an Alabama jury's $500,000 libel award to a police commissioner who had been criticized in print by a civil rights group, *Sullivan* held that public officials hoping to win a libel judgment would henceforth have to meet the high standard of proving "actual malice."[72] Any less stringent standard, the majority reasoned, would have the effect of "chilling First Amendment freedoms in the area of race relations."[73]

At the same time, the mid-century Court adopted a more deferential approach in cases where the state – or, more likely, the federal government – could plausibly claim to be acting with the aim of *mitigating* the effects of structural inequality on American democracy. The justices were particularly skeptical of claims that the First Amendment protected corporate or commercial speakers from the emergent

[68] As the Court declared in Thornhill v. Alabama (1940), the first decision to extend constitutional protection to labor picketing, the judiciary's proper role was not to defend the industrial status quo but rather to ensure that "the group in power at any moment [does] not impose penal sanctions" on those who advocate for peaceful political or economic change. 310 U.S. 88, 103, 104 (1940). For the Court's decision on laws requiring labor organizers to register with the state, see Thomas v. Collins, 323 U.S. 516 (1945).

[69] 357 U.S. 449, 462 (1958). [70] 371 U.S. 415, 430–31 (1963). [71] 376 U.S. 254 (1965).

[72] That is, that the statement in question was made with knowledge of its falsity or with reckless disregard for the truth.

[73] Ibid. at 301.

regulatory state. In order to discourage such claims, they drew a bright line between expressive activities that were primarily concerned with moneymaking and those that were not. Advertising and soliciting were distinguishable from the core First Amendment activities of "communicating information and disseminating opinion[s]," the Court reasoned, and thus less worthy of judicial protection.[74] A similar line of reasoning produced a decision distinguishing professional lobbying efforts from the expressive activities of ordinary Americans. As Chief Justice Earl Warren wrote for the Court in *U.S.* v. *Harriss* (1954), new federal regulations requiring lobbyists to register with the Congress and disclose their sources of income were not an affront to First Amendment rights but rather a reasonable means of ensuring that "the voice of the people" was not "drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal."[75]

Laws that made union membership a condition of employment in certain industries also survived First Amendment scrutiny. That some workers should be required to join and contribute to unions followed naturally from the reigning Democratic Party's view that collective bargaining offered the surest route to industrial peace. By the 1950s, however, critics of organized labor had seized on the idea that mandatory union contributions violated the First Amendment by compelling anti-union workers to subsidize expressive activities that they opposed. In *International Association of Machinists* v. *Street* (1961), the Court, speaking through Justice Brennan, agreed that workers could not be compelled to support political activity against their wills. At the same time, Brennan found that workers could be required to contribute to a union, so long as the compelled contributions were used only for core union activities such as organizing elections and representing workers in negotiations with employers. Although the First Amendment offered individual citizens protection against compelled speech, it also guaranteed the right of "the majority" of workers to form and operate a union without "being silenced by the dissenters." Indeed, the Court was constitutionally obligated to balance the rights of individual workers against the rights of workers as a class, protecting "both interests to the maximum extent possible without [permitting] undue impingement of one on the other."[76]

THE REVOLUTION'S TROUBLED LEGACY

Clearly, the middle decades of the twentieth century witnessed a significant restructuring of American society. Still, the question remains: Do these

[74] Valentine v. Chrestensen, 316 U.S. 52 at 54.

[75] U.S. v. Harriss, 347 U.S. 612, 625 (1954). The law defined a "lobbyist" as a person "receiving any contributions or expending any money" for the purpose of influencing the passage or defeat of legislation. Chief Justice Warren, speaking for the majority, agreed that the act would have to be read narrowly – as applying only to paid lobbyists who regularly consulted with members of Congress – to survive constitutional scrutiny.

[76] 367 U.S. 740, 773 (1961).

admittedly significant developments amount to a *revolution*? If the term implies a clean break with the governing structures and legitimating principles of the past as well as the successful construction of new arrangements underpinned by alternative principles, then it is at least arguable that the Court's admittedly transformative rulings fell short of this standard. Indeed, two problems – one practical and one theoretical – plagued the mid-century Court's civil liberties jurisprudence, foreshadowing the eventual unraveling of the post–New Deal consensus on civil liberties. The practical problem was that the justices, aware of the Court's limited capacity to enforce its own decisions, often seemed to pull back from principled stands when confronted with credible threats of widespread noncompliance. As a result, the "rights revolution" ended with significant vestiges of the old order still very much in place.

Consider the ill-fated attempt to decouple church and state. The early 1960s decisions on prayer and Bible reading in the schools made clear that the "wall of separation" metaphor was more than empty rhetoric, as did a separate decision invalidating religious tests for state officeholders.[77] And yet the Court's separationist reading of the Establishment Clause was never fully matched by developments on the ground. The school prayer rulings, in particular, proved difficult to enforce; a number of contemporary academic studies found that many public school teachers and administrators simply ignored them.[78]

It is surely no accident that the Court, in the face of widespread opposition to its rulings on religion in the schools, declined to follow Justice Black's metaphor to its logical conclusion.[79] When confronted with a challenge to the tax-exempt status of religious entities in *Walz* v. *Tax Commission* (1970), for example, the justices stopped short of ordering what would surely have been the largest tax increase in American history. Indeed, even Justice Black joined a tortuous majority opinion holding that governments that exempted religious bodies from taxation were not "sponsoring" religion, but merely "abstain[ing] from demanding that the churches support the state."[80] (Never mind that these tax exempt entities received, free of charge, a variety of public services.) Sunday closing laws and legislative prayers likewise survived Establishment Clause challenges.[81] Viewed collectively, these rulings made clear that the rights

[77] Torcaso v. Watkins, 367 U.S. 488 (1961).

[78] On local defiance of the Court's school prayer rulings in the 1960s and 1970s, see Lucas A. Powe, Jr., *The Warren Court and American Politics* (Cambridge, MA: Belknap Press, 2000), 362–63; Daniel K. Williams, *God's Own Party: The Making of the Christian Right* (New York: Oxford University Press, 2010), 67.

[79] On the public reaction to *Engel* v. *Vitale*, see Powe, *The Warren Court and American Politics*, 187–90; Williams, *God's Own Party*, 62–67. As Williams points out, between 1962 and 1964 no fewer than 111 members of Congress introduced constitutional amendments overturning the Court's decision barring prayer in the public schools.

[80] Walz v. Tax Commission of City of New York, 397 U.S. 664, 675 (1970).

[81] Although Sunday closing laws were undoubtedly religious in origin, a majority of the Court found that they also served the secular purpose of protecting citizens' "health, safety, recreation, and general well-being." McGowan v. Maryland, 366 U.S. 420, 444 (1961). Legislative prayers,

revolution would not end with the complete secularization of the American state.

A similar gap between principle and doctrine can be seen in the Court's decisions on sexual and reproductive privacy. In striking down a Massachusetts law that prohibited the distribution of contraceptives to unmarried persons, the Court had seemed to suggest that any official intrusion into the "decision whether to bear or beget a child" was a fundamental violation of personal autonomy. The Court's willingness to issue such a sweeping statement of principle may be explained in part by the fact that the nation's contraception laws had all but lapsed into desuetude; in fact, the states that still had such laws on the books defended them by claiming that there was no constitutional injury to redress, since the laws were never enforced.

Regulation of abortion, in contrast, was alive and well in 1973 when the Court decided *Roe* v. *Wade*.[82] This may explain why the Court felt it advisable to adopt a more cautious and pragmatic tone in its landmark abortion decision, even as it broadened the scope of the underlying right. Whatever the reason, Blackmun and the *Roe* majority determined that the primary problem with abortion restrictions was not that they interfered with privacy in the sense of individual autonomy but rather that they impinged upon the patient–physician relationship. Seen in this light, the constitutional right to access abortion services had to be balanced against the state's interest in protecting the health of the mother and, in the latter stages of pregnancy, the health of the fetus.[83] Although *Roe*'s immediate effect was to expand access to abortion services throughout the nation, the medical privacy frame suggested obvious routes by which abortion opponents might narrow, if not negate, the right to terminate a pregnancy.

while certainly intended to promote respect for religion, were too "deeply embedded in the [nation's] history and tradition" to be deemed incompatible with the Establishment Clause. Marsh v. Chambers, 463 U.S. 783, 786 (1983).

[82] Daniel K. Williams. "No Happy Medium: The Role of Americans' Ambivalent View of Fetal Rights in Political Conflict over Abortion Legalization," *Journal of Policy History* 25.1 (2013): 42–61. By this point the liberalization movement of the late 1960s, during which numerous states had legalized therapeutic abortions and two had legalized abortion "on demand," had effectively stalled. Williams points out that although numerous states adopted therapeutic laws in the late 1960s, only one (Florida) did so after 1970, and this as a result of a court order. In 1971, twenty-five state legislatures debated such laws, and all the measures were defeated. Moreover, in 1972, voters in two states (Michigan and North Dakota) defeated therapeutic abortion reform in statewide referenda. Also in 1972, the New York legislature repealed that state's liberal abortion law, but the repeal legislation was vetoed by Governor Nelson Rockefeller.

[83] "The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate ... A State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision." 410 U.S. 113, 154 (1973).

The theoretical problem that dogged civil liberties jurisprudence in this period concerned the rather murky nature of the relationship between the Court's civil liberties principles and its egalitarian theory of American democracy. We have seen that the Court rejected First Amendment challenges to commercial speech regulations, lobbying regulations, and union shop agreements. But it bears emphasis that each of these decisions provoked spirited dissents arguing that the majority was permitting lawmakers to run roughshod over rights that the Court had earlier declared inviolable. Thus, a 1951 decision finding that the First Amendment did not protect door-to-door commercial solicitation led Justice Black to ask why a salesman hawking subscriptions to the *Saturday Evening Post* should be afforded less constitutional protection than a Jehovah's Witness or labor organizer engaged in the door-to-door distribution of handbills. In each case, Black alleged, the end result of regulation was to "hobble" the free circulation of "religious or political ideas."[84] When the Court in 1955 upheld the Federal Lobbying Act, Justice William O. Douglas wondered why the Court had only ten years before struck down a seemingly similar Texas law that required labor organizers to register with the state. At least to Douglas, it seemed that both laws exerted a chilling effect on speech, forcing speakers to tread cautiously – or else refrain from speaking entirely – for fear of crossing "the prohibited line" that divided constitutionally protected expression from paid organizing or lobbying activities.[85] And when the Court in 1961 upheld the constitutionality of mandatory union contributions, Black attacked his fellow justices for seeming to abandon the core principle of *West Virginia* v. *Barnette* – namely, that citizens could never be forced to endorse or subsidize political speech with which they disagreed.[86]

In theory, the mid-century Court might have produced a body of doctrine that integrated principled commitments to free expression, personal autonomy, and egalitarian democracy into a coherent whole. But this was not to be. All too often, the justices asserted the constitutionality of measures that seemed likely to mitigate the effects of entrenched inequality without offering clear explanations of how particular policies might be reconciled with an expansive conception of personal autonomy or the ideal of an unfettered marketplace of ideas. On other occasions, the justices fractured into competing camps based around irreconcilable theories concerning the relationship between civil liberties

[84] Breard v. Alexandria, 341 U.S. 622, 650 (1951). Black, J., dissenting.

[85] U.S. v. Harriss, 347 U.S. 612, 632 (1954). Douglas, J., dissenting.

[86] Black doubted that unions were capable of maintaining strictly separate accounts for political and collective bargaining activities. In all likelihood, he reasoned, the objecting employee would receive only few pennies on the dollar – an amount that might or might not reflect the true extent of the union's political activities. Meanwhile, the employee would remain officially affiliated with an organization whose aims he despised. The union security agreement thus violated "a man's constitutional right to be wholly free from any sort of governmental compulsion in the expression of opinions." International Association of Machinists v. Street, 367 U.S. 740, 797 (1961). Black, J., dissenting.

and the regulatory state. As a result, the rights revolution bequeathed a troubled legacy, leaving behind a body of law that was plagued by internal tensions and, when wielded by justices of a different ideological stripe, easily turned against its original normative commitments.

MODERN CIVIL LIBERTIES: THE AGE OF INCOHERENCE

Richard Nixon's victory in the presidential election of 1968 marked the beginning of the end of the rights revolution. With the nation gripped by urban riots and anti-war protests, Nixon blamed the Court – and its civil liberties rulings in particular – for fostering a general spirit of lawlessness. Nixon's fellow Republican, Ronald Reagan, who was elected president in 1980, directed similar complaints at the Court. By the early 1980s, the rise of the Christian Right had expanded the list of conservative grievances. In addition to attacking the Court's record on "law and order" questions, Reagan and other prominent Republicans now promised to appoint justices who would roll back recent rulings on school prayer, abortion, and pornography.

Republicans would win six of seven presidential contests between 1968 and 1988. Control of the White House provided Republican Presidents with an opportunity to remake the Court in their party's image, much as FDR and the Democrats had done in the late 1930s and early 1940s.[87] The emergence in the 1970s of a conservative legal movement provided the intellectual foundation for this effort.[88] Many of the movement's early leaders, including Robert Bork and Edwin Meese, attacked the Warren Court for ignoring the original intent (or meaning) of the Constitution's text – noting, for example, that the phrase "right to privacy" appears nowhere in the document. Others foresaw that Warren-era civil liberties principles might be applied to conservative ends, such as weakening corporate transparency laws and rolling back campaign finance regulations. As corporate attorney and future Supreme Court justice Lewis Powell explained in an influential 1971 memo, reformers on the left had long ago learned that an "activist Court" was potentially "the most important instrument [in our constitutional system] for social, economic and political change." It was high time that the nation's corporations applied this lesson in defense of "the free enterprise system."[89]

[87] Beginning with Nixon's 1969 nomination of Warren Burger to replace Earl Warren as Chief Justice, Republican Presidents would fill ten consecutive vacancies on the Court.

[88] The origins of the conservative legal movement are discussed in Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: Princeton University Press, 2012); Amanda Hollis-Brusky, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution* (New York: Oxford University Press, 2015); Ken I. Kersch, "Ecumenicalism through Constitutionalism: The Discursive Development of Constitutional Conservatism in *National Review*, 1955–1980," *Studies in American Political Development* 25 (2011): 86–116.

[89] The Powell Memo can be read online at: http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf.

Identifying and confirming judicial nominees willing to undo the Warren Court's legacy proved more difficult than expected. Yet, beginning with Nixon's 1969 nomination of Warren Burger to replace Earl Warren as Chief Justice, the arrival of a series of Republican appointees began to transform the Court's ideological orientation. By the 1980s, the Court was beginning to steer constitutional doctrine in directions that comported with key Republican policy goals – from weakening the regulatory state to restoring authority to state and local governments to restricting access to abortion. But just as the rights revolution did not sweep away everything that came before it, the Republican ascendancy did not bring about the complete dissolution of Warren-era civil liberties doctrine. Instead, it ushered in a period of bitter ideological division, with the justices clearly divided into "conservative" and "liberal" blocs. If the conservative bloc has prevailed more often than the liberal, internal divisions within the conservative ranks have nonetheless foreclosed the possibility of a return to the constitutional arrangements of the nineteenth century. And, indeed, conservative members of the Burger (1969–1986), Rehnquist (1986–2005), and Roberts (2005–) Courts have at times openly embraced Warren-era civil liberties doctrines, even as they have exploited that framework's internal tensions and applied its core principles to radically new ends.

At the risk of oversimplification, it is possible to trace three distinct lines of development in the Rehnquist and Roberts Courts' major civil liberties decisions. The first consists of the surprisingly small number of areas where the Court has successfully rolled back – or at least limited the influence of – Warren-era civil liberties principles. The second consists of the surprisingly large number of cases where the Court, acting very much in the spirit of the rights revolution, has extended speech and privacy protections to cover novel situations and previously marginalized groups of Americans. The third consists of cases where the Court has advanced conservative policy goals not by rolling back Warren-era protections but by using innovative interpretations of civil liberties provisions to dismantle the previous regime's handiwork.

As an example of the first line of cases, consider the Rehnquist and Roberts Courts' rulings in the area of church–state relations. Beginning in the early 1980s, the Court rejected Establishment Clause challenges to a series of state and local programs that indirectly funded religious activities; examples included state tax write-offs for religious educational expenditures and school voucher programs that offset the cost of attending parochial schools.[90] Although these programs clearly steered public funds to religious entities, a bare majority of the Court reasoned that any aid to religion resulted from the voluntary decisions of private citizens and thus did not constitute an official "establishment" of religion. Viewed collectively, these decisions clearly eroded the Warren-era "wall of separation." At no point, however, did the Court's conservative majority directly repudiate the landmark mid-century church–state precedents. Rather, it

[90] Mueller v. Allen, 463 U.S. 388 (1983); Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

proceeded by building upon or reinforcing doctrinal vestiges of the old order that had survived the "rights revolution" intact.

The Court's 1970 ruling in *Walz* v. *Tax Commission* proved particularly useful in this regard. If tax exemptions for religious institutions did not run afoul of the Establishment Clause, the argument went, then why should similar exemptions for *individuals* pose First Amendment problems? Had not *Walz* definitively rejected the strict separationist position "that any program which in some manner aids an institution with a religious affiliation violates the Establishment Clause"?[91] Moreover, the amount of money that flowed to religious entities as the indirect result of individual tax write-offs and school voucher programs paled in comparison to the financial windfall bestowed by the *Walz* decision. Seen in this light, the newer programs were not "atypical of existing government programs" that had survived even Justice Hugo Black's exacting scrutiny.[92]

In the case of abortion, the Court has mostly stayed above the fray, leaving state and lower federal courts to sort out the question of whether particular forms of regulation are so onerous as to violate a woman's right to terminate a pregnancy.[93] As a result, a patchwork system of regulation has emerged, with access to abortion services varying widely from state to state. In jurisdictions where the lower courts have upheld innovative restrictions – from twenty-four-hour waiting periods to mandatory sonogram procedures to laws requiring that abortion providers have admitting privileges at a nearby hospital – it has become difficult, if not impossible, for women to avail themselves of the constitutional right to terminate a pregnancy in its early stages. But while some pushback was certainly to be expected in light of the Republican party's staunch opposition to abortion, the movement to restrict access could hardly have proceeded so smoothly absent the *Roe* majority's decision to (1) frame the issue in the language of medical privacy and (2) adopt a balancing approach to health and safety regulations. Like the landmark mid-century Establishment Clause decisions, in other words, *Roe* left in place significant vestiges of the traditional regulatory structure, which in turn provided abortion opponents with convenient launching points for attacks on the underlying constitutional right.[94]

[91] Mueller v. Allen, 463 U.S. 388, 393 (1983).

[92] Zelman v. Simmons-Harris, 536 U.S. 639, 665, 668 (2002). O'Connor, J., concurring.

[93] The major exception is *Gonzales* v. *Carhart*, in which a bare majority of the Court upheld a state ban on partial-birth abortions. 550 U.S. 124 (2007).

[94] Significantly, the Court in June 2016 invalidated, by a vote of 5–3, a Texas law requiring that doctors performing abortions have admitting privileges at nearby hospitals and also that abortion providers undertake costly upgrades to their existing facilities. Opponents of the measure observed that more than half of the state's abortion clinics had closed within two years of the law's passage, leaving some Texas residents as much as 500 miles from the nearest abortion provider. A majority of the Court, in an opinion by Justice Breyer, found that the medical benefits of the challenged provisions, if any, were not outweighed by the burdens imposed on women seeking abortions. It remains unclear, however, whether the decision signals a broader shift away from the Court's recent practice of deferring to state lawmakers and the lower courts. Whole Woman's Health v. Hellerstedt, 579 U.S. ___ (2016); Mary Tuma, "Only Eight Clinics Expected to Survive Ruling," *The Austin Chronicle*, June 12, 2015.

In a second line of cases, the Court has carried on the legacy of the Warren Court, embracing both the doctrinal substance and normative spirit of the landmark 1960s civil liberties decisions. Some of the resulting decisions arguably comport with conservative policy preferences. For example, in the early 1990s, at a time when many conservatives were alarmed by the rise of campus speech codes, the Court found that the First Amendment generally precludes the criminalization of hate speech, absent a specific threat to an identifiable individual.[95] Other decisions, however, have cut against the conservative grain. Thus, the Court has recently struck down a number of state and federal laws designed to restrict access to violent or pornographic media content and video games.[96] And, perhaps most surprisingly, the Court in *Lawrence* v. *Texas* (2003) struck down a state-level criminal ban on sodomy, thus extending the right to privacy to cover same-sex intimacy.[97]

At the level of doctrine, these decisions are firmly rooted in the great mid-century free speech and privacy precedents. But doctrine alone cannot explain why the Court, in these particular cases, elected to advance the legacy of the rights revolution. A fuller explanation would begin by noting that many of these cases, in contrast to the abortion and church–state cases, involve forms of regulatory authority that were thoroughly discredited during the heyday of the Warren Court. In the case of free speech, three decades of First Amendment rulings insisting upon the viewpoint neutrality of speech regulations had by the time of the Court's rightward shift effectively stripped states and localities of the ability to discriminate for or against particular speakers, even when the speakers or ideas in question are reviled by mainstream society.[98] To be sure, obscene speech remained theoretically beyond the scope of First Amendment protection, but this category had been narrowed almost to oblivion: works that did not depict explicit sexual acts or that possessed some semblance of "literary, artistic, political or scientific value" were by the late 1970s beyond the reach of the censors.[99] Any attempt to revive the government's traditional role in policing public discourse would have involved far more than overturning a single wayward precedent; it would have meant uprooting a doctrinal framework that had been constructed over several decades and that appeared to enjoy

[95] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); also see Virginia v. Black, 538 U.S. 343 (2003).

[96] Reno v. American Civil Liberties Union, 521 U.S. 844 (1997); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004); Brown v. Entertainment Merchants Association, 564 U.S. ___ (2011); United States v. Stevens, 559 U.S. ___ (2010).

[97] Lawrence v. Texas, 539 U.S. 558 (2003).

[98] This point was driven home by the Seventh Circuit's 1978 decision upholding the right of American Nazi Party members to march through the heavily Jewish enclave of Skokie, Illinois. Collin v. Smith, 578 F.2d 1197 (1978).

[99] Miller v. California, 413 U.S. 15 (1973); Jenkins v. Georgia, 418 U.S. 153 (1974).

broad public support – at least in the abstract. In this area, where doctrinal vestiges were few and far between, even the Court's most conservative members have generally embraced the inherited framework, and even in the most controversial of cases.[100]

To be sure, the Rehnquist Court narrowly affirmed the constitutionality of state-level sodomy bans as late as 1986. But the more important point to note about the Court's decision in *Bowers* v. *Hardwick* is that a generally conservative Court came within a single vote of extending constitutional protection to same-sex intimacy at a time when many in the Republican party viewed homosexuality as a dire threat to the moral and physical health of the nation.[101] The 5–4 decision, with two Republican appointees in the majority and a third only narrowly dissuaded from joining them, testified to the difficulty of reconciling sodomy prosecutions with the major privacy precedents of the 1960s and 1970s.[102] If the Court's earlier rulings had found that private, consensual, noncommercial sexual conduct was generally beyond the reach of the state, it was difficult to see why homosexual conduct should be excluded from the scope of the rule. Moreover, by the 1980s, it was clear that laws prohibiting sodomy, like the earlier bans on contraception, were enforced only rarely and often in an arbitrary and vindictive manner.[103] As in *Griswold*, a strong case could be made that desuetude principles alone provided sufficient grounds for an opinion invalidating the nation's anti-sodomy laws.[104] That *Bowers* was overruled only seventeen years after it was handed down was due in no small part to the efforts of the many activists who, in the intervening years, built a constitutional case for reversal and cultivated public support for decriminalization.[105] But it surely does these activists no disservice to suggest that they were aided by the gradual erosion, over the preceding four decades, of the states' powers of morals police.

[100] In *Ashcroft* v. *Free Speech Coalition*, for example, the Court struck down provisions of the Child Pornography Prevention Act of 1996 (CPPA) that prohibited "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct." The Court found that the language was overbroad and would potentially apply to works of "serious literary, artistic, political, or scientific value." 535 U.S. 234, 246 (2002). A revised child pornography law was upheld in *U.S.* v. *Williams*. 553 U.S. 285 (2008).

[101] 478 U.S. 186 (1986).

[102] Justice Lewis Powell, a Nixon appointee, originally voted to strike down the sodomy law at issue in *Bowers* but later reversed his vote. Powell later expressed regret for his decision to join the *Bowers* majority. Dale Carpenter, *Flagrant Conduct: The Story of Lawrence v. Texas* (New York: Norton, 2012), 213.

[103] See, for example, Carpenter, *Flagrant Conduct*, 3–25.

[104] For the argument that the *Lawrence* majority's opinion – and the Court's privacy jurisprudence more generally – has been shaped by the principle of desuetude, see Cass R. Sunstein, "What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage," *University of Chicago Law & Economics, Olin Working Paper* 196 (2003), available online at www.law.uchicago.edu/files/files/196.crs_.lawrence.pdf.

[105] Carpenter, *Flagrant Conduct*, 124–30, 154–79.

But it is the third line of cases that is perhaps the most interesting. In cases involving corporate speakers, the Burger, Rehnquist, and Roberts Courts have enthusiastically embraced the ideals of unfettered public discourse and personal autonomy that undergirded so much of the mid-century Court's civil liberties jurisprudence. But instead of wielding these ideals in the service of a more egalitarian society, it has used them to dismantle key features of the regulatory state. The first signs of a shift came in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council* (1976), when the Court extended First Amendment protection to commercial speech. If one purpose of the First Amendment was to promote the "societal interest in the fullest possible dissemination of information," then the Court could see no reason why speakers should be stripped of constitutional protection merely because the information they hoped to convey was commercial in nature.[106] On this point, the Court's remaining liberals agreed with the recent Republican appointees: the mid-century Court had erred when it permitted lawmakers to restrict speech solely on the basis of its commercial content.

Sharp disagreements arose, however, when the Court began to consider the precise extent of corporate and commercial First Amendment rights. At bottom, the rift concerned the relationship between civil liberties and economic power. In cases involving corporate speakers, the Court's conservative justices tended to treat the marketplace and autonomy ideals as abstract commands: more speech was always better than less, regardless of who was speaking; and coerced speech was always constitutionally problematic, even when the target of coercion was a corporation and even when the information in question was demonstrably true. In contrast, the Court's liberals tended to adhere to the Warren-era view that civil liberties principles were not to be interpreted in ways that reinforced structural flaws in the nation's representative system of government.

In *First National Bank of Boston* v. *Bellotti* (1978), for example, a bare majority consisting entirely of Republican appointees struck down a Massachusetts law that banned corporations from attempting to influence ballot initiatives "unless the corporation's business interests were directly involved." Relying heavily on the marketplace metaphor, Justice Lewis Powell's majority opinion declared that "the inherent worth of . . . speech in terms of its capacity for informing the public" was unaffected by "the identify of its source, whether corporation, association, union, or individual."[107] In contrast, three Democratic appointees and William Rehnquist, a Nixon appointee, would have held that the law was a permissible

[106] Central Hudson Gas & Electric v. Public Service Commission, 447 U.S. 557, 561 (1980). Henceforth, factually accurate commercial speech involving lawful activity would be constitutionally protected, unless the state could demonstrate that the challenged regulation "directly advanced" a "substantial government interest" and was "not more extensive than necessary to serve that interest."

[107] First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978).

means of preventing corporations from dominating the airwaves and directing shareholder money to political causes that were only tangentially related to the corporation's bottom line. Far from distorting public discourse, Massachusetts was attempting to preserve the historic "role of the First Amendment as a guarantor of a free marketplace of ideas."[108]

Although the *Bellotti* majority found that the First Amendment protected the right of corporations to influence elections, the precise scope of this right was left undefined. Some language in the opinion suggested that regulations narrowly targeted at the avoidance of corruption (or its appearance) would survive First Amendment scrutiny. And a subsequent 1990 decision upheld a state law that barred corporations from using treasury funds (as opposed to political action committee funds) for political purposes.[109] As a result, an uneasy truce held for the next three decades. Under the Federal Election Campaign Act and the Bipartisan Campaign Reform Act (BCRA), the size of direct contributions to candidates, parties, and political action committees was limited, and corporate and union expenditures were channeled through political action committees. Independent expenditures were also subject to rules designed to prevent corporations and unions from circumventing contribution limits by cutting ads on behalf of specific candidates.

The truce collapsed in 2006, however, following the death of Chief Justice Rehnquist and the retirement of Sandra Day O'Connor. Following the confirmation of John Roberts and Samuel Alito, respectively, to fill the resulting vacancies, it became clear that a bare majority of the Court now favored dismantling most remaining restrictions on corporate electoral activity. The most significant blow to the campaign finance regime came in 2010, when a bare majority held in *Citizens United* v. *Federal Elections Commission* that the First Amendment protects the right of corporations to spend unlimited amounts from their corporate treasuries to influence campaigns, provided they do not coordinate their expenditures with a particular candidate.[110] As in *Bellotti*, the marketplace metaphor undergirded much of the majority opinion. According to Justice Kennedy, laws restricting political spending by corporations distorted the ideological marketplace by depriving average Americans of information they might want or need to hear. To be sure, corporations possessed the capacity to dominate the airwaves in ways that average citizens could never hope to match. But this fact was irrelevant since, under the marketplace theory, the public could be counted on to separate the wheat from the chaff.[111]

[108] Ibid. at 810, White, J., dissenting.
[109] Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).
[110] Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).
[111] 558 U.S. 310 at ___ (2010). "By suppressing the speech of ... corporations," Kennedy wrote, "the Government prevent[s] their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests ... Factions should be checked by permitting them all to speak, and by entrusting the people to judge what is true and what is false." A subsequent lower court decision, following *Citizens United* to its logical conclusion, held that the First Amendment protects the right of interest groups and political action committees to *raise* unlimited amounts of money, provided, again, that they do not coordinate their expenditures with a particular candidate. SpeechNOW.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010).

The impact of the Court's corporate speech decisions was not confined to the realm of campaign finance. Following *Virginia Board* and *Bellotti*, the number of First Amendment challenges to corporate transparency and disclosure laws skyrocketed – as did the odds of success. In recent years, roughly half of all First Amendment decisions handed down at the federal appellate level have benefited business corporations and trade groups as opposed to individuals and traditional expressive associations.[112] More to the point, the resulting decisions have cut to the very core of the regulatory state. To list but a few examples, corporations have successfully advanced First Amendment speech challenges to laws prohibiting the buying and selling, without consent, of patient prescription data by data mining and pharmaceutical companies,[113] regulations requiring that health claims used to market food products be supported by at least two randomly controlled trial studies,[114] regulations requiring companies to disclose their use of "conflict minerals,"[115] and regulations requiring tobacco companies to display graphic warning labels on packs of cigarettes.[116]

The autonomy principle and the corollary prohibition against compelled speech have proved particularly useful in this regard. In its opinion upholding the right of tobacco companies to refuse to include graphic warning labels on their products, for example, the D.C. Circuit held that "any attempt by the government to compel individuals to ... subsidize speech to which they object" was subject to strict scrutiny. This rule applied even when the speech in question involved "statements of fact the speaker would rather avoid" and regardless of whether the speakers in question were individuals or corporations.[117] A bare majority of the Supreme Court endorsed a similar argument in *Harris* v. *Quinn* (2014), a potentially far-reaching decision invalidating a "fair share" agreement that required publicly subsidized home health care workers to contribute to the costs of union representation.[118] Breaking with a long line of precedent that included *International Association of Machinists* v. *Street*, the *Harris* majority found that, although the collective bargaining system in question furthered legitimate state interests, these interests were not sufficient to overcome the First Amendment rights of employees who objected to paying union dues. To hold otherwise would be to violate the principle

[112] John C. Coates IV, "Corporate Speech and the First Amendment: History, Data, and Implications," *Constitutional Commentary* 30 (2015): 223–76.
[113] Sorrell v. IMS Health, 564 U.S. ___ (2011).
[114] POM Wonderful, LLC v. FTC (D.C. Cir. Jan. 30, 2015).
[115] National Association of Manufacturers v. Securities and Exchange Commission, 748 F.3d 359 (D.C. Cir. 2014). The *NAM* decision was, however, overruled by American Meat Institute v. USDA, 760 F.3d 18 (D.C. Cir. 2014) (en banc).
[116] R.J. Reynolds Tobacco Co. v. Food and Drug Administration, 696 F.3d 1205 (D.C. Cir. 2012).
[117] Ibid. at 1211. [118] Harris v. Quinn, 134 S. Ct. 2618 (2014).

that the government "may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves."[119]

In decisions such as *Virginia Board, Citizens United*, and *Harris* v. *Quinn*, the reconstituted Court has dealt a series of significant blows to the regulatory state, but not by challenging its authority head-on. Rather, the Court's conservative majority has conceded the legitimacy of the underlying power (e.g., to regulate campaign finance, to mandate corporate transparency, to impose collective bargaining arrangements), only to render regulation impractical through an expansive interpretation of the First Amendment rights of individuals and corporations. Adding to the irony, it has done so using the very doctrines that the mid-century Court used to dismantle the various state and local prerogatives that had long relegated workers and minorities to a subordinate position in American society. To be sure, as Justice Alito acknowledged in his opinion for the *Harris* majority, previous Courts had repeatedly rebuffed First Amendment challenges to the regulatory state. But these earlier precedents were not binding upon the present Court, Alito insisted, as they were the "result of historical accident, not careful application of principles."[120]

CONCLUSION

This last remark from Justice Alito, with its juxtaposition of "principles" and "historical accidents," might well serve as the epitaph for the past century of constitutional development in the area of civil liberties. Since at least the New Deal period, it has been the aspiration of judges and commentators alike to liberate citizens from arbitrary authority structures bequeathed by their forebears. During this period, constitutional interpreters have generally agreed that if official authority is to survive constitutional scrutiny, it should not be because of the judge's irrational prejudice in favor of the familiar but rather because the rights claimant has misunderstood or misstated the nature of the principle at stake – whether the freedom of speech, the freedom of religion, or the right to privacy. The problem – and the explanation for much of the incoherence of recent civil liberties doctrine – is that the distinction between a "historical accident" and a proper "application of principles" often lies in the eye of the beholder.

[119] 573 U.S. ___ (2014). Although the specific holding of *Harris* was narrowly targeted at Illinois' regulation of home health care workers, the decision seemed to signal the Court's willingness to reconsider the broader question of compelled union dues. And, indeed, the Court in March 2016 divided 4–4 on the question of whether public sector "agency shop" provisions were in violation of the First Amendment. If not for Justice Scalia's untimely death in February 2016, the Court almost certainly would have handed down a far-reaching decision eviscerating the critical Warren-era precedents concerning union dues and the First Amendment. Friedrichs v. California Teachers Association, 578 U.S. ___ (2016).

[120] 573 U.S. ___ (2014)

In the same term that the Court decided *Harris* v. *Quinn*, it also decided *Obergefell* v. *Hodges*, a landmark decision granting same-sex couples the right to marry. In *Obergefell*, Justice Kennedy and the majority found that state laws that limited the right to marry to opposite-sex couples were, in effect, historical accidents. Because the laws in question served no purpose other than to register a longstanding and irrational prejudice against homosexuals, they could only be characterized as an illegitimate denial of "liberty" under the Fourteenth Amendment's Due Process Clause. Although "history and tradition" were certainly relevant to the constitutional inquiry, they did not mark the "outer bounds" of constitutional liberty. The past, Kennedy insisted, would not be "allow[ed] . . . to rule the present."

Now on the opposite side of the "historical accident" formulation, Justice Alito failed to perceive how traditional marriage laws could be characterized as arbitrary relics of a bygone era. In a dissent joined by Justices Scalia and Thomas, Alito suggested that traditional marriage laws served the important purpose of "encourag[ing] potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children." Far from registering an irrational prejudice, existing laws embodied an interest long regarded as legitimate "in a great variety of countries and cultures all around the globe." If anyone was guilty of conflating irrational prejudice and constitutional principle, it was Justice Kennedy and the majority. It was they, not state lawmakers, who had read into "the Constitution a vision of liberty that happen[ed] to coincide with their own."

The core disagreement in *Obergefell* calls to mind Walter Lippmann's warning, issued in the late 1920s, that Americans would increasingly find themselves unable to justify legal authority by reference to shared moral or religious principles. Lippmann was of course referring to the difficulty of enforcing traditional legal prohibitions in a world that was growing more morally heterogeneous by the day. But he might just as easily have formulated the point in the opposite way: with the collapse of traditional belief structures, expansively worded constitutional guarantees – from the "freedom of speech" to the "establishment of religion" to "liberty" itself – would be transformed into highly adaptable tools that could be used to challenge (or buttress) almost any form of authority, whether public or private, national or local, old or new. To be sure, Americans would remain free to invoke tradition as one possible locus of interpretive authority, but the interpretive significance of tradition was itself up for grabs. Whether inherited authority structures furthered legitimate ends or merely reflected parochial prejudices – whether against gays and lesbians or in favor of organized labor – would become increasingly a matter of opinion. Judges and commentators, for their part, would be left to search in vain "for a new orthodoxy into which men can retreat."