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ERAS OF THE FIRST AMENDMENT

David Yassky†

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Students of the First Amendment continually read the Amendment out of the Constitution—not in the sense of denying it effect, but in the sense of reading it in isolation, uninformed by the broader principles embedded in the founding document. Underneath all the differences among the vast range of free speech scholars, most commentators share a fundamental and flawed premise: that the First Amendment is

† Counsel, House Committee on the Judiciary, Subcommittee on Crime and Criminal Justice. The opinions contained in this article are mine alone and are in no way intended to reflect the views of my employers. Many of the ideas in this article were developed in conversations with Diana Fortuna. An earlier version was delivered at the Yale Student Legal Theory Workshop; I am grateful to the participants, particularly Janine Crawley, for their provocative suggestions. Owen Fiss, Jon Hanson, Tom Hentoff, Robert Schapiro, and Lester Yassky read this article in draft and provided helpful comments. My primary intellectual debt is to Bruce Ackerman, on whose work this article hopes to build.

concerned solely with governmental regulation of speech.[1]

This sort of "clause-bound" interpretation[2] ignores the larger purposes underlying the First Amendment. The First Amendment is not a lone prohibition on speech restrictions. Its guarantee that "Congress shall make no law . . . abridging the freedom of speech, or of the press" cannot be properly interpreted without appreciating the role the provision plays in the constitutional plan. The people who drafted and enacted the First Amendment sought not only to protect speech rights, but also to reinforce and implement the core constitutional structures of separated powers and federalism. As these constitutional structures have changed, so too has the meaning and purpose of the First Amendment. Questions about how much speech the Amendment allows can be answered only by understanding the connections between the Free Speech Clause and more fundamental constitutional decisions about the allocation of political power. Recovering these links will be a primary goal of this Article.

The Article's method will be to review the history of the First Amendment. As we shall see, the familiar history of the Amendment is highly misleading—or perhaps I should say *both* familiar histories, for there are in fact two different versions. The first version, the one taught in grade schools, emphasizes the Founders' commitment to tolerance: the vindication of John Peter Zenger, the Enlightenment spirit of the Revolution, and so forth. As every schoolchild knows, this commitment was enshrined in the plain text of the First Amendment, text which continues to this day to provide robust protection for speech rights.

This story, unfortunately, fits poorly with actual legal history. For despite all the rhetoric in First Amendment cases about the Founders' intentions, contemporary free speech doctrine is thoroughly modern. Not until the 1930s did the courts begin to recognize anytbing close to a prohibition on censorship. To the contrary, throughout the first 150 years of the First Amendment, federal courts regularly enforced severe restrictions on citizens' ability to speak freely.

To explain this anomaly, academic commentators have constructed a second version of the familiar history. This account, which is the one taught to first-year constitutional law students and propounded by nearly all scholars and casebooks, portrays a First Amendment tradition marked by slow and steady progress. The orthodox academic history begins with the censorship of the World War I seditious libel cases[3] and

1. When I refer in this article to "the First Amendment," I mean only the speech and press clauses. Although my argument has implications for the religion and assembly clauses, I do not claim to have treated them thoroughly here.

2. The phrase is Professor Ely's. See John H. Ely, Democracy and Distrust: A Theory of Judicial Review 12 (1980).

3. See Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919).

moves through the Holmes and Brandeis minority opinions in the 1920s[4] up to the present apex of speech protections.[5]

Simply juxtaposing these two familiar histories suggests that something is amiss. Either the level of speech protection has been consistently high, or there has been a gradual upward climb. Either the grade school version or the law school version must be mistaken. Or, as this Article will argue, both are mistaken. The history of the First Amendment reveals neither an identity between the Founders' aspirations and contemporary achievements, nor a steady trajectory from darkness to enlightenment. While today's First Amendment stands for something very different from what the Founders envisioned, the change was produced not by an increasing societal belief in the value of free speech, but by two watershed transformations in American government—the Civil War and the New Deal—that remade the entire constitutional framework.

Ever since its enactment, the Bill of Rights, and in particular the First Amendment, have embodied a constitutional commitment to liberty—an undertaking to protect the people against tyranny. This fundamental purpose has remained invariant since 1791. The nature of the threat to liberty, however, has changed over time. This threat comes from the governmental institutions created by the Constitution itself. As the powers of these institutions have changed, so too has the nature of their hazards, and so has the protection demanded of the First Amendment. While the dangers presented by the original constitutional scheme no longer seem urgent, the modern governmental structure involves new perils, against which the Founders' safeguards

4. Whitney v. California, 274 U.S. 357 (1927), overruled by Brandenburg v. Ohio, 395 U.S. 444 (1969); Gitlow v. New York, 268 U.S. 652 (1925).

5. See, e.g., Texas v. Johnson, 491 U.S. 397 (1989) (overturning flag desecration statute); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (subversive advocacy is protected "except where [it] is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (establishing "actual malice" test for libel of public figure).

For a clear and thorough exposition of the orthodox history, see Harry Kalven, Jr., A Worthy Tradition: Freedom of Speech in America (1988); see also Thomas I. Emerson, The System of Freedom of Expression 63-64 (1970) (Espionage Act cases "began the remarkable development of First Amendment doctrine which has continued to the present day"); Kent Greenawalt, Speech, Crime, and the Uses of Language 188 (1989) ("Substantial Supreme Court development of First Amendment doctrine began with review of convictions under the 1917 Espionage Act . . . ."); Floyd Abrams, A Worthy Tradition: The Scholar and the First Amendment, 103 Harv. L. Rev. 1162, 1163 (1990) (book review) (calling Kalven's book "the single indispensable study of the development of first amendment law"). Casebooks, too, invariably begin their First Amendment story in 1917, and tell of an unwavering climb toward enlightenment. See, e.g., Gerald Gunther, Individual Rights in Constitutional Law 651 (4th ed. 1986) ("The Court's first significant encounter with the problem of articulating the scope of constitutionally protected expression came in a series of cases involving agitation against the war and the draft during World War I."); Paul A. Freund et al., Constitutional Law: Cases and Other Problems 1130-1344 (4th ed. 1977).

are inadequate. The specific content of the First Amendment—its method for combatting tyranny—has changed accordingly. Each of the three eras of American constitutionalism—from the founding to the Civil War, from the Civil War to the New Deal, and from the New Deal through the present—has seen its own particular incarnation of the First Amendment effort to ensure liberty.

In tracing these eras, this Article will treat free speech doctrine within each time period, including the contemporary era, as more or less monolithic. For the purposes of this Article, differences among the competing First Amendment theories put forward by scholars—theories grounded in self-governance,[6] individual autonomy,[7] or the "free trade in ideas"[8]—are minor. The fundamental precepts of contemporary free speech doctrine, including an absolutist hostility to government regulation of public-directed speech, are common ground. This Article will not attempt, then, to argue that one or another of the prevailing academic approaches to the First Amendment is in some sense best. Instead, the effort will be to offer a fresh history of the First Amendment, one that relates free speech doctrine to broader constitutional structures.

Part I will begin the story with the Founders' understanding of the structural role of the First Amendment. In this understanding, the First Amendment served as a bulwark of state independence. Along with the rest of the Bill of Rights, the First Amendment had as its primary purpose maintenance of the federal system—or, more precisely, protection of the states against federal government overreaching. The Founders' plan left the individual states entirely free to regulate speech, while strictly prohibiting the federal government from displacing the states' various speech regimes.

When the Civil War dramatically reshaped the federal-state relationship, the strnctural purpose of the Bill of Rights changed in response. Part II will describe this change. No longer were the Constitution's protections of individual rights aimed exclusively at the national government. Indeed, over the seventy years following the Civil War, imposing restrictions on state governments became a central constitutional concern. But this concern found expression not through the Free Speech Clause of the First Amendment but through the property-focused guarantees of the Fifth and Fourteenth Amendments.

6. See, e.g., Kalven, supra note 5; Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948); Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245.

7. See, e.g., Greenawalt, supra note 5; John Stuart Mill, On Liberty (1989); David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45 (1974).

8. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See generally Martin H. Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591 (1982) (discussing and critiquing "marketplace of ideas" theory).

Free speech was relegated to the periphery. This period, from the Civil War to the New Deal, was the nadir of the First Amendment.

Part III will show how the New Deal brought free speech to the center of constitutional jurisprudence. This shift, too, was the product of a broad-gauged reconfiguration. The legitimation of activist government rendered previous constitutional understandings unworkable. No longer could liberty be guaranteed—as in the Federalist era—by protecting the independent authority of the states, or—as in the Civil War era—by preserving common law rights to property and contract. Instead, the Supreme Court has interpreted the constitutional guarantee of liberty as protecting the processes of democracy and electoral accountability. In the New Deal era, the Court has extended to political affairs the libertarianism it earlier applied to economic affairs: The First Amendment prohibits the government from rearranging private distributions of political resources. The impetus for this interpretation comes from the highly undemocratic and unaccountable nature of the administrative state. Because the New Deal era government is so powerful, the liberty principle embedded in the First Amendment requires the Court to ensure the state's subjection to popular control.

Having identified the three eras of free speech jurisprudence in Parts I, II, and III, Part IV will elaborate the scholarly method and the premises about constitutional theory that underlie this recounting. This method is holistic, structural, and historical. It understands each constitutional component in relation to other provisions; it focuses on the concrete institutional endowments effected by constitutional lawmakers rather than the general principles those lawmakers arguably endorsed; and it is sensitive to the development of constitutional structure over time. Part IV will conclude by examining the normative implications of the history of the First Amendment. Contemporary free speech doctrine suffers from many of the same defects that eventually forced the abandonment of earlier eras' liberty jurisprudence. Understanding the origins of the modern orthodoxy will suggest directions for future change.

I. The First Amendment in the Federalist Framework

In his concurring opinion in *Whitney v. California*, Justice Brandeis wrote:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assem-

bly should be guaranteed.[9]

Well, not exactly. The *Whitney* concurrence contains some of Brandeis' most stirring rhetoric, and it eventually was adopted by a majority of the Court. It accurately captures the liberal commitment to tolerance shared by many, probably most, of the individuals who participated in the Founding. But Brandeis slips when he suggests that the Constitution aimed at stamping out censorship. The First Amendment, like the rest of the Bill of Rights, did not originally apply to the states. The "guarantee" it effected was therefore quite weak—at least to contemporary eyes. A citizen in 1800 had no absolute right to free speech; if the speech-restricting law was a state law, the Constitution was silent.

On the other hand, if Brandeis attributed too much to the Founders' intentions for the First Amendment, Robert Bork attributed too little when he wrote: "The Framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject. . . . The First Amendment, like the rest of the Bill of Rights, appears to have been a hastily drafted document upon which little thought was expended."[10] The original First Amendment was by no means the equivalent of today's blanket prohibition on speech regulation, but neither was it a trivial afterthought, intended to have little or no practical effect.

Looking at the First Amendment in isolation has limited scholars and judges to these two alternatives, despite the obvious shortcomings of each. The First Amendment did aim at ensuring liberty to the citizens of the new republic, but not by eradicating all censorship. Rather, the framers of the First Amendment sought to guarantee liberty by maintaining the independence of the states. To this end, the Amendment prohibited the central government from interfering in the political life of the states, while leaving state governments free to regulate speech.

A. *The Origin of the First Amendment as a States' Rights Protection*

The ratification debates clearly articulated the Founders' view of the Bill of Rights as a protection against the centralization of power.[11] The Federalist supporters of the Constitution asserted that the Bill was superfluous. To the Federalists, Article I, Section 8's enumeration of

9. 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring), overruled by Brandenburg v. Ohio, 395 U.S. 444 (1969).

10. Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 22 (1971).

11. In speaking of "the Founders' view," I do not mean to claim that the individuals who participated in drafting and ratifying the Constitution shared a uniform set of beliefs and values. I do contend, however, that I can meaningfully characterize the intentions and ideals embodied by the Constitution, and can attribute these intentions and ideals to "the Founders." Indeed, I believe that such characterization is indispensable to interpretation of the Constitution, or of any law.

the permissible areas of federal legislation was a sufficiently powerful check on the central government.[12] The federal government would have no power to legislate beyond what was specifically delegated to it in the Constitution. Indeed, Hamilton wrote that he would

> go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?[13]

The Anti-Federalists were not satisfied. Massachusetts, New Hampshire, New York, and Rhode Island included proposals for bills of rights as part of the resolutions they passed ratifying the Constitution.[14] In the crucial New York convention, the Anti-Federalists nearly succeeded in conditioning ratification on the calling of a national convention to propose amendments. At the last minute, by a vote of 31—29, the delegates agreed to substitute "in full confidence" for "on condition" in the resolution of ratification.[15] The Federalists secured legal ratification, but, as the political price, they agreed to add to the Constitution a set of explicit prohibitions on federal government power. The purpose of the Bill of Rights was to incorporate these Anti-Federalist protections into the predominantly Federalist document.

The last thing the Anti-Federalist proponents of the Bill wanted

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12. See, e.g., 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 540 (Jonathan Elliot ed., 1866) [hereinafter Elliot's Debates] (statement of Thomas M'Kean); id. at 435-38 (statements of James Wilson).

13. The Federalist No. 84, at 513-15 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Madison's version of this argument (during the ratification process, at least—his views later changed) was that a bill of rights would simply be useless: "[A] mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands." The Federalist No. 48, at 313 (James Madison) (Clinton Rossiter ed., 1961). He believed that only the constitutional structures of separated and divided powers could prevent goverumental overreaching and ensure individual liberty. See The Federalist No. 51 (James Madison). The Founders' ideological transformation from a belief in bills of rights—a belief enshrined in the Declaration of Independence—to a reliance on structural solutions is recounted in Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 430-564 (1969).

14. See 1 Elliot's Debates, supra note 12, at 322-27, 337. South Carolina also proposed modifications, although not a comprehensive bill of rights. See 1 id. at 325. Virginia listed a set of rights which it declared was implicit in the Constitution. See 1 id. at 327. In 1788, North Carolina declined to ratify, calling for a bill of rights to be added before it would consent. See 1 id. at 331-32.

15. See 2 id. at 412.

was to empower the federal courts to invalidate state legislation. Their concern was just the opposite: maintaining the authority of the states in the face of the new, dangerously powerful national government. No one among the Founders thought that the Bill of Rights would limit the states.

This understanding was wholeheartedly accepted by the judiciary. In 1845, the Supreme Court in *Permoli v. Municipality No. 1*[16] addressed the scope of state authority under the religion clauses of the First Amendment. The New Orleans statute at issue in *Permoli* made it unlawful to bring a corpse into a Catholic church; the municipality sought to funnel funerals into a state-established "obituary church." A Catholic priest convicted of violating the statute appealed to the Supreme Court, invoking the protection of the First Amendment. The Court made short shrift of his claim: "The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states."[17] This analysis applied to freedom of expression as well.

The states made (il)liberal use of their authority. Legal historians Leonard Levy[18] and Norman Rosenberg[19] have uncovered a history of vigorous and repeated acts of censorship by state governments—what Levy termed a "legacy of suppression." Throughout the early 19th century, states used criminal libel statutes to imprison critics of the government.[20] Just as stifling to dissent, incumbent politicians regularly recovered sizable verdicts in civil libel cases against publishers and opponents who had disparaged their performance in office.[21] Because this regime of censorship was implemented at the state level, rather than under congressional authority, it went unimpeded by the First Amendment.

B. *The Founders' Theory of the First Amendment*

To the people who drafted and enacted the First Amendment, its silence with respect to state restrictions on speech was no anomaly, no gap in the armor of constitutional protection. The Founders believed it entirely appropriate, even desirable, for the states to regulate speech.

16. 44 U.S. (3 How.) 589 (1845).

17. Id. at 609.

18. See Leonard W. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History (1960) [hereinafter Legacy]. Levy later modified his views somewhat, see Leonard W. Levy, Emergence of a Free Press (1985), but his factual findings and essential interpretive conclusions have remained unchanged.

19. See Norman L. Rosenberg, Protecting the Best Men: An Interpretive History of the Law of Libel (1986).

20. See id. at 108–20; Levy, Legacy, supra note 18, at 204–12.

21. See Rosenberg, supra note 19 at 120–28.

When Levy published *Legacy of Suppression* in 1960, its argument that the Founders accepted a great deal of government censorship was dramatic revisionism; it is now orthodoxy.[22] While there has been a protracted debate over the nuances of Levy's position, his basic conclusions are uncontroversial: The Founders' conception of free speech libertarianism was vastly different from contemporary versions.

In the first place, the Founders did not conceive of liberty as requiring that all points of view have access to public debate. Large categories of immoderate public speech were, in their view, properly subject to censure. Recent scholarship by Professor Rosenberg has buttressed Levy's findings:

> [T]o political leaders of Jefferson's generation constitutional guarantees did not require toleration of everything published in the press about the conduct of the best men. Rather, political leaders from both major factions endorsed a quite different proposition: government, if not at the national then at the state level, had a positive responsibility to monitor—and, when necessary, to step in and moderate—political communication.[23]

The Founders did not believe that liberty depended upon the inclusion in public debate of all possible points of view.[24] Just as important, the

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22. Levy argued that the Founders considered only prior restraints on speech to violate the First Amendment; they saw post-publication punishment as permissible. See Levy, Legacy, supra note 18, at 186. The leading exponent of the then-mainstream view attacked by Levy was Zechariah Chafee. See Zechariah Chafee, Jr., Free Speech in the United States (2d ed. 1942).

23. Rosenberg, supra note 19, at 100.

24. I do not want to give the impression that the Founders had no theory of freedom of speech, or that they were unconcerned to protect this freedom. To the contrary, of the 13 state constitutions adopted during the revolutionary period, ten contained explicit protections for speech or the press. See 1 The Bill of Rights: A Documentary History 235 (Bernard Schwartz ed. 1971) (reprinting Virginia Declaration of Rights enacted in 1776); id. at 256–61 (reprinting New Jersey Constitution enacted in 1776) (no speech protection); id. at 266 (reprinting Pennsylvania Declaration of Rights enacted in 1776); id. at 284 (reprinting Maryland Declaration of Rights enacted in 1776); id. at 287 (reprinting North Carolina Declaration of Rights enacted in 1776); id. at 289–90 (reprinting Connecticut Declaration of Right enacted in 1776) (no speech protection); id. at 300 (reprinting Georgia Constitution enacted in 1777); id. at 301–13 (reprinting New York Constitution enacted in 1777) (no speech protection); id. at 324 (reprinting Vermont Declaration of Rights enacted in 1777); id. at 335 (reprinting South Carolina Constitution enacted in 1778); id. at 342 (reprinting Massachusetts Declaration of Rights enacted in 1780); id. at 378 (reprinting New Hampshire Bill of Rights enacted in 1783).

I do, however, want to emphasize two points. First, the Founders' conception of free speech was very different from the versions espoused by present-day courts and commentators. As Levy and Rosenberg have demonstrated, the Founders countenanced a far greater degree of government censorship than does the current orthodox approach. Their theory was rooted in the common law privacy torts; the significance of this fact is developed infra at text accompanying notes 80–119.

Second, the state constitutional protections varied in scope, from Maryland's simple declaration "[t]hat the liberty of the press ought to be inviolably preserved," id. at 284, to Pennsylvania's broader guarantee "[t]hat the people have a right to freedom of

Founders maintained that each state had to determine for itself how much speech to permit. Speech was one of the many areas of public life deliberately left by the Constitution to the regulatory discretion of the states. This allocation of power was deeply rooted in the Federalist theory of liberty.

Because the states were less extensive than the entire republic and closer to the people than the federal government, the Founders believed that the states were more easily held accountable to the citizenry. Time and again in the debates in the states over ratification, both Federalists and Anti-Federalists expressed their assumption that the people's liberties were safer with the states than with a central government. In the New York convention, for example, John Lansing noted:

> It has been observed, that, as the people must, of necessity, delegate essential powers either to the individual or general sovereignties, it is perfectly immaterial where they are lodged; but, as the state governments will always possess a better representation of the feelings and interests of the people at large, it is obvious that those powers can be deposited with much greater safety with the state than the general government.[25]

The classic judicial statement of this view is Justice Marshall's opinion in *Barron v. Baltimore*.[26] The plaintiff in *Barron* sought to apply the Fifth Amendment's prohibition against uncompensated takings to the City of Baltimore. Marshall dispatched this claim by noting that the Constitution left the relationships between the individual states and their citizens untouched. If the people had a quarrel with their state governments, that was a matter between the states and their citizens; the federal government—and the federal Constitution—had nothing to do with it:

> Had the people of the several states, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments: the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by the discontented state, and the required improvements would have been made by itself.[27]

Marshall went further. Recalling the ratification debates, he located the

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speech, and of writing, and publishing their sentiments: therefore the freedom of the press ought not to be restrained." This variation was precisely what the Constitution was designed to protect. The Founders wanted the states, not the federal government, to retain authority over speech regulation. In fact, two of the states that called for a federal Bill of Rights—New York and Delaware—did not have speech protections in their own state charters.

25. 2 Elliot's Debates, supra note 12, at 217.

26. 32 U.S. (7 Pet.) 243, 247–51 (1833).

27. Id. at 249–50 (plurality opinion).

rationale behind this constitutional policy in the different attitudes the Founders held toward the state and federal governments:

> [I]t is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.
>
> In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.[28]

In framing the Constitution, the Founders left most governmental authority in the states. They relied on the popular character of the states to protect fundamental rights. This reliance was a central component of the Founders' vision of liberty.

Not only did the Constitution omit restrictions on states, but it actively depended for its success on the vigor and independence of state governments. The Founders were crucially concerned with the problem of majority tyranny—what Madison called "the violence of faction."[29] They feared that one faction would capture the central government and use its control of the governmental machinery to wipe out and oppress its rivals. Madison's famous solution, implemented by the Constitution, was to "extend the sphere" of governance—to bring the full play of contending societal forces into a forum where the factions would cancel each other out.[30]

The state governments were to play an integral role in this process. They were built-in factions. In an age before the emergence of modern political parties, the state governments were ready-made political organizations, continually prepared to challenge oppression by the federal government. The Founders envisioned that if the central government should ever attempt to overstep its boundaries, the states would mobilize popular opposition to the Congress and the President:

> [A]mbitious encroachments of the federal government on the authority of the State governments would not excite the oppo-

28. Id. at 250 (plurality opinion).
29. The Federalist No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).
30. Id. at 83.

> sition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole.[31]

The Founders had seen precisely that happen in the Revolution, and they sought in the Constitution to provide for the states to continue to play a checking-and-balancing role. This role was institutionalized in national elections by authorizing state legislatures to elect Senators and to appoint presidential electors. In extreme circumstances, Article V empowered the states by themselves to initiate changes in the federal Constitution. Both the normal electoral mechanism and the extraordinary amendment device had as a prerequisite the states' control over their own internal political processes. Maintaining this control was the overriding objective of the First Amendment.

Seen from the Founders' viewpoint, the Bill of Rights, including the First Amendment, was a set of structural protections for the federal system. The Founders' intention for the First Amendment, if there is such a thing, was not to eradicate censorship. It was to limit central government intrusion into the states' prerogatives. Proponents of the Bill of Rights saw it as a guarantee of liberty not because it listed uninfringeable rights but because it set out areas that were left entirely to the states' discretion.

C. *The First Amendment in Practice*

The Founders' theory was elaborated in the constitutional practice of the next half-century. Two political battles during this period raised important First Amendment issues. In both of these episodes, the Amendment played the role its framers had intended for it: a bulwark against centralization.

1. *The Sedition Act.* — For a decade after ratification, proponents of the national government and supporters of states—now coalesced into the Federalist and Republican parties—clashed over the proper scope of federal government authority. The Federalist Washington and Adams administrations pursued a policy of strengthening the central government. They created the Bank of the United States and actively supported England in its war against France. The Republicans, led by Jefferson, bitterly opposed these efforts.

Fearing the success of Republican challenges to their program, the Federalists enacted the Alien and Sedition Acts in 1797 and 1798. These laws, the Sedition Act in particular, baldly exceeded constitutional limits on federal lawmaking authority. The Act provided

> [t]hat if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published,

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31. The Federalist No. 46, at 298 (James Madison) (Clinton Rossiter ed., 1961).

> or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; . . . then such person . . . shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.[32]

Just as the Anti-Federalists had feared, a national government bent on consolidating power sought to use censorship to short-circuit political checks on its expansionist ambitions. The Federalists indicted fourteen people under the Sedition Act in federal courts, and obtained ten convictions.[33] Every one of these cases was a political prosecution. None involved the sort of personal slander today thought of as libel. The first victim was Representative Matthew Lyon, a Republican from Vermont.[34] Lyon was convicted on the basis of two letters to the editors of newspapers published during his 1798 campaign for Congress. The letters attacked Adams' "continual grasp for power" and his "unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice."[35] Other prosecutions aimed at silencing prominent Jeffersonian newspapers. James Callender, an editor of the Richmond *Examiner*, the leading Republican paper in the South, was convicted for accusing Adams of pushing the country toward a war with France.[36] The Supreme Court, in an act of cowardice spurred, perhaps, by its institutional insecurity (*Marbury* being five years in the future), refused to hear argnment on the constitutionality of the Sedition Act; indeed, every Justice on the all-Federalist Court expressed approval of the Act in opinions delivered on circuit.[37]

32. An Act in addition to the act, entitled "An act for the punishment of certain crimes against the United States," ch. 74, § 2, 1 Stat. 596, 596-97 (1798).

33. See James M. Smith, Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties 185-86 (1956). The Federalists also initiated a number of Sedition Act prosecutions in state courts.

34. Lyon's case was apparently not reported in the Federal Cases, although it was tried in the U.S. Circuit Court for the Vermont District. The case is documented in Francis Wharton, State Trials of the United States During the Administrations of Washington and Adams (Burt Franklin ed., 1970); see also Smith, supra note 33, at 221-46 (detailing the Federalist attack on Lyon).

35. Wharton, supra note 34, at 333 (quoting Lyon's indictment).

36. See United States v. Callender, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709); see also Smith, supra note 33, at 334-58 (providing a detailed history of Callender's indictment and conviction). The indictment of Luther Baldwin evidences the desperation with which the Federalists enforced the Sedition Act. Baldwin was indicted and fined $150 for remarking, when a cannon fired shortly after President Adams had passed it, that the country would have been well served had some of the shot lodged in Adams's buttock. See id. at 270-71.

37. See, e.g., *Callender*, 25 F. Cas. at 256-58 (opinion of Chase, J.); In re Fries, 9 F.

The Supreme Court's failure notwithstanding, the federal system worked as the Founders had anticipated. The Sedition Act was met quickly by the Kentucky and Virginia Resolutions. The Republican-controlled Kentucky legislature, in a resolution drafted by Thomas Jefferson, declared that the Act, "which does abridge the freedom of the press, is not law, but is altogether void, and of no force."[38] Virginia enacted a similar denunciation—authored, along with an accompanying "Report on the Virginia Resolutions," by James Madison. Madison's agonized, even disbelieving, "Report" established the Sedition Act's plain unconstitutionality by thoroughly examining the debates surrounding ratification of the Constitution and of the Bill of Rights: "It is painful to remark how much the arguments now employed in behalf of the Sedition Act, are at variance with the reasoning which then justified the Constitution, and invited its ratification."[39]

The Virginia and Kentucky Resolutions served as an organizing focus for the Republican opposition. On the strength of popular resistance to the Federalists' nationalization of power, and in particular to the Alien and Sedition Acts, Jefferson unseated Adams in the 1800 election. The Republican victory, however, was a triumph not for free speech libertarianism but for states' rights. Republicans never repudiated the crime of seditious libel.[40] They only insisted that the power to punish libelers was restricted to the states. As a leading Republican, Representative Edward Livingston of New York, stated in arguing against enactment of the Sedition Act by the House: "There is a remedy for offenses of this kind in the laws of every State in the Union. Every man's character is protected by law, and every man who shall publish a libel on any part of the Government, is liable to punishment."[41] Once in power, the Republicans abandoned the Federalists' centralization program, and they let the Sedition Act expire rather than turning it against their Federalist opponents. But state law seditious libel prosecutions—by Republican state governments—continued.[42]

These events neatly illustrate the role of the First Amendment not

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Cas. 826, 836–41 (C.C.D. Pa. 1799) (No. 5126) (opinion of Iredell, J.); Smith, supra note 33, at 271 (opinions of Cushing and Washington, JJ., in Luther Baldwin's case); Wharton, supra note 34, at 336 (opinion of Paterson, J., in Lyon's case). In fact, Justice Chase's overly enthusiastic supervision of Sedition Act prosecutions led, in part, to his impeachment by the Republicans once they gained office.

38. 4 Elliot's Debates, supra note 12, at 541.

39. Id. at 572.

40. See Levy, Legacy, supra note 18, at 307–08. Professor Walter Berns, while criticizing Levy, has reached a conclusion similar to my own. See Walter Berns, Freedom of the Press and the Alien and Sedition Laws: A Reappraisal, 1970 Sup. Ct. Rev. 109, 110–11 ("The principle on which . . . Republican leaders based their opposition was not 'a broad libertarian' version of civil liberties but the doctrine of states' rights, or nullification, or disunion."); see also id. at 121, 126, 129 (arguing that the Republican's attack on the Alien and Sedition Acts was rooted in their desire to protect states' rights).

41. Levy, Legacy, supra note 18, at 264.

42. See id. at 297–307; Berns, supra note 40, at 150–53.

as a guarantee of personal freedom nor even as a protection of democratic processes, but as a provision specifically aimed at safeguarding the federal system. It was no coincidence that the first threat to the First Amendment—and to the political process the Founders had established—came from the same Administration that also threatened the federal-state balance the Founders had put in place. The core First Amendment concern was centralization. The Founders believed that they could ensure individual liberty by limiting the federal government's power, leaving as the domain of the states all but the categories of federal authority specifically enumerated in the Constitution. They counted on the states to maintain this allocation—to combat centralization—through the political process. The Framers of the Bill of Rights well understood that the states' ability to perform this role depended crucially upon First Amendment protection from federal government censorship.

2. *The Debate over Abolition Literature.* — The constitutional crisis of 1798—1800 established for good the importance to the federal system of the First Amendment prohibition against national government regulation of speech. The second major free speech controversy involved the issue at the heart of federal-state conflict: slavery. From about 1830 through the Civil War, Southerners sought, at both the federal and state levels, to prohibit abolitionist literature. The debates surrounding these efforts confirmed the First Amendment consensus left in place by the Sedition Act affair: States could censor what they wished, but the federal government was forbidden to meddle in the flow of speech.

Beginning in the 1830s, southern concern over abolition literature reached a fever pitch. In the wake of the Nat Turner uprising, which the Governor of Virginia blamed in part on incitement by abolitionist newspapers, the pro-slavery forces strenuously attempted to eradicate the offending publications.[43] Virginia and Tennessee enacted laws banning material "calculated to incite" rebellion among the slaves; the maximum punishment for a black offender under the Virginia statute was death.[44] Most southern states already had broader, if less draconian, statutes prohibiting abolitionist literature.[45]

Despite these statutes, abolitionists in the North continued to flood the South with newspapers and pampblets. The legislatures of South Carolina, North Carolina, Virginia, Georgia, Mississippi, Alabama, and

43. See W. Sherman Savage, The Controversy over the Distribution of Abolition Literature 1830-1860, at 3 (1938). Useful studies of the debate over abolition papers are provided by Professor Savage's monograph and by Russel B. Nye, Fettered Freedom: Civil Liberties and the Slavery Controversy, 1830-1860, at 32-69, 94-196 (1949). An 1859 brouhaha centered on censorship of an anti-slavery book is reported in James M. McPherson, Battle Cry of Freedom: The Civil War Era 200 (1988).

44. 1832 Va. Acts 20; accord 1836 Tenn. Pub. Acts 145. The Virginia prohibition was later broadened to include all material advocating abolition. See 1836 Va. Acts 44.

45. See, e.g., 1802 N.C. Sess. Laws 200; 1820 S.C. Acts 22; 1804 Ga. Laws 5.

Kentucky called on their northern counterparts to enact censorship statutes.[46] When these appeals failed, the Southerners sought to have the U.S. Postal Service cease delivery of abolitionist publications. After a mob in Charleston looted the local post office, the Postmaster General asked President Jackson for relief.[47] In his December 1835 message to Congress, Jackson proposed a bill to prohibit from the mails all discussion of slavery.[48]

Considering the intensity of southern support for a ban, Jackson's proposal ought to have had an easy time in Congress. In 1835, most northern Senators were as antagonistic to abolitionists as they were to slavery; they sought accommodation with the South rather than conflict. Jackson's bill seemed assured of passage when John C. Calhoun, the leading champion of the southern cause, took charge of it in the Senate. Rather than sending the bill on its normal route through the Post Office Committee, Calhoun arranged to have it referred to an *ad hoc* Committee on Incendiary Papers chaired by himself and composed but for one member of Southerners.[49]

Jackson's proposal put the southern Senators, Calhoun in particular, in a difficult position. The proposal's injection of the federal government into the arena of slavery and speech directly contravened the South's commitment to principles of states' rights. Calhoun personified this commitment, not only as a politician—most notably in the 1832 nullification crisis in which he contended that individual states possessed the authority to nullify federal laws they deemed unconstitutional—but as a constitutional theorist as well. His *A Disquisition on Government* and *A Discourse on the Constitution and Government of the United States* remain the most sophisticated version of the states' rights view of the Constitution ever offered.[50] Jackson's proposal, by permitting federal government censorship, would have rescinded one of the crucial constitutional protections of state independence, the First Amendment. After a considerable delay, the *ad hoc* Committee issued a lengthy re-

46. See Nye, supra note 43, at 109–15; Savage, supra note 43, at 43–49.

47. See Savage, supra note 43, at 15–24 (describing Charleston uprising); Nye, supra note 43, at 56–57 (same); see also 5 Correspondence of Andrew Jackson 360–61 (John Spencer Bassett ed., 1931) (Jackson's reply to the Postmaster General).

48. See 12 Register of Debates in Congress, Comprising the Leading Debates and Incidents of the First Session of the Twenty-Fourth Congress: Together With an Appendix, Containing Important State Papers and Public Documents, and the Laws, of a Public Nature, Enacted During the Session: With a Copious Index to the Whole pt. 4, app. 11 (Joseph Gales & William W. Seaton eds., 1836) [hereinafter Register of Debates]. Jackson's message was reprinted in Seventh Annual Message, 3 A Compilation of the Messages and Papers of the Presidents 1394–95 (James D. Richardson ed., 1897).

49. See Cong. Globe, 24th Cong., 1st Sess. 36–37 (1835).

50. See John C. Calhoun, A Disquisition on Government and A Discourse on the Constitution and Government of the United States, *in* 1 The Works of John C. Calhoun 1, 168–81 (Richard K. Crallé ed., 1851) (Calhoun's theory that Constitution requires assent of "concurrent majorities"—i.e., majority of national population and majority of intra-state populations—to governmental initiatives).

port, authored primarily by Calhoun himself, rejecting Jackson's bill and suggesting an alternative.[51]

The report began by affirming the southern states' right to maintain slavery, and by condemning the abolitionists' "evil and highly dangerous" efforts to interfere with that right.[52] But, Calhoun asserted, dealing with the abolitionists is a job for the states, not the federal government. Calhoun recounted the history of ratification and the subsequent controversy over the Alien and Sedition Acts, concluding that the principles underlying the First Amendment were too important to be dispensed with. Jackson's proposal, he argued, was "a violation of one of the most sacred provisions of the constitution, and subversive of reserved powers essential to the preservation of the domestic institutions of the slave-holding States, and, with them, their peace and security."[53] To Calhoun, even the worthy goal of shutting down the abolitionist press could not justify an abrogation of federalist guarantees:

> It would indeed have been but a poor triumph for the cause of liberty, in the great contest of 1799, had the sedition law been put down on principles that would have left Congress free to suppress the circulation, through the mail, of the very publications which that odious act was intended to prohibit. The authors of that memorable achievement would have had but slender claims on the gratitude of posterity, if their victory over the encroachment of power had been left so imperfect.[54]

Rather than abandoning the anti-abolition agenda completely, however, Calhoun sought to craft a proposal that would conform with his states' rights understanding of the Constitution. To this end, he put forth an alternative to the Jackson bill. Instead of banning abolition literature directly, Calhoun's version would have outlawed the delivery of mail that conflicted with the law of the recipient state.[55]

Calhoun's proposal met opposition from both sides. In fact, on the very day the Committee report was released, three of the Committee's six members expressed disapproval of the report on the Senate floor.[56] The Southerners' complaint was with Calhoun's conclusion that an outright ban on abolition literature was unconstitutional.[57] The more serious opposition came from Northerners, who refused to believe that Calhoun had remedied the constitutional defects of the earlier proposal. The Northerners, led by John Davis and Daniel Webster of Massachusetts, contended that any selection by Congress of what

51. See 12 Register of Debates, supra note 48, at pt. 4, app. 72–77. Senators' remarks concerning the report, although not the text of the report itself, are reprinted in Cong. Globe, 24th Cong., 1st Sess. 150–51 (1836).

52. 12 Register of Debates, supra note 48, at pt. 4, app. 72.

53. Id.

54. Id. at 73.

55. See Cong. Globe, 24th Cong., 1st Sess. 151 (1836).

56. See id. at 150–51 (statements of Sens. King, Davis, and Linn).

57. See, e.g., id. at 347 (statement of Sen. King).

could and could not be mailed violated the First Amendment. Whatever the formula for determining acceptability, they argued, Calhoun's bill made the federal government the agent of censorship.[58]

Calhoun's response was to insist that his bill vindicated the federalism principles underlying the Bill of Rights. Nothing could be more consistent with the First Amendment, he reasoned, than to leave to state law the determination of what speech to allow. If his bill called for federal government intervention, it was only in order to effectuate the individual state preferences envisioned, even mandated, by the Constitution.[59]

As the debate progressed, the Northerners' objections proved persuasive. The Senate rejected Calhoun's bill 25 to 19, ending the southern push for federal government intervention. With the Senate evenly divided between North and South, the balance of defeat was provided by the six Senators from border slave states, all of whom—including Henry Clay—voted against the bill.[60] Missouri's Thomas Benton is exemplary. Though a loyal Jacksonian, Benton's ardent states' rights convictions led him to oppose both the President's proposal and Calhoun's alternative. Benton's remarks on the Calhoun bill, reported in the *Congressional Globe*, expressed the view of the swing contingent:

> Mr. Benton was not willing that the United States should be made a pack horse for the abolitionists; but it seemed to him to be going too far to invest ten thousand postmasters (for he believed that was about the number), with the authority vested in them by this bill, and he could not vote for it.[61]

Because the debate in Congress over abolitionist literature did not result in legislation, it led to no judicial statement of First Amendment doctrine. Nonetheless, the episode demonstrates the prevailing constitutional consensus in the period between the Founding and the Civil War. Constitutional concerns may not have been the decisive factor in the minds of the Northerners who opposed Calhoun's bill, but these Senators—as well, perhaps, as some among those who supported the bill—undoubtedly saw the proposal as a violation of the First Amendment. Even Calhoun, through his rejection of Jackson's straightforward censorship proposal, showed himself to appreciate the importance of First Amendment restrictions on national power (although his alternative was a dubious improvement).

From the Founding to the Civil War, the purpose and effect of the

58. See id. at 288–89, 299 (statements of Sen. Davis); id. at app. 453 (statement of Sen. Webster).

59. See id. at 298, 302 (statements of Sen. Calhoun).

60. See id. at 539. By "border slave states," I mean Delaware, Kentucky, Maryland, and Missouri—slave states that did not secede. Because one seat in both Missouri and Delaware either was vacant or abstained, these four states produced only six votes on the bill.

61. Id. at 301 (statement of Sen. Benton).

First Amendment was to leave regulation of speech to the states. This particular concern with the power of the central government reflected the larger theory of the Founders. In the original constitutional vision, liberty was tied to the independence of the states. This theory was embedded in the constitutional structure. The separation of powers, the enumeration of powers in Article I, Section 8, and the Bill of Rights all aimed at checking the federal government, thereby ensuring that states would remain the primary loci of lawmaking authority. The First Amendment was a central component of the federal structure. It protected not only the rights of individual citizens, but also the prerogatives of the states, and, most important, the vitality of the state-based political process.

II. The Impact of the Civil War Amendments

The Civil War marked a new phase in the development of free speech jurisprudence, as it did in constitutional law generally. The key innovation of the Thirteenth, Fourteenth, and Fifteenth Amendments was to introduce constitutional limitations on state governments. The Founders' solution to the problem of tyranny had been to limit the central government. They had placed their trust in the states. This solution, of course, presented its own problems. In the period leading to the Civil War, the nation had come to see that the states, too, could imperil the most fundamental individual liberties. To counter this newly perceived threat, the Supreme Court developed for the first time constitutional limits on *state* government authority. Under the rubric of substantive due process, a set of judicially articulated norms became the primary constitutional guarantee of individual liberty.[62] These norms, however, drew heavily upon the pre-existing state-centered constitutional structure. Post-Civil War substantive due process doctrine derived almost entirely from common law precepts. While the states as institutions of popular government were no longer the repositories of constitutional trust, the state-court created common law assumed the burden of guarding against governmental tyranny.

A. *The Nadir of Free Speech*

The Court's emerging jurisprudence of liberty rights ignored First Amendment values. From the Founding to the Civil War, citizens' rights to free speech had been insecure, considering the states' unchecked authority to censor. After the Civil War, there was no right at all to free speech. Censorship trials continued to be prominent fea-

62. Cf. Eric Foner, Reconstruction 258 (1988) (in drafting the Fourteenth Amendment, "Congress placed great reliance on an activist federal judiciary for civil rights enforcement—a mechanism that appeared preferable to maintaining indefinitely a standing army in the South, or establishing a permanent national bureaucracy empowered to oversee Reconstruction").

tures of the political process. Government prosecutors were able to convict—if not to silence—some of the most prominent reform politicians. In 1891, for example, a Texas court convicted and fined William Lamb, one of the founders of the Populist Party, for libel.[63] His crime was rnnning an advertisement criticizing a local politician in the newspaper he published. In a pivotal development, censorship was no longer limited to the states. The federal government criminalized dissent with equal, perhaps greater, vigor. In 1918, Eugene Debs was sentenced by a federal judge to ten years in jail for giving a speech against American involvement in World War 1. While serving his sentence—which was upheld by the Supreme Court in *Debs v. United States*[64]—Debs received nearly one million votes as the Socialist Party candidate in the 1920 presidential election.[65]

This reign of censorship went unchallenged by the courts. Again and again, the Supreme Court rejected claimed First Amendment rights in favor of the government's power to regulate speech and punish dissenting speakers.[66] Not until the 1930s did the Court begin to recognize a constitutional prohibition on censorship.

The most well-known decisions of the post-Civil War, pre-New Deal period are *Gitlow v. New York*[67] and *Whitney v. California*.[68] These cases are remembered primarily for the minority opinions written by Justices Holmes and Brandeis, opinions which served as the foundation for the pro-speech jurisprudence that sprang up in the 1930s. The majority opinions in *Gitlow* and *Whitney*, however, upheld convictions under state criminal syndicalism statutes designed to prohibit the spread of socialist literature. And while most commentators and casebooks treat *Gitlow* and *Whitney*—the dissents, that is—as the beginning of a tradition of tolerance that continues to the present,[69] in fact the majority opinions are much more typical of the era in which the cases were decided. These opinions are part of a "tradition" of indif-

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63. See Lawrence Goodwyn, Democratic Promise 346–47 (1976).

64. 249 U.S. 211 (1919). The speech was deemed an attempt "to cause and incite insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States." Id. at 212.

65. 917,799, to be exact. Information Please Almanac 614 (41st ed. 1988). Debs was pardoned by President Harding in 1922.

66. For a thorough review of this history, see David M. Rabban, The First Amendment in Its Forgotten Years, 90 Yale L.J. 514 (1981). Rabban examines every First Amendment case before World War I, summarizing:

> The Supreme Court, with one minor exception, uniformly found against the free speech claimants . . . . The overwhelming majority of prewar decisions in all jurisdictions rejected free speech claims . . . . No court was more unsympathetic to freedom of expression than the Supreme Court, which rarely produced even a dissenting opinion in a First Amendment case.

Id. at 520, 523.

67. 268 U.S. 652 (1925).

68. 274 U.S. 357 (1927).

69. See sources cited supra note 5.

ference to speech values that was already well-established by the time they were written.

Of the many cases permitting laws that today would be considered clear First Amendment violations,[70] *Halter v. Nebraska*[71] provides a particularly striking example. Despite all the popular furor surrounding the Supreme Court's recent decisions invalidating flag desecration statutes,[72] it went virtually unnoticed that the Court had faced the issue once before—in 1907, when it *upheld* a Nebraska statute banning "the desecration of the flag of the United States."[73]

Like *Gitlow* and *Whitney*, *Halter* upheld a state statute. State authority to censor was nothing new.[74] But the post-Civil War era saw the evisceration of First Amendment limits on the federal government as

70. See Fox v. Washington, 236 U.S. 273 (1915) (affirming censorship of newspaper) (opinion of Holmes, J.); Patterson v. Colorado, 205 U.S. 454, 462 (1907) (upholding fines imposed on newspaper for its criticisms of Colorado Supreme Court) (The First Amendment does not "prevent . . . punishment of such [publications] as may be deemed contrary to the public welfare.") (opinion of Holmes, J.); Davis v. Beason, 133 U.S. 333 (1890) (upholding conviction for advocating bigamy).

71. 205 U.S. 34 (1907).

72. United States v. Eichman, 110 S. Ct. 2404 (1990); Texas v. Johnson 109 S. Ct. 2533 (1989).

73. *Halter*, 205 U.S. at 34, 34 (quoting statute). The Court's opinion, by the first Justice Harlan, makes interesting reading:

> From the earliest periods in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not then remarkable that the American people, acting through the legislative branch of the Government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the Nation. . . . For that flag every true American has not simply an appreciation but a deep affection. No American, nor any foreign born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free Government. Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.

ld. at 41. Harlan's unintendedly ironic juxtaposition of "free Government" with a barely veiled approbation of vigilante suppression of dissent shows how little speech values counted in the constitutional liberty calculus of the late 19th and early 20th centuries.

74. Indeed, it might seem tempting to ascribe the Court's neglect of the First Amendment to the fact that the Amendment was not "incorporated" into the Fourteenth Amendment (and thus not applicable to state laws) for most of the period I have described. This temptation should be avoided for three reasons. First, and most important, it begs the question of why the First Amendment wasn't incorporated until 1925 (in *Gitlow*). It is true that most challenges to speech restrictions before the 1920s were framed in terms of the Fourteenth Amendment rather than the First, but the Court could have found speech—as it found rights to property and contract—to be among the essential liberties protected by the Due Process Clause. Second, the Espionage Act upheld by Debs v. United States, 249 U.S. 211 (1919), and Schenck v. United States, 249 U.S. 47 (1919), was a federal statute—so even if state law cases can be disregarded, the Court's position remains unchanged. The third reason incorporation is a red herring is that when the First Amendment finally was incorporated, the Court proceeded to hand

well. In 1877, for example, the Court in *Ex parte Jackson*[75] approved a congressional statute prohibiting distribution through the mails of a variety of objectionable materials, including "lewd" books and information about abortion—a law essentially indistinguishable from the anti-abolition statute opposed by Calhoun forty years earlier. The Court's opinion in *Jackson*, written by Justice Field, refers to the abolition literature controversy: "In 1836, the question as to the power of Congress to exclude publications from the mail was discussed in the Senate; and the prevailing opinion of its members, as expressed in debate, was against the existence of the power."[76] Justice Field reports that "[g]reat reliance is placed by the petitioner upon these views,"[77] but proceeds to reject the First Amendment claims. As Justice Field's opinion demonstrates, the constitutional consensus that in 1836 had limited federal regulation of speech, had by 1877 ceased to operate.

The logical extension of *Ex parte Jackson* was federal authority to engage in the same sort of political censorship that the states had always perpetrated. The crescendo of suppression by the federal government was reached four decades later with the infamous Espionage Act[78] and the World War I seditious libel cases—*Debs* and *Schenck v. United States*[79]—decided under its authority.

B. *Fanfare for the Common Law*

The *Schenck-Debs-Gitlow* line of cases has baffled First Amendment scholars. Virtually all commentators agree that the cases were wrongly decided—Robert Bork being the salient exception.[80] Still, the problem remains explaining just how the Court managed so completely to ignore the seemingly clear constitutional prohibition against censorship. The implicit assumption in contemporary free speech scholarship is that the Court simply, and unaccountably, forgot about the First Amendment.

In fact, *Schenck*, *Debs*, and *Gitlow* were the result of a complex re-

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down its two most heinous (because they were decided in peacetime) anti-speech decisions, *Gitlow* and *Whitney*.

75. 96 U.S. 727 (1877).

76. Id. at 733.

77. Id. at 735.

78. Espionage Act of 1917, ch. 30, § 3, 40 Stat. 217.

79. 249 U.S. 47 (1919). *Schenck*, like *Debs*, upheld the conviction of a radical preaching against the war. Note that Justice Holmes—hero of the *Gitlow* dissent and *Whitney* concurrence, and architect of the clear and present danger standard—also authored the opinions in both *Debs* and *Schenck*, as well as in Frohwerk v. United States, 249 U.S. 204 (1919), another case affirming an Espionage Act conviction. Holmes' change of heart came in Abrams v. United States, 250 U.S. 616 (1919), when he dissented from yet another Espionage Act affirmance. See David M. Rabban, The Emergence of Modern First Amendment Doctrine, 50 U. Chi. L. Rev. 1205, 1311–17 (1983) (analyzing Holmes's conversion).

80. See Bork, supra note 10, at 23–35. For the mainstream view, see, e.g., Emerson, supra note 5, at 63–65, 102–05; Kalven, supra note 5, at 125–66.

thinking, occasioned by the Civil War Amendments, of the constitutional vision of liberty. These Amendments shattered the Federalist understanding, which had relied solely on limiting the federal government's power to displace state law. The Civil War presented the Supreme Court with a wholly new task: developing a set of constitutional rights enforceable against all levels of government. The Court responded to this challenge by locating these new rights in the common law. From the Civil War to the New Deal, the Court effected the constitutional guarantee of individual liberty by ensuring that neither the federal government nor the states could interfere with citizens' common law rights to property and contract.

1. *The Structural Basis for a Constitutionalized Common Law.* — The *Schenck* regime is certainly vulnerable to normative criticism. Today, most Americans believe that the government has the authority, even the duty, to regulate economic affairs—and that it has no such authority over speech. But, putting this normative discussion to one side,[81] the Court's decision to define the constitutional right to liberty as a right to property and contract was highly successful according to the most important criterion of constitutional interpretation: It made sense of the new Amendments without doing violence to the original Constitution.

The Court's reconceptualization of the liberty ideal found ample support in the text and structure of the Founding document. The original Constitution's few constraints on the states are in Article I, Section 10. Most of these provisions are aimed at activities by states that would be incompatible with union: The states may not coin their own money, interfere with national commerce, conduct their own foreign policy, or raise their own armies.[82] The only restriction not within this category (apart from the ban on titles of nobility) is the prohibition against "any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts." The Bill of Attainder and ex post facto Law provisions limit the ability of state legislatures to revise the common law; they impose a partial separation of powers requirement on states by insisting that state legislatures may not engage in the sort of backward-looking, target-specific activity that is the exclusive province of the judiciary.[83]

The Contract Clause is a more direct protection of the common law. It alone demonstrates conclusively that the Founders intended to safeguard the common law. The Seventh Amendment provides still further evidence of the Founders' concerns. By gnaranteeing the procedures of common law adjudication against federal government modi-

81. It is retrieved infra at text accompanying notes 194–202.

82. See Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 249 (1833) ("[T]he several limitations on the powers of the states . . . will be found, generally, to restrain state legislation on subjects intrusted to the government of the Union, in which the citizens of all the states are interested. In these alone, were the whole people concerned.").

83. Cf. Ely, supra note 2, at 90 (explaining federal—i.e., Art. I, § 9—version of these clauses as separation of powers provisions).

fication, the Amendment indicates the central role of common law rights in the Founders' conception of liberty.

Most important, the constitutional structure accords a privileged position to the common law. The Founders' commitment to a limited national government implied a concomitant belief in the legitimacy of the common law. In elevating the common law's privileged position to the level of constitutional right, the post-Civil War Court acted to harmonize the recent constitutional upheaval with the Founders' plan.

The Founders had set in place a powerful array of checks aimed at the federal government: the separation of powers, the enumeration of powers in Article I, Section 8, and the Bill of Rights. To contemporary eyes, there appears to be a tension between the laissez-faire orientation of these devices and the Founders' simultaneous uncritical acceptance of state law. Part of this difference is traceable to the states' greater claims to majoritarian democracy and popular sovereignty. But in the main, the Founders saw no conflict, because they viewed state law—meaning the common law—as prepolitical or "natural." They could understand the separation of powers as an anti-government protection because, to them, state law was not really government action.

This view was more often unstated than explicit. Occasionally, however, it bubbled to the surface, notably in Justice Story's opinion for the Court in *Swift v. Tyson*.[84] The issue in *Swift* was one of pure contract law: whether the holder of a debt could recover from the debtor, when the debtor had been induced to agree to the debt by the fraudulent promises of a third party. The suit was brought in the federal Circuit Court in New York, and the relevant transactions had all taken place in New York. Decisions by New York state courts indicated that a New York court would not permit the holder to recover; the laws of most other states, however, would have allowed recovery. The Circuit Court, unsure whether it was obliged to follow New York precedents, certified the question to the Supreme Court.

Story began his analysis by noting that the Judiciary Act of 1789 required federal courts to apply "the laws of the several states" in cases such as this.[85] But, he continued:

> In the ordinary use of langnage it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws. . . . The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws.[86]

Story's distinction between legislation and judge-made law rests on the

84. 41 U.S. (16 Pet.) 1 (1842), overruled by Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

85. Id. at 18 (quoting The Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92).

86. Id. at 18.

assumption that common law is not positive law, not the command of the sovereign state, but rather an expression of natural law. When presented with common law issues, such as "questions of general commercial law," the Court's function is "to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case."[87] To Story, common law—"general" law—simply reflects natural, pre-existing truths; it is not dependent upon the political power of the government, and its legitimacy is therefore unquestionable. The original Constitution took as its starting point this view of the common law; its particular version of the philosophy of limited government assumed both that government action is inherently suspicious and that government "inaction" (including common law regulation) is presumptively legitimate.

This view not only persisted into the post-Civil War era, but became the source of the Court's retooled vision of individual liberty. In the wake of the Civil War, the Court could no longer understand the constitutional commitment to liberty simply as a set of checks on the federal government. The clear mandate of the Civil War Amendments was that henceforward states as well as the federal government would be subject to constitutional restrictions. But, the Civil War did not entirely repudiate the federal system.[88] The Fourteenth Amendment left in place the essential components of federalism: the states as primary lawmakers, and a federal government limited by separated and enumerated powers and by the Bill of Rights. This system rested on a theory of the legitimacy of the common law. The new constitutional skepticism toward state law did not extend to the common law; to the contrary, the theory underlying the Constitution continued to regard common law rights as natural. The Court was to develop a set of rights to be protected from government—including state government—action, but enforcement of traditional common law rights did not count as action.

The emerging institution of substantive due process took its shape from the contours of this hybrid understanding. The Civil War Amendments presented the Court with the task of remaking the constitutional instantiation of the liberty ideal. The Court met this challenge by declaring common law property and contract rights to be inviolable. This solution incorporated the lesson of the Civil War—that states could no longer be exempt from constitutional constraint—while still adhering to the basic federal system the Founders had established.

It is a mistake, then, to tbink that the Court simply forgot about the

87. Id. at 19.

88. As historian Eric Foner has written of the Radical Republicans responsible for enactment of the Civil War Amendments: "Yet if a degree of federal intervention in state affairs scarcely conceivable before 1860 now became possible, few Republicans wished to break completely with the principles of federalism." Foner, supra note 62, at 259.

Bill of Rights after the Civil War. Indeed, opinions from the *Schenck* era are full of rhetoric about protecting the "the right of the individual to liberty" against "the power of the state to legislate."[89] But, when the Court of that period spoke of liberty, it was concerned not with what are now thought of as civil liberties but with economic rights. The language just quoted is from *Lochner v. New York*—the quintessential economic liberty case. *Lochner* went on to define liberty as the right of an individual to own property, "to contract in relation to [one's] own labor," and "to purchase and sell labor."[90] In the Court's transformed understanding, protecting these rights against government abrogation fulfilled the commitment to liberty expressed by the Bill of Rights. One consequence of this position was the submergence of free speech. Because the common law provided no speech rights, the Court's new definition of liberty left speakers unprotected.

2. *The Development of a Constitutionalized Common Law.* — The *Lochner* era is commonly understood as a triumph of laissez-faire ideology, and not as a constitutionalization of common law rights, because the common law underpinnings of *Lochner* are not obvious on the face of the opinion itself. The constitutionalization of the common law did not spring full-blown from enactment of the Civil War Amendments. Rather, its development over time can be traced in a series of cases from the 1870s, '80s, and '90s in which the Court attempted to give meaning to the new amendments.

The Court's first brush with this problem, the *Slaughter-House Cases*,[91] decided in 1873, polarized the Court between two extremes. *Slaughter-House* involved a Louisiana statute that created a livestock-slaughtering monopoly in New Orleans. The plaintiffs in *Slaughter-House*, competing butchers, challenged this statute under all three of the Fourteenth Amendment's key substantive clauses—arguing that it deprived them of the privileges and immunities of plying their trade, that it deprived them of equal protection of the law by unequally apportioning the license to slaughter, and that it deprived them of liberty and property without due process of law.

This claim squarely asked the Court to decide just how much the Constitution had been altered by the Civil War Amendments. By a bare five-member majority, the Court adopted a narrow reading. Justice Miller's opinion for the Court acknowledged that a momentous change had occurred. Miller declared that the original Constitution and the Bill of Rights were "historical and of another age" and that "within the last eight years three other articles of amendment of vast importance have been added by the voice of the people to that now venerable instrument."[92] But, the opinion concluded that "we do not

89. Lochner v. New York, 198 U.S. 45, 57 (1905).
90. Id. at 58, 64.
91. 83 U.S. (16 Wall.) 36 (1873).
92. Id. at 67.

see in those amendments any purpose to destroy the main features of the general system."[93] Rather than conferring the broad economic rights sought by the plaintiffs, Miller's opinion limited the scope of the Fourteenth Amendment to the protection of African-Americans.[94] Once this limited purpose was discerned, Miller easily disposed of the plaintiffs' claims: the Privileges and Immunities Clause was held to protect only a few unarguably federal rights;[95] the Equal Protection Clause was deemed inapposite because race was not an issue;[96] and the statute was found not to violate the Due Process Clause because it had been duly enacted by the Louisiana legislature.[97]

Miller's parsimony was attacked as strenuously by his colleagues as it is by present-day critics. Four dissenters, led by Justice Field, argued for a construction of the Fourteenth Amendment that would protect "the natural and inalienable rights which belong to all citizens."[98] Yet, it is easy to understand what motivated the majority. The broad reading urged by the plaintiffs and the dissenters threatened to supplant the states altogether—"to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States."[99] This, the majority knew, was not the purpose of the Civil War Amendments. Miller was evidently uneasy about relying on a slippery-slope argument—he wrote: "The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument"[100]—but he relied upon one all the same:

> [W]hen, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.[101]

In the absence of a plausible limit to the dissenters' vision of newly-

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93. Id. at 82.

94. See id. at 71 ("[N]o one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race . . . .").

95. See id. at 74–80.

96. See id. at 81.

97. See id. at 80–81.

98. Id. at 96 (Field, J., dissenting).

99. Id. at 77.

100. Id. at 78.

101. Id.

federalized rights, a majority of the Court preferred Miller's narrow reading.

In fact, such a limit had already been worked out by Field in his *Slaughter-House* dissent. Field's use of natural-rights rhetoric should not obscure his dissent's solid grounding in constitutional structure. Today, Field's dissent is remembered primarily for its reliance on the Fourteenth Amendment's Privileges and Immunities Clause—the clause made defunct by Miller's majority opinion. It is a common misconception, however, that Field viewed the clause as an invitation to formulate judicially-created fundamental rights. The "privileges and immunities" he believed the clause to protect were the liberties of property and contract enjoyed under the common law. Thus, for Field the crucial fact in the case was that the Louisiana slaughterhouse statute established a monopoly, and that "monopolies in any known trade or manufacture . . . were held void at common law in the great *Case of Monopolies*."[102]

To make his case, Field compared the Fourteenth Amendment's language to the Privileges and Immunities Clause of Article IV, which forbids discrimination by a state against the citizens of other states:

> It will not be pretended that under the fourth article of the Constitution any State could create a monopoly in any known trade or manufacture in favor of her own citizens, or any portion of them, which would exclude an equal participation in the trade or manufacture monopolized by citizens of other States.[103]

The original Privileges and Immunities Clause left the states free to alter the common law, but only if they were evenhanded in their treatment of in-state and out-of-state citizens. The newer Privileges and Immunities Clause went further by taking away from the states all authority to infringe common law rights:

> Now, what the clause in question [i.e., Article IV] does for the protection of citizens of one State against the creation of monopolies in favor of citizens of other States, the fourteenth amendment does for the protection of every citizen of the United States against the creation of any monopoly whatever.[104]

Field saw the Fourteenth Amendment's use of the "privileges and immunities" phrase as important because it echoes Article IV. The nondiscrimination principle of Article IV draws its strength from the constitutional vision of the several states as belonging to a single nation. The Fourteenth Amendment clause has within it a similar notion of rights common to the citizens of the several states. These common

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102. Id. at 101–02 (Field, J., dissenting) (citing Case of Monopolies, 11 Coke's Reports 85 (K.B. 1602)).

103. Id. at 101 (Field, J., dissenting).

104. Id.

rights were defined by the "common law of England," which "is the basis of the jurisprudence of the United States."[105] It is the shared quality of common law rights which suited them so well for constitutional protection. This point is evident in Field's initial statement of the issue in *Slaughter-House*:

> The question presented is . . . whether the recent amendments to the Federal Constitution protect the citizens of the United States against the deprivation of *their common rights* by State legislation. In my judgment the fourteenth amendment does afford such protection, and was so intended by the Congress which framed and the States which adopted it [emphasis added].[106]

Common rights, common law rights, natural rights—these concepts melded together in Field's vision of a Constitution newly amended to guarantee to each American citizen his proper birthright of fundamental freedoms.[107]

In 1873, this vision was as yet too radical for a majority of the Court. But, over time, as the limits to Field's theory became apparent, and the threat of wholesale federalization receded, the narrow reading adopted in *Slaughter-House* lost its persuasiveness. A key intermediate decision is *Butchers' Union Slaughter-House and Live-Stock Landing Co. v. Crescent City Live-Stock Landing and Slaughter-House Co.*,[108] decided in 1884, eleven years after *Slaughter-House*. In an interesting twist, *Butchers' Union* continued not only the doctrinal narrative begun by *Slaughter-House* but also the historical narrative of Louisiana meat-packing politics. The statute at issue in *Slaughter-House* was enacted in 1869, and its grant of exclusivity purported to extend for 25 years. In 1879, however, Louisiana adopted a new constitution authorizing municipalities throughout the state to regulate slaughtering and declaring void "[t]he monopoly features in the charter of any corporation now existing in the State."[109] When New Orleans began to grant slaughtering licenses to other companies, the original statute's beneficiary sued to enjoin its new competitors, arguing that in granting their licenses New Orleans had impaired the obligations of the contract created by the 1869 exclusivity statute. The opinion for the Court, again written by Justice Miller, rejected this claim because the 1869 Louisiana legislature lacked authority to enter into an "irrepealable contract."[110]

105. Id. at 104 (Field, J., dissenting).

106. Id. at 89 (Field, J., dissenting). This formulation recurs later in the opinion: "The amendment was adopted . . . to place the common rights of American citizens under the protection of the National government." Id. at 93 (Field, J., dissenting).

107. See id. at 105 (Field, J., dissenting) ("That amendment [the Fourteenth] was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes.").

108. 111 U.S. 746 (1884).

109. Id. at 748 (quoting La. Const. art. 258 (1879)).

110. Id. at 749.

This holding was unexceptionable in the context of well-established Contract Clause jurisprudence. The meat of *Butchers' Union* is in Justice Field's concurring opinion. Rather than relying on the Contract Clause, Field's opinion restated his conviction that the original Louisiana statute was unconstitutional because it interfered with the common law:

> All grants of this kind are *void at common law*, because they destroy the freedom of trade, discourage labor and industry, restrain persons from getting an honest livelihood, and put it in the power of the grantees to enhance the price of commodities. They are void because they interfere with the liberty of the individual to pursue a *lawful* trade or employment [emphasis added].[111]

This formulation was finally adopted by the full Court in *Allgeyer v. Louisiana*[112] in 1897. *Allgeyer*, which struck down a Louisiana statute regulating sellers of insurance, established the right to contract as a first-order constitutional guarantee. The opinion, authored by Justice Peckham, built in its key holding on the doctrinal foundation laid by Field:

> The liberty mentioned in [the Fourteenth] [A]mendment means not only the right of the citizen to be free from the mere physical restraint of his person . . . but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelibood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[113]

The crucial qualifiers used by Peckham—"all *lawful* ways" and "any *lawful* calling"—incorporated the *Slaughter-House/Butchers' Union* premise that the common law defined the extent and nature of liberties protected by the Constitution from legislative interference. The reign of the constitutionalized common law continued through Peckham's opinion ten years later in *Lochner* and until the New Deal.

This regime, though its conception of liberty was indisputably robust, nevertheless left the First Amendment unenforced. Far from guaranteeing free expression, common law actions for libel and defa-

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111. Id. at 755–56 (Field, J., concurring). With a prophetic reference to baking, Field continued:

> The oppressive nature of the principle upon which the monopoly here was granted will more clearly appear if it be applied to other vocations than that of keeping cattle and of preparing animal food for market—to the ordinary trades and callings of life—to the making of bread, the raising of vegetables, the manufacture of shoes and hats, and other articles of daily use.

Id. at 756 (Field, J., concurring).

112. 165 U.S. 578 (1897).

113. Id. at 589.

mation gave public officials valuable tools for suppressing dissent.[114] As a result, the liberty-protecting energies of the *Lochner* regime were focussed entirely on economic rights, and not at all on speech rights.

These two themes of post-Civil War liberty jurisprudence—inviolable property rights and devalued speech rights—intersected neatly in *Davis v. Massachusetts*,[115] a decision handed down two months after *Allgeyer*. The State of Massachusetts convicted Davis for violating a Boston ordinance prohibiting any "public address" on "public grounds" "except in accordance with a permit from the mayor."[116] Davis appealed to the Supreme Court. Chief Justice White, speaking for a unanimous Court, disposed of the case in three pages: Because the Boston municipality owned the property on which Davis had spoken, it could restrict his behavior in whatever ways it wanted.[117] To the *Davis* Court, Boston's right to regulate behavior in its parks was conferred by the municipality's ownership of public property: "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."[118] Davis had no constitutionally cognizable right to speak on public land because he had "no proprietary right" in the land.[119]

III. FREE SPEECH IN THE NEW DEAL ERA

The jurisprudence typified by *Davis* persisted until the late 1930s, when the New Deal brought about a second transformation of the constitutional understanding of liberty. In a series of cases in the late 1930s and early '40s, the Supreme Court approved federal and state regulatory programs that dramatically rearranged common law market relationships.[120] This legitimation of the activist state repudiated the

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114. See supra notes 67–79 and accompanying text.

115. 167 U.S. 43 (1897).

116. *Davis*, 167 U.S. at 44 (quoting Boston, Ma., Rev. Ordinances § 66 (1893)).

117. Id. at 46–47.

118. Id. at 47 (quoting with approval Commonwealth v. Davis, 39 N.E. 113 (Mass. 1895)).

119. Id. The early flag desecration case, Halter v. Nebraska, 205 U.S. 34 (1907), similarly frames a speech claim in terms of property rights: "It is familiar law that even the privileges of citizenship and the rights inhering in personal liberty are subject, in their enjoyment, to such reasonable restraints as may be required for the general good. Nor can we hold that any one has a right of property which is violated by such an enactment as the one in question." *Hatter*, 205 U.S. at 42.

120. Compare Wickard v. Filburn, 317 U.S. 111 (1942) (upholding production quotas of Agricultural Adjustment Act of 1938), United States v. Darby, 312 U.S. 100 (1941) (upholding wage and hour requirements of Fair Labor Standards Act of 1938), Steward Machine Co. v. Davis, 301 U.S. 548 (1937) (upholding federal unemployment insurance system of Social Security Act of 1935), NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding National Labor Relations Act of 1935), and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding state minimum wage statute) with United States v. Butler, 297 U.S. 1 (1936) (invalidating acreage reduction provisions of

prior era's constitutionalization of rights to property and contract. At the same time, the New Deal presented the Court with wholly new challenges to individual liberty. Not only did the post-New Deal government possess unprecedented interventionist powers, but it consolidated these powers within relatively unaccountable administrative agencies. Faced with the task of reconstituting the Founding commitment to liberty in response to these challenges, the Court invigorated the Bill of Rights' non-economic guarantees of personal freedom—most energetically, the speech and press clauses of the First Amendment.

A. *The Rebirth of Free Speech*

The *Schenck-Gitlow-Davis* regime came to a precipitous end in the late 1930s. The clearest sign of the break is *Lovell v. Griffin*,[121] decided in 1938. The issue presented in *Lovell*—the validity of a municipal ordinance prohibiting the distribution of handbills without a permit—was virtually identical to that decided by the Court 40 years earlier in *Davis*. But without even mentioning *Davis*, the *Lovell* Court unanimously[122] invalidated the statute.

Agricultural Adjustment Act of 1933 as beyond scope of congressional power), Moorehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936) (invalidating state minimum wage statute under Due Process Clause of the Fourteenth Amendment), Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating Bituminous Coal Conservation Act as exceeding Commerce Clause power), A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating National Industrial Recovery Act on separation of powers and Commerce Clause grounds), and Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating Child Labor Act as exceeding Commerce Clause power).

Professor Ackerman has argued that the election of 1936 effected a constitutional amendment. See Bruce Ackerman, Constitutional Politics/Constitutional Law, 99 Yale L.J. 453, 510–14 [hereinafter Constitutional Politics]; Bruce Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013, 1051–57 (1984) [hereinafter Storrs]. This argument really has two parts. Ackerman's historical argument, which I accept wholeheartedly and draw upon extensively, is that the New Deal was a decisive watershed in constitutional law. The second part of the argument aims at justifying the Court's actions as legitimate. This part of Ackerman's argument rests on a series of normative premises about the nature and purposes of judicial review. I do not wish to embrace these premises unequivocally, nor need I for the present. I claim here only that the Court's free speech jurisprudence experienced a major shift in the 1930s, and that subsequent doctrinal developments reflect the Court's effort to understand the First Amendment within a broader framework of constitutional principle.

121. 303 U.S. 444 (1938); see also Dejonge v. Oregon, 299 U.S. 353 (1937) (overturning state conviction under anti-communist censorship statutes); Grosjean v. American Press Co., 297 U.S. 233 (1936) (striking down special tax on newspapers). The cases of the late 1930s were anticipated by two earlier decisions, Stromberg v. Califoruia, 283 U.S. 359 (1931) (invalidating state criminal syndicalism statute) and Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931) (invalidating state statute authorizing injunctions against defamatory newspapers).

122. Eight Justices joined the *Lovell* majority; Justice Cardozo did not participate in the decision.

A few months later, in *Hague v. CIO*,[123] the Court displayed the robust extent of its newfound emphasis on free speech. The *Hague* Court enjoined Jersey City officials from enforcing an ordinance prohibiting the distribution of printed materials in public places. Justice Roberts' plurality opinion brushed *Davis* aside:

> We have no occasion to determine whether, on the facts disclosed, the *Davis* case was rightly decided, but we cannot agree that it rules the instant case. Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.[124]

By 1938, the Court had reversed completely its direction of the previous seven decades. The jurisprudence set in place by *Lovell* and *Hague* continues to the present. Later cases, such as *New York Times Co. v. Sullivan*[125] and *Brandenburg v. Ohio*[126] are often seen as achieving the zenith of the free speech trajectory, but contemporary free speech absolutism had become firmly established within the first decade of the New Deal era. In fact, by 1946 the Supreme Court gave speech rights precedence even over private property rights. *Marsh v. Alabama*[127] involved a company town—Chickasaw, Alabama—owned by the Gulf Shipbuilding Corporation. A Jehovah's Witness had been convicted of trespass for distributing handbills on a Chickasaw street corner. The Court overturned the conviction, holding that the First Amendment forbade the use of trespass laws to interfere with free speech. The triumph of speech rights over property rights in *Marsh* demonstrates the complete reversal of values effected by the New Deal.[128]

The transition from the *Davis/Schenck* era to the *Hague/Marsh* era

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123. 307 U.S. 496 (1939).

124. Id. at 515 (plurality opinion).

125. 376 U.S. 254, 279–83 (1964) (establishing "actual malice" test for libel of public figure).

126. 395 U.S. 444, 447 (1969) (subversive advocacy is protected "except where [it] is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

127. 326 U.S. 501 (1946).

128.
> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . . Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.

Id. at 506–07. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), which held that mandatory pledges of allegiance in schools violated the First Amendment, contains similarly robust language: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." Id. at 642 (plurality opinion of Jackson, J.).

was as abrupt as the contrast between them is striking. *Hague* and *Marsh* were not the result of incremental advances in a "tradition" of ever-growing judicial sensitivity to speech claims. First Amendment jurisprudence experienced a fundamental disjunction in the 1930s. The Court's entire approach to individual liberty changed, down to the basic aims animating its decisions. Common law rights to property lost their constitutional protection. Speech rights, previously unrecognized, became dominant.

These two developments were related. The primary constitutional achievement of the New Deal period was the repudiation of *Lochner*'s enshrinement of property and contract rights. The breakthrough decision was *West Coast Hotel v. Parrish*,[129] which upheld a state law setting minimum wages. After *West Coast Hotel*—the "switch in time"—the Court went on to ratify the entire New Deal agenda.[130] The cases approving New Deal initiatives have rightly been seen as the most important of the period, and the law they made—that government regulation of the economy is constitutionally legitimate—is rightly seen as the key jurisprudential product of the New Deal.

The New Deal's legitimation of government activism had ramifications beyond the sphere of economic rights. It remade the entire constitutional landscape, forcing a thorough reworking of the Court's conception of liberty. While constitutionalized common law rights were inconsistent with the interventionist state, the Justices had no intention of abandoning the Bill of Rights, or the liberty imperative which animates it. Rather than seeing the New Deal as having discredited libertarianism altogether, the Court understood that the activist state posed new and different threats to individual liberty, and that it required the development of a correspondingly reformulated theory of constitutional liberty. It was in response to this challenge that the Court articulated the absolutist First Amendment theory that dominates contemporary jurisprudence.

The connection between the demise of *Lochner* and the rise of free speech is evident in two historical markers. The first is the debate in the Senate Judiciary Committee on Roosevelt's Court-packing proposal.[131] In these remarkable hearings—truly the crucible in which the modern Court was forged—the passing of one jurisprudential era and the birth of another is palpable. The critical fact to remember about the defeat of Court-packing is that the Senate Committee that rejected the bill was dominated by New Deal Democrats. Witness after witness and Senator after Senator stated that they supported Roosevelt, that

129. 300 U.S. 379 (1937).

130. See, e.g., Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

131. See Reorganization of the Federal Judiciary: Hearings on S. 1392 Before the Senate Comm. on the Judiciary, 75th Cong., 1st Sess. (1937) [hereinafter, Hearings]; S. Rep. No. 711, 75th Cong., 1st Sess. (1937).

they favored the New Deal program, that they believed the Court was wrong to strike it down, but that they opposed Court-packing.[132] The function of the Supreme Court in protecting individual liberty was simply too important.

Roosevelt's concentration of authority frightened even many supporters of the President's initiatives. Liberals and moderates, as well as conservatives, saw in some aspects of the New Deal agenda the potential for excess. In 1937, this potential seemed far from abstract. The rise of fascism in Europe inspired a deeply sober caution in advocates of State interventionism. At the hearings, witnesses and Senators repeatedly suggested that without the Court, the United States might fall prey to the sort of dictatorship that had taken over Germany and Italy.[133] These fears helped to prevent a complete victory by Roosevelt. Just as the Anti-Federalists had succeeded in forcing a Bill of Rights into the Federalist Constitution, those who in the 1930s feared the overweening power of the activist state were able to insist that the post-New Deal constitutional order retain an independent judiciary capable of restraining the popular branches.

When it came to specifying the Court's proper role, the witnesses and Senators regularly pointed to the First Amendment guaranties of freedom of speech and conscience. *Pierce v. Society of Sisters*[134] and *Meyer v. Nebraska*,[135] two of the handful of pre-New Deal cases to uphold litigants' First Amendment claims, came to signify the good work that the Court does, work that the Senators felt strongly it must be permitted to continue to do. The Committee report on the bill, after citing *Society of Sisters*, concludes with a matchless repudiation: "It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."[136]

The second marker of the new era, representing the Supreme Court's full absorption of the lessons of the Court-packing hearings, was *United States v. Carolene Products Co.*[137] That decision, issued be-

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132. See Hearings, supra note 131. Among the prominent New Dealers who opposed Roosevelt's bill were Senator Burton K. Wheeler, see id. at 485–519, and kitchen-cabinet member Raymond Moley, see id. at 539–90.

133. See, e.g., id. at 674–76 (statement of Sen. Connally); id. at 700 (statement of Fred Brenckman); id. at 767 (statement of Erwin N. Griswold); id. at 864–65 (statement of Dorothy Thompson); id. at 1029 (statement of Oswald Garrison Villard).

134. 268 U.S. 510 (1925) (invalidating state statute requiring enrollment in public schools).

135. 262 U.S. 390 (1923) (invalidating state law prohibiting teaching of language other than English in elementary school). In light of Professor Ackerman's explanation of Griswold v. Connecticut, 381 U.S. 479 (1965), as a product of the New Deal transformation, see Ackerman, Constitutional Politics, supra note 120, at 541 & n.184, it is interesting that both *Society of Sisters* and *Meyer*, which figured so prominently in the Court-packing hearings, were relied upon by Justice Douglas in formulating the penumbral right to privacy. See *Griswold*, 381 U.S. at 481–83.

136. S. Rep. No. 711, supra note 131, at 23.

137. 304 U.S. 144 (1938).

tween *Lovell* and *Hague*, contains the Court's most significant announcement of the rebirth of the Bill of Rights. Justice Stone's famous footnote four cited *Lovell* to illustrate the questionable constitutionality of legislation "within a specific prohibition of the Constitution, such as those of the first ten amendments."[138] It is no accident that this tip-of-the-hat to speech rights occurred in one of the landmark abandonments of *Lochner* doctrine. Stone's remark is more than simply an allusion to the Court's new sympathy for First Amendment plaintiffs. It signals that the Court's focus on free speech is a direct consequence of the New Deal repudiation of property rights as an avenue for fulfilling constitutional commitments to individual liberty.

B. *The Structural Basis for a Robust First Amendment*

The connection between the emergence of the activist state and the Court's turn to the First Amendment is much deeper than merely that *Marsh* filled the void left by the repudiation of *Lochner*. Speech, along with the other non-economic aspects of the Bill of Rights, was more than simply a convenient context for the Court's refocussed efforts to protect a sphere of individual freedom. The Justices' choice to elaborate a powerful and comprehensive set of civil liberties fit brilliantly with their contemporaneous reconception of the government's regulatory role. The Court's rediscovery of the First Amendment followed directly from the transformation of government structure wrought by the New Deal.

1. *The Need for Majoritarian Control.* — The New Deal completed the nationalization of government begun by the Civil War. The Civil War Amendments began the move from a state-centered to a nation-centered system, and the New Deal placed constitutional authority squarely in the federal government. But, the structural consequences of the two reform episodes were quite different. The primary institutional beneficiary of the Civil War Amendments was the federal judiciary. The Amendments' nationalization was effected through new constitutional limits on the states, limits that were enforced by the federal courts.[139] In contrast, the New Deal implemented its nationalization by expanding the powers of Congress and the President. The resulting jurisprudence of liberty was sharply different from the Civil War era's constitutionalization of common law rights.

The New Deal reforms caused two basic changes in constitutional doctrine. First, they expanded the Commerce Clause power to reach even the most intra-state activities.[140] This eviscerated the constitu-

138. Id. at 152 n.4.

139. That is a simplification. The Civil War Amendments certainly expanded the power of Congress as well, most obviously in § 5 of the Fourteenth Amendment. Nevertheless, the separation of powers and the (expanded list of) enumerated powers continued to limit federal lawmaking capability.

140. See, e.g., Wickard v. Filburn, 317 U.S. 111 (1942) (validating quotas on wheat

tional check of enumerated powers in Article I, Section 8. Second, the New Deal ahandoned the constraint of separated powers by endowing administrative agencies with sufficient power to regulate autonomously.[141] This consolidation of power combined with the expansion of the Commerce Clause to produce wholesale nationalization. Freed from the necessity of obtaining the consent of multiple branches to governmental action, the agencies rapidly accelerated the substitution of federal regulation for state law.

Underlying hoth of these structural transformations, and the nationalization impulse generally, was a new constitutional understanding of the common law. The New Dealers repudiated the central tenet of the Founding framework: that government which governs best, governs least. They denied the Federalist assumption that market distributions were somehow natural or prepolitical. With this appreciation of public responsibility for inequality came a recognition that government inaction is not inherently more legitimate than government action. As the myth of the prepolitical common law dissipated, the case for restraints on the federal government weakened. Federal initiatives came to seem less like new law and more like better law.[142]

Fueled by these insights, the New Deal's twin repudiations of constitutional tradition, its nationalization and centralization of power, replaced the Founders' system of federalism with an administrative state. Under the Federalist system, states were the primary lawmakers, overseen by a federal government with authority to displace state law when required by the collective national interest. After the New Deal, administrative agencies replaced the states as the default lawmakers.

These changes undermined the rationale for constitutional protection of common law rights. But, as the Court-packing hearings demonstrated, the legitimation of economic interventionism did not obviate

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not intended for commerce); United States v. Darby, 312 U.S. 100 (1941) (upholding federal government power to set minimum wages for goods expected to move interstate); see also Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (lack of adequate accommodations for blacks inhibits interstate commerce).

141. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Whether the agencies are considered to be part of the executive or a new "fourth branch," the point is the same: Their ability to promulgate rules, implement policies, and make case by case determinations, all under the same roof, effectively destroyed the separation of powers. I have detailed the New Deal's repudiation of the separation of powers, and outlined the jurisprudence of agency control that took its place, in David Yassky, Note, A Two-Tiered Theory of Consolidation and Separation of Powers, 99 Yale L.J. 431 (1989).

142. This new understanding of the common law is evidenced by the Supreme Court's decision in Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) ("whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern").

After reading this Article in draft, Tom Hentoff pointed out that dispelling the myth of the prepolitical common law gave impetus not only to nationalizing forces, but also to proponents of states' rights. Once the mask of common law neutrality was lifted, laying bare the conflict between nation and state, partisans on both sides emerged.

judicial articulation of the constitutional commitment to liberty. The New Deal had eliminated two of the three constitutional constraints on government action, the enumeration and separation of powers, but the third prong, the Bill of Rights, remained intact. Indeed, the unabashed activism of the post-New Deal federal government made a sphere of individual liberty all the more important.

Instead of abandoning the liberty principle of the Bill of Rights, the post-New Deal Court took up the challenge of countering the danger to liberty posed by the administrative state. This danger was neither—as in the Federalist era—that the central government would quash institutions of local attachment, nor—as in the Civil War era—that traditional common law entitlements would be wiped away, but rather that the modern administrative state is powerfully anti-democratic.

At the same time its reach was extended, the government threatened to escape the grasp of majoritarian democracy. The Founders' commitment to popular government was eclipsed by the New Dealers' commitment to administrative expertise. Agency experts are not democratically accountable; government is less popular than it was before the New Deal. While elected officials used to be directly involved in lawmaking, now they are primarily overseers, acting to set the direction of agency policymaking and to correct agency excesses.[143]

Faced with these challenges, the Court turned its attention to the processes of control over the government: politics and elections. Enhanced judicial attention to the political process became necessary to counter the threat of administrative tyranny. Because government as a whole is less democratic, ensuring the integrity of electoral mechanisms became crucial. As Roosevelt himself observed: "[W]e have built up new instruments of public power. In the hands of a people's Government this power is wholesome and proper. But in the hands of political puppets of an economic autocracy such power would provide shackles for the liberties of the people."[144] Free speech absolutism aims to forestall such shackles by protecting the distribution of political resources against government manipulation. In the Court's post-New Deal formulation, the First Amendment prohibits government from interfering

143. See Yassky, supra note 141, at 437–38 (describing post-New Deal separation of powers doctrine, under which regulatory power is consolidated in administrative agencies and supervisory authority is divided among original branches); cf. Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 578 (1984) (administrative agencies constitute "fourth branch" overseen jointly by original branches).

144. 5 Public Papers and Addresses of Franklin D. Roosevelt 16 (1941). I speculate that concerns like this may have directly influenced some of the early decisions in the First Amendment renaissance. For example, Hague v. CIO, 307 U.S. 496 (1939) (discussed supra at text accompanying note 124), was a notoriously authoritarian machine boss. See William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal 275–76 (1963) (characterizing Hague as "local tyrant").

with citizens' political activities—just as *Lochner* prohibited government from interfering with their economic activities.

With social orderings so highly politicized, the Court perceived that libertarianism in the post-New Deal regime required a limit not to governmental reach but to governmental autonomy. Formerly, the state had been prohibited from disturbing market allocations of wealth; after the New Deal, the state was forbidden to counter citizens' attempts to enforce government accountability. The Court shifted its application of the principle of liberty from the context of political outcomes to the context of political participation, defined as the process by which citizens exercise control over the state. Consider again *Carolene Products*: Justice Stone cited nine then-recently decided First Amendment cases for the proposition that "legislation which restricts ... political processes ... [perhaps should be] subjected to more exacting judicial scrutiny."[145]

2. *The Unleashed Judiciary.* — The demise of federalism and of separation of powers had one further impact on the development of the Supreme Court's liberty jurisprudence. The Court has been much more inventive—some would say fanciful—in developing free speech doctrine than it was in articulating *Lochner*-era economic rights. This so-called judicial activism has been much rebuked. But, in fact, the changed character of judicial review is directly traceable to the distinctive role of the judiciary in the post-New Deal system. For the modern Court, the process of assessing litigants' claims necessarily involves a level of judicial creativity far higher than that required of earlier Courts.

In the Federalist period, the Court could ascertain a citizen's rights by looking to state law, as modified by applicable federal statutes. Judicial review was limited to ensuring that federal statutes were enacted in compliance with Article I, Section 8, the Bill of Rights, and the separation of powers. The Civil War Amendments added a step. If a litigant's claim depended on a state or federal statute, the Court was required to measure that statute against common law rights to property and con-

145. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Shades of Professor Ely's representation-reinforcement theory are evident in the argument here. For a fuller discussion of Ely's theory, see infra text accompanying notes 176–178.

Carolene Products marks the rebirth not only of the First Amendment but of the entire Bill of Rights. The enormous body of constitutional criminal procedure doctrine is almost entirely a creation of the post-New Deal era. Like free speech law, much of this doctrine can be understood as a response to the Court's concerns about the anti-democratic tendencies of the administrative state. For example, the primary purpose of the Fifth and Sixth Amendment rights guaranteed by Miranda v. Arizona, 384 U.S. 436 (1966), and its progeny, is to safeguard the role of the jury as a key institution of democratic participation. Juries are second only to elections as fora in which citizens scrutinize, and even occasionally nullify, official action. Cf. Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1182–99 (jury is central mechanism of democratic accountability protected by Bill of Rights).

tract. Although this development gave the Court access to new sources for its decisions—with the result that many more laws were declared unconstitutional—the Court continued to rely on an existing body of doctrine.

The task of the post-New Deal judiciary is qualitatively different. For the first time, the constitutional liberty guarantee depends not on a ready-made body of doctrine—the common law—but on rights developed and articulated by the federal courts themselves. The courts have had to fill in, more or less from scratch, the blanks in the general constitutional command to protect political liberties. There is no common law definition of speech, as there is of property or contract. To determine the constitutionality of a statute, it is no longer sufficient simply to decide whether the state or the federal government is the appropriate decision-maker in a particular policy area (the Federalist-era calculus), nor to compare the statute with long-established common law rights (the post-Civil War calculus). Instead, to vindicate the Constitution's commitment to individual liberty, the courts have been required actively to elaborate a comprehensive set of judicially-enforced guarantees.[146]

This process is often perceived as illegitimate "judicial activism." It is not my intention in this Article to address such criticisms, but two points are worth making here. First, critics of "activism" are correct in noting that much of what the modern Court does can properly be called lawmaking. The rules of law governing what is and is not "speech," and what speech is protected, have been generated by the Court itself. The second point is that regardless of whether one thinks such rule-making is an appropriate judicial function, it is indisputably embedded in the governmental structure left in place by tbe New Deal. In this sense, at least, the Court's "activism" is legitimate: It derives from the Constitution's concurrent commitments to interventionism and majoritarianism, as embodied in the concrete institutions of administrative agencies and a judiciary willing and able to enforce political rights.

C. *Libertarianism in an Activist State*

Despite the magnitude of the New Deal changes, there remain significant jurisprudential continuities with the pre-New Deal era. In shifting from economic liberty rights to political liberty rights, the Court retained the essential structure of the constitutional liberty formula: protecting private resources against government redistribution. The

146. This is the "counter-majoritarian" tendency that Alexander Bickel identified in the contemporary Court. See Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–23 (1962). Although Bickel provided the definitive analysis of this trend, he failed to appreciate that the "difficulty" became severe only after the New Deal and that the trend is related to transformations in the structure of the federal government.

difference is that in the post-New Deal era it is political-participation resources not wealth resources that are protected against government redistribution. What the Court has done with First Amendment doctrine is to create a libertarian sphere modeled on its earlier instantiation of constitutional liberty principles.

Two cases decided in the 1980s reflect the Court's recognition of speech as a constitutionally protected individual liberty: *Pacific Gas & Electric Co. v. Public Utilities Commission of California*[147] and *PruneYard Shopping Center v. Robins*.[148] *Pacific Gas* involved a newsletter distributed by PG&E, a privately owned utility, in its monthly billing envelopes. Toward Utility Rate Normalization ("TURN"), a consumer activist organization that regularly opposed PG&E in ratemaking proceedings, petitioned the California PUC to either forbid PG&E to distribute the newsletter or require the utility also to distribute a response authored by TURN. The PUC agreed with TURN's arguments, ordering that the "space remaining in the [PG&E] billing envelope, after inclusion of the monthly bill"[149] had to be divided between PG&E and TURN.

The Court overturned this order, holding that "compelling a private corporation to provide a forum for views other than its own . . . infringe[s] the corporation's freedom of speech."[150] The violation has three facets: PG&E is forced to respond to TURN's speech;[151] a chilling effect will deter PG&E from addressing controversial issues, so as to avoid provoking TURN;[152] and readers may mistakenly attribute TURN's views to PG&E.[153]

The PG&E interest vindicated by the *Pacific Gas* Court seems remarkably similar to a property right: It prohibits state appropriation of property for the use of promoting speech. Indeed, Professors Fiss and Michelman have both interpreted *Pacific Gas* and other recent cases[154] as a return by the Court to the *Lochner* regime of protecting wealth from political invasion.[155]

This argnment is on to something important, but it is not quite right. Compare *Pacific Gas* with *PruneYard*, decided six years earlier.

147. 475 U.S. 1 (1986) (plurality opinion of Powell, J.).

148. 447 U.S. 74 (1980).

149. *Pacific Gas*, 475 U.S. at 6 (plurality opinion) (quoting material that the parties submitted to the Court).

150. Id. at 9 (plurality opinion).

151. See id. at 10, 15 (plurality opinion).

152. See id. at 10 (plurality opinion).

153. See id. at 15 (plurality opinion).

154. E.g., First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (overturning restrictions on political advertising by corporations); Buckley v. Valeo 424 U.S. 1 (1976) (overturning restrictions on campaign spending and contributions).

155. See Owen M. Fiss, Free Speech and Social Structure, 71 Iowa L. Rev. 1405, 1406-07 (1986); Frank I. Michelman, Possession vs. Distribution in the Constitutional Idea of Property, 72 Iowa L. Rev. 1319, 1320 & n.7 (1987) (*Pacific Gas* exemplifies judicial hostility to the "distributive" conception of constitutional property rights).

PruneYard is the last in a long and highly controversial line of cases dealing with speech in shopping centers. In cases prior to *PruneYard*, the Court had established that the First Amendment does not confer a right to use privately owned shopping centers for political speech;[156] this doctrine is consistent with the Fiss/Michelman reading of *Pacific Gas*.

PruneYard added a twist. The case involved a group of high-school students seeking to distribute pamphlets in a privately owned shopping center in California. The California Supreme Court granted the students a right to use the shopping center for protest activities under the free speech provision of the California Constitution. The U.S. Supreme Court affirmed, holding that property owners have no constitutional right to exclude speakers. While the First Amendment does not compel a shopping center to open its doors to speakers, neither under *PruneYard* does it prohibit a state from imposing such compulsion.

This holding is in tension with *Pacific Gas*. Just as the PUC tried to force PG&E to share its resources with other speakers, so the California Constitution forced PruneYard Shopping Center to enable competing speech. But, the *Pacific Gas* rationales of forced response, chilling effect, and false attribution apply equally to shopping centers. In fact, the dissent in *Pacific Gas* claimed that "the right of access [denied] here is constitutionally indistinguishable from the right of access approved in *PruneYard*."[157]

Nonetheless, the cases can be distinguished. Justice Marshall noted the critical factor in his *Pacific Gas* concurrence:

> The . . . difference between this case and *PruneYard* is that the State has chosen to give TURN a right to speak at the expense of [PG&E's] ability to use the property in question as a forum for the exercise of its own First Amendment rights. While the shopping center owner in *PruneYard* wished to be free of unwanted expression, he nowhere alleged that his own expression was hindered in the slightest. In contrast, the present case involves a forum of inherently limited scope.[158]

Not all property rights, then, can be related to the First Amendment.

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156. The Court's first brush with this issue, Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 309 (1968), upheld a union's First Amendment right to picket a non-union store in a privately owned shopping center. *Logan Valley*, however, was narrowed by Lloyd Corp. v. Tanner, 407 U.S. 551, 564 (1972) (First Amendment does not protect speech that has "no relation to any purpose for which the [shopping] center was built and being used"), and was overruled by Hudgens v. NLRB, 424 U.S. 507, 518 (1976) (First Amendment does not protect speech on privately owned property). The open question decided by *PruneYard*, then, was whether a state can grant more expansive speech rights than those contained in the federal Constitution.

157. *Pacific Gas*, 475 U.S. at 26 (Rehnquist, J., dissenting).

158. Id. at 23–24 (Marshall, J., concurring in judgment).

The issue for the Court is not whether property rights are infringed but whether the infringement reduces the owner's ability to speak. Simply owning property does not give rise to a First Amendment right to deny its use to others, even when the use is for others' speech. For a First Amendment right to obtain, the property must be characterized as a speech resource. The envelope space in *Pacific Gas* can be so characterized, but the shopping center in *PruneYard* cannot.

While not a right to property, though, the *Pacific Gas/PruneYard* right is a property-like right reminiscent of *Lochner*. The key similarity is that both are founded on a distinction between market distributions and political distributions; in both cases, market distributions are treated as "natural" or prepolitical. Just as *Lochner* did for property, *Pacific Gas* and *PruneYard* enshrine private orderings of speech resources. These private orderings are assumed to be legitimate and beyond the reach of state intervention.[159]

This assumption underlies a wide range of contemporary First Amendment doctrine. A particularly important example is the line of cases initiated by *Buckley v. Valeo*,[160] the landmark case striking down a congressional statute limiting political campaign expenditures. At the heart of the *Buckley* holding is a refusal to rearrange presumptively legitimate distributions of speech resources: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."[161] The premise underlying this position is that there is a "natural" political process which, if left untouched, cannot be deficient. Restrictions on campaign expenditures are impermissible because they disturb this process. This view is precisely analogous to *Lochner*'s faith in market relationships and condemnation of government interference.

The most recent contribution to the *Buckley* case law, *Austin v. Michigan Chamber of Commerce*,[162] deviates from earlier precedents by upholding a state regnlation prohibiting certain corporate political expenditures. But, the Court justifies its deviation not by repudiating the *Pacific Gas/PruneYard* assumptions, but by explaining that they do not apply in this particular case. The statute upheld in *Austin* regnlated only corporate entities. The Court's opinion, written by Justice Mar-

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159. Cf. Cass R. Sunstein, Lochner's Legacy, 87 Colum. L. Rev. 873, 883–84 (1987) (First Amendment jurisprudence takes existing distributions as natural and protected).

160. 424 U.S. 1 (1976) (per curiam); see also Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) (invalidating application of Federal Election Campaign Act restrictions to certain expressly political nonprofit organizations); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (invalidating a Massachusetts criminal statute that forbade certain expenditures influencing referendum proposals as violative of speech rights).

161. *Buckley*, 424 U.S. at 48–49.

162. 110 S. Ct. 1391 (1990).

shall, seizes on the fact that corporations enjoy "unique legal and economic characteristics" to establish that the regulation at issue is an exception to the normal *Buckley* rule: "State law grants corporations special advantages . . . that enhance their ability to attract capital and to deploy their resources . . . ."[163] The government, in other words, has already intervened in the speech arena by granting "special advantages" to corporations. Because the natural distribution of speech resources has thereby been disturbed, the Court reasoned, a countervailing restriction is permissible. "We emphasize that the mere fact that corporations may accumulate large amounts of wealth is not the justification for [the restriction]; rather, the unique state-conferred corporate structure that facilitates the amassing of large corporate treasuries warrants the limit on independent expenditures."[164]

The *Austin* exception makes plain the assumptions implicit in the *Buckley* rule: the political process is natural, not a product of government policy. Wealth-based disparities in political power are legitimate and constitutionally protected. Only when disparities in political power can be traced to state "intervention" is further, remedial intervention constitutional. The libertarian world view underlying *Lochner* has been transported wholesale into the First Amendment.[165]

IV. Lessons Learned: Constitutional Change and the First Amendment

I have tried in this Article to make sense of the First Amendment by using "the method of inference from the structures and relationships created by the constitution in all its parts."[166] The key insight of this "holistic"[167] method is that First Amendment doctrine is and has been formulated to achieve goals far broader than the toleration of dissent. Throughout its history, the First Amendment has been interpreted as part of a larger constitutional framework.

Using this holistic approach, I have identified three distinct eras of the First Amendment. This history belies the popular belief that contemporary free speech jurisprudence sprang full-blown from the Founders' vision. Perhaps more surprising, the three-part history is equally

163. Id. at 1397.

164. Id. at 1398.

165. The *Buckley* principle was recently applied in Rust v. Sullivan, 111 S. Ct. 1759 (1991), the abortion counseling case. *Rust* upheld a regulation prohibiting clinics receiving federal funds from counseling women about abortion. The Court's decision hinged on the premise that First Amendment constraints lapse when the government enters a field of public debate.

166. Charles Black, Structure and Relationship in Constitutional Law 7 (reprint ed. 1985).

167. Professor Ackerman has devoted much of a recent book review to a call for "holistic" interpretation. See Bruce Ackerman, Robert Bork's Grand Inquisition, 99 Yale L.J. 1419 passim (1990) (reviewing Robert H. Bork, The Tempting of America (1990)).

at odds with orthodox scholarly accounts. Since Levy, most scholars accept the premise that the Founders' conceptions of free speech were vastly different from modern notions. But, rather than seeking to understand the purpose of the First Amendment in the original constitutional scheme or in subsequent ones, scholars have simply drawn a line of upward progress connecting the early censorious cases to today's liberal decisions. This progressive vision, though comforting, does not fit the facts.

Academic blindness to the true history of the First Amendment is due in large part to weaknesses in the conventional method of constitutional scholarship. Virtually all First Amendment scholars are clause-bound rather than holistic.[168] They take as their task deciphering the constitutional prohibition against "abridging the freedom of speech, and of the press." Apart from these words of the Amendment, the sources clause-bound scholars draw on in performing their task tend to be limited to remarks in the Philadelphia Convention and the ratification debates concerning freedom of speech and press; contemporary evidence, such as libel trials, of the Founders' beliefs in this area; and Supreme Court decisions interpreting the First Amendment. Those scholars who do go beyond these materials look not to sources bearing on constitutional structure, but to philosophers of tolerance and, more recently, of semiotics.[169]

Not only does clause-bound interpretation provide an inadequate account of the First Amendment at any given point in time, it also disables the interpreter from accurately perceiving doctrinal change. The conventional model carries with it an implicit assumption of gradualism. For the clause-bound scholar, the questions posed by the First Amendment are constant over time, and the materials with which the Court attempts to answer them are also essentially invariant. Consequently, clause-bound scholars see change as coming from a steady accretion of wisdom. The much used image of a "free speech tradition,"[170] with its connotations of incremental progress and unitary focus, encapsulates the clause-bound view.

The holistic model, in contrast, sees that developments in First Amendment doctrine have been linked to structural transformations in the Constitution. This leads to a picture of change very different from the gradualist "tradition" image. Because the goal of coherence among various interrelated constitutional doctrines is paramount, change in

168. See sources cited supra note 5; see also Lee C. Bollinger, The Tolerant Society 5–6 (1986) (focusing on judicial interpretation of the text of the First Amendment because there is "precious little evidence to reveal [the Founding Fathers'] intentions"); Martin H. Redish, Freedom of Expression 4–5 (1984) (concerned with values underlying First Amendment rather than holistic understanding of Constitution).

169. See, e.g., Bollinger, supra note 168, at 204–12; Greenawalt, supra note 5, at 9–34.

170. See Kalven, supra note 5, at 3.

any particular doctrine is constrained by the overall structural vision. Most of the time, this constraint will permit little or no change, in service of maintaining an overall coherence. When one part of the Constitution *is* reconceptualized, however, change in other doctrines may be quite sudden. Rather than a tradition, then, the holistic model envisions "punctuated equilibria"[171]—long periods of relative stasis interrupted by transfigurative eruptions.

The history described in Parts I, II, and III demonstrates the weaknesses of the clause-bound approach and the superiority of the punctuated equilibria model. Change in First Amendment doctrine has been episodic and revolutionary, rather than constant and incremental. The Founders' First Amendment consensus remained stable until the Civil War, after which the federal government's capacity to regulate speech expanded greatly. The egregious censorship of the early twentieth century, a plain contravention of the Founders' ideals, ill fits the conventional picture of gradual progress. Lacking the interpretive tools to explain this period, clause-bound scholars simply ignore it. Nor does the First Amendment's rebirth in the 1930s conform to the orthodox paradigm of an ongoing and seamless tradition. The Court's turn to free speech burst out of nowhere. The tectonic forces that drove this rediscovery are invisible without an understanding of the contemporaneous emergence of a constitutionally sanctioned activist state. For a full understanding of constitutional doctrine and of doctrinal change, interpretation must be holistic.

A. *Holistic, Structural, and Historical Interpretation*

The holistic method, though little-used by contemporary constitutional scholars, is by no means new. Charles Black called for just such an approach in a 1968 lecture series, published as *Structure and Relationship in Constitutional Law*.[172] In this section, I comment briefly on three scholars who have taken up Black's clarion call: David A.J. Richards, John Hart Ely, and Bruce Ackerman.[173] These three are salient excep-

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171. I borrow the phrase "punctuated equilibria" from theorists of evolutionary biology. See Niles Eldredge & Stephen J. Gould, Punctuated Equilibria: An Alternative to Phyletic Gradualism in Models in Paleobiology 82 (Thomas J.M. Schopf ed., 1972); S.J. Gould & R.C. Lewontin, The spandrels of San Marco and the panglossian paradigm: a critique of the adaptationist programme, B205 Proc. Royal Soc'y London 581 (1979).

172. Black, supra note 166, at 3. The holistic method, of course, predates Black considerably. Black himself describes the prevalence of holism in Founding-era constitutional interpretation. Id. at 13-32.

173. Two additional efforts deserve attention. Professor Kogan has done for the law of personal jurisdiction what I have attempted to do for free speech. See Terry S. Kogan, A Neo-Federalist Tale of Personal Jurisdiction, 63 S. Cal. L. Rev. 257 (1990). Using a holistic approach, he has explained watersheds in personal jurisdiction doctrine as part of the larger constitutional transformations brought about by the Civil War and the New Deal.

Professor Amar's recent work on the Bill of Rights both presents the Bill as a coher-

tions to the reign of "clause-bound interpretation," yet their accounts are nonetheless, for one reason or another, incomplete. Contrasting their work with the explanations offered here may helpfully illuminate the features of the particular holism I am advocating.

Professor Richards, in two recent books,[174] has undertaken the same project that this Article attempts: He seeks to interpret individual constitutional clauses, including the First Amendment,[175] in the light of a general theory of the Constitution. For Richards, this unifying theory is essentially Lockean liberalism. He perceives that the various provisions of the Founders' Constitution were connected thematically by their commitment to protecting absolute rights of property and conscience and to maintaining the requisite elements of the government's political legitimacy. Richards' exegesis of the First Amendment follows directly from this thematic vision.

The problem with this account is that Richards is stuck in the Founding era. The description he provides was accurate in 1800, but today it is outmoded—not by the mere passage of time, nor by the progress of moral philosophy, but by two concrete and thoroughgoing overhauls of the constitutional structure. The Lockean commitment to limited government, and its concomitant definition of political legitimacy, have been decisively excised from the Constitution.

Professor Ely's approach to constitutional interpretation is also holistic, but his description of the coherent whole is very different from Richards'. To Ely, the central purpose of the Constitution is "representation-reinforcement"—perfecting the processes of democratic accountability. Ely justifies much of the contemporary First Amendment orthodoxy as an effort at achieving this goal.[176]

Ely is more up to date than Richards. In fact, representation-reinforcement is a fair description of the *PruneYard-Pacific Gas* principle that I believe underlies modern First Amendment jurisprudence. Yet Ely is vulnerable to the same criticism that can be levelled at Richards: ahistoricism. While Ely has captured the essence of post-New Deal liberta-

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ent whole and draws connections between the Bill and the original Constitution. See Amar, supra note 145. Some of the structural themes sketched in part I, supra, are presented more elaborately in Amar's article. See also Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205, 229-50 (1985) (holistic account of federal jurisdiction).

174. David A.J. Richards, Toleration and the Constitution (1986) [hereinafter Toleration]; David A.J. Richards, Foundations of American Constitutionalism (1989) [hereinafter Foundations].

175. See Richards, Toleration, supra note 174, at 165-230; Richards, Foundations, supra note 174, at 172-201.

176. Ely, supra note 2, at 105-16. Interestingly, in an earlier essay Professor Ely used very traditional methods of constitutional analysis to arrive at the conclusion that flag-desecration laws violate the First Amendment. See John H. Ely, Flag Desecration: A Case Study in tbe Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482 (1975).

rianism, he fails to appreciate that regime's place in a succession of constitutional frameworks. The first two eras of constitutional jurisprudence differed sharply from the modern period. In neither was the Court concerned primarily, or even significantly, with "policing the process of representation" or "facilitating the representation of minorities," to take two of Ely's chapter titles. These foci emerged only after the New Deal transformation.

Ely's neglect of history is important because it leads him to misunderstand the origins and underlying premises of the jurisprudential regime he otherwise accurately describes. He arrives at the right answer but for the wrong reasons. Ely settles on the representation-reinforcement theory because it is, he argues, the only account of judicial review consistent with the Constitution's fundamentally democratic and majoritarian premises.[177] In actuality, as we have seen, the move to representation-reinforcement resulted from the Court's rethinking of the problem of liberty posed by the modern activist state. The versions of the Constitution that held sway from the Founding to the Civil War, and from the Civil War to the New Deal, exhibited as much commitment to the democratic ideal[178] as the current version, yet they contained few if any representation-reinforcing imperatives, whether of the First Amendment variety or otherwise. The rise of these political rights guarantees was required to counterbalance the loss of democratic participation inherent in the administrative state.

Bruce Ackerman is a third follower of Black. But, unlike Richards and Ely, Ackerman's constitutional scholarship is deeply historical. In two recent articles, Ackerman has sketched a constitutional history centered on the three "constitutional moments" of the Founding, the Civil War, and the New Deal.[179] He has described the resulting Constitution of today as the Court's "synthesis" of the "higher law" made during these three episodes.

This Article has tracked Ackerman's three-part historical schema quite closely. Its effort at "synthesis," however, has taken a path different from Ackerman's. Ackerman attributes to each moment a defining principle, commitment to which was enshrined in the Constitution by the higher-lawmakers of the respective periods: Moment One stands for individual liberty, Moment Two for equality, and Moment Three for

177. As Professor Ackerman has pointed out, this explanation can be criticized on its own terms for its conflation of democracy and majoritarianism. See Ackerman, Storrs, supra note 120, at 1035–38, 1047–49.

178. In contemporaries' eyes, at least. It remains an open question whether constitutional decisions made in an era of slavery, and of exclusive male suffrage, deserve the deference of later generations.

179. See Ackerman, Constitutional Politics, supra note 120; Ackerman, Storrs, supra note 120. This sketch will be elaborated in a forthcoming book, We The People. The comments made here, while I believe they fairly treat the argument in Ackerman's published work, may not be appropriate to the fully developed argument in We The People.

activist government. Ackerman then synthesizes these principles, interpreting *Brown v. Board of Education*, for example, as embodying the Fourteenth Amendment's commitment to equality in an arena of activist government—the public scbools—brought to the constitutional forefront by the New Deal.[180]

In contrast to this principle-focused approach, I have emphasized the concrete institutions and mechanisms that were set up to implement these principles. This approach is *structural* as well as holistic. This is not to say that principles should be ignored. It would be perfectly ridiculous to talk about the Fourteenth Amendment without at some point discussing slavery. After all, constitutional structures are no more than devices for implementing principles.

For just this reason, though, focussing on structure is at least as productive as studying principle. Ultimately, principle-interpretation and strnctural-interpretation should prove equivalent—the right equals the remedy. Compare, for example, Ackerman's claim that *Lochner* was a product of the Civil War ascendance of free labor ideology[181] with this Article's claim that it was a constitutionalization of the common law. As we have seen, the architect of the *Lochner* doctrine was Justice Stephen Field. It is true that Field believed fervently in free labor. Indeed, Field was as committed a judicial reformer as any who has followed him to the bench. The disfavor in which his beliefs are now held should not obscure the warmth of the passion which animated his opinions, as when, in *Butchers' Union*, he declared that "the right to pursue . . . [t]he common business and callings of life . . . is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."[182]

It is crucial, however, that Field's ideological commitment to laissez-faire found expression through the constitutional structure of the common law. In its privileged treatment of common law, the Constitution echoed Field's own conviction that economic rights were fundamental. Field believed that the web of relationships and rights established by the common law were indispensable to, even constitutive of, civilized society—and so did those who set up the original constitutional framework, with its multiple safeguards against common-law-dis-

180. See Ackerman, Constitutional Politics, supra note 120, at 527–36.

181. See id. at 518–19; William E. Forbath, The Ambiguities of Free Labor: Labor and the Law in the Gilded Age, 1985 Wis. L. Rev. 767, 772–94 (discussing the *Slaughter-House Cases* and competing interpretations of "free labor" during the post-Civil War period); cf. William E. Nelson, The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America, 87 Harv. L. Rev. 513, 554–59 (1974) (linking jurisprudential approaches of antislavery movement and post-Civil War Supreme Court jurisprudence). See generally Foner, supra note 62 (discussing rise of free labor ideology).

182. Butchers' Union Slaughter-House and Live-Stock Landing Co. v. Crescent City Live-Stock Landing and Slaughter-House Co., 111 U.S. 746, 757 (1884) (Field, J., concurring). This passage is followed by a lengthy quotation from *The Wealth of Nations*.

placing federal action. This bias toward the common law was only strengthened by the Civil War Amendments. If the connection between free labor ideology and *Lochner* is more than coincidence, so too is the decision's reliance upon the common law for its definition of fundamental rights. Had there not been at the heart of the constitutional plan a structure that embodied laissez-faire, Field's vision could not have triumphed.

All I have shown so far is that principle and structure are two ways of talking about the same thing. I now want to highlight three advantages of the structural approach—advantages that enable a fuller account of constitutional change than principle-interpretation can offer.

First, looking at the structures of separation of powers and federalism focuses the interpretive eye. "Liberty" and "equality" are roomy concepts. Trying to specify with precision the Philadelphia delegates' conception of liberty, or the Reconstruction Congress' intention to promote equality, much less to apply these ideas to contemporary problems, presents a host of interpretive problems. The structural method, while hardly mechanical, nonetheless provides a helpful discipline.

The second advantage of structural interpretation is that the Constitution, both as written and as interpreted by courts, speaks the language of practice rather than theory. True, the Preamble consecrates the document to "secure the Blessings of Liberty," but the body of the Constitution is concerned with creating offices and institutions, detailing the way these structures relate to one another, and allocating decision-making authority among them. The essence of the document is its translation of principle into a tangible set of practices; interpretation must follow this lead.

Third, and most important, the structural method attunes the interpreter to the crucial impact of structure itself on constitutional change. When people set out to reform institutions, the existing contours of these institutions often play a decisive role in determining the direction of the change. Political reform movements are almost always channelled through existing structures of political participation, strengthening some and weakening others. Once insurgents occupy the existing institutions, their new perspective may influence their vision of desirable reform.

These forces of bureaucratic determinism, plain on a micro level to political scientists and students of organizational behavior,[183] operate

183. There is a rich literature in political science and sociology suggesting that institutional structure is a powerful determinant of governmental response to social problems. See, e.g., Peter J. Katzenstein, Introduction: Domestic and International Forces and Strategies of Foreign Economic Policy, *in* Between Power and Plenty: Foreign Economic Policies of Advanced Industrial States 19–21 (Peter J. Katzenstein ed., 1978); James G. March & Johan P. Olsen, The New Institutionalism: Organizational Factors in Political Life, 78 Am. Pol. Sci. Rev. 734 (1984); Margaret Weir & Theda

as well on the macro level of constitutional change. In describing the three eras of the Constitution, I have tried to show that each new period built on what came before. Neither the "founders" of the post-Civil War regime, nor those of the New Deal era, were free to remake the constitutional order from scratch. Not only would such total revolutions have been politically unachievable, they would have been inconceivable. Existing institutions and structures shaped the way the relevant actors thought about concepts like liberty and articulated their aspirations. After the Civil War, for example, the Court in searching for a way to express the Constitution's revised vision of liberty naturally turned to the already privileged common law, and elevated it to a position of inviolability. The innovation was that the responsibility for protecting these rights was taken from the states and given to the federal judiciary.

This innovation itself became a structure that conditioned subsequent constitutional evolution. The Court-packing hearings show that, by the New Deal, the notion that courts are necessary to check the excesses of popular government was already well-ingrained. The New Deal changed the mandate of judicial review, and gave the Court an added measure of independent authority to define this mandate, but these mutations, rather than creating a new institution from whole cloth, grew from an established set of practices.

Much constitutional evolution follows this pattern: Seen in a new light, and with new purposes in mind, old institutions take on new powers and begin to perform new functions—yet, many of their original characteristics inevitably persist. Just as natural selection puts a species' existing attributes to newly-important uses, the Constitution has changed through adaptation. Successor regimes have been constructed from the available materials of their predecessors. Sensitivity to this process will yield a wealth of insight into the nuances of contemporary doctrine. For interpretation to be fully successful, it must be not only holistic and not only historical, but structural as well.

B. *Toward a New Scholarship of the First Amendment*

The account of the First Amendment offered in this Article has one further implication for constitutional scholarship. Scholars' normative inquiries, as well as their descriptive efforts, must be broadened beyond the issues raised by a particular constitutional clause. To this point, this Article has been concerned solely with description. Articles such as this one, which seek to rationalize a body of law, are often meant to confer legitimacy on the explained opinions. But, I come not to praise the First Amendment, but to bury it—or rather to praise it only faintly.

Skocpol, State Structures and the Possibilities for "Keynesian" Responses to the Great Depression in Sweden, Britain and the United States, *in* Bringing the State Back In 107 (Peter B. Evans et al. eds., 1985).

Recent critics have powerfully challenged the justice of reigning First Amendment paradigms. Professors Fiss[184] and Michelman[185] note that the Court's particular brand of free speech absolutism permits moneyed interests to dominate public debate. Professor MacKinnon has taken this critique another step, arguing that traditional First Amendment jurisprudence enforces sex oppression.[186]

These criticisms should come as no surprise now that we have perceived the essential similarity between *Lochner* and *Buckley*—or, for that matter, *Texas v. Johnson*,[187] the flag-desecration case. This unsavory provenance should prompt legal commentators to reconsider the *Johnson* decision. In contrast to the public outrage that greeted the decision, First Amendment scholars cannot have been displeased—or even particularly surprised—by *Johnson*. Flag burning is not a controversial issue among law professors. The *Johnson* holding, and that of the follow-up case *United States v. Eichman*,[188] fit squarely within any of the conventional doctrinal frameworks propounded by academic commentators. These scholars see *Johnson* and *Eichman* as the capstone to our grand First Amendment tradition. To them, the holdings embody the First Amendment guarantee of pluralistic political discourse.[189]

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184. See Fiss, supra note 155, at 1406–07; Owen M. Fiss, Why the State?, 100 Harv. L. Rev. 781, 785–88 (1987); see also Owen M. Fiss, State Activism and State Censorship, 100 Yale L.J. 2087 passim (1991) (applying theory of earlier articles to case of government subsidies to the arts).

185. See Michelman, supra note 155, at 1340–50.

186. See Catherine A. MacKinnon, Toward a Feminist Theory of the State 195–214 (1989) [hereinafter, Feminist Theory]; Catherine A. MacKinnon, Francis Biddle's Sister: Pornography, Civil Rights and Speech, *in* Feminism Unmodified 163, 165–67, 172–74, 178 (1987). Although MacKinnon's critique deals specifically with obscenity law, the force of her argument—that for the powerful, the right to speak includes the right to legitimate their power and to insinuate its effects into the cognitive structures of the powerless—extends to other areas of First Amendment doctrine as well, and it comprehends power hierarchies other than gender. To take as an example the paradigmatic orthodox issue of subversive advocacy: *Brandenburg* implicitly assumes that the only speech that can be equivalent to force is speech by the powerless that threatens the political status quo. The opinion's analysis is built on the world view that speech unconnected to revolutionary violence neither effects coercion, nor permits coercion, nor is fueled by coercion.

187. 109 S. Ct. 2533 (1989).

188. 110 S. Ct. 2404 (1990) (invalidating flag-desecration statute enacted by Congress in effort to circumvent *Johnson*).

189. Almost all of the law review articles focusing on *Johnson* have applauded the Court's decision, for more or less the expected reasons. See Robert Goldstein, The Great 1989–1990 Flag Flap: An Historical, Political, and Legal Analysis, 45 U. Miami L. Rev. 19, 67 (1990) (arguments for flag burning law are "hopelessly inadequate"); Arnold H. Loewy, The Flag-Burning Case: Freedom of Speech When We Need It Most, 68 N.C. L. Rev. 165, 175 (1989); Sheldon H. Nahmod, The Sacred Flag and the First Amendment, 66 Ind. L.J. 511, 522–24 (1991) ("*Johnson* posed an easy first amendment issue"); Geoffrey R. Stone, Flag Burning and the Constitution, 75 Iowa L. Rev. 111, 114 (1989) (Court's decision in *Johnson* "was clearly correct and essentially uncontroversial as a matter of both precedent and principle"); C.L. Welborn, *Texas v. Johnson*: The

I have already discussed the historical fallacy in this view. Its normative fallacy is just as great. *Johnson*'s commitment to pluralistic discourse is shallow at best. Its assumptions—the *Pacific Gas/PruneYard/Buckley* assumptions—about the political process are no more defensible than *Lochner*'s assumptions about the market. Just as the formal equality to "purchase and sell labor" masked from critical examination the injustice of the worker-owner relationship, so too the formal equality to purchase communications resources and the formal equality of "one person-one vote" obscure the reality of maldistributed political power.

A few days after the Supreme Court decided *Eichman*, the Louisiana House of Representatives passed a bill to reduce the maximum penalty for battery from $500 and one year in prison to $25—in cases where the battery is part of a "flag-burning incident."[190] This bill was an invitation to "private" enforcement of a norm where public enforcement would violate the Constitution. It underscores the New Deal lesson that common law rights are neither prepolitical nor "neutral." It is not true that the natural state of affairs is that people have a right to burn flags, or that the only danger to this right is a federal or state statutory prohibition. There simply is no natural state of affairs. Either I can burn a flag with impunity, or I do so at the risk of violent retaliation by the state or by "private" onlookers. In either case, my *real* rights—my actual, day-to-day ability to do things—are very much the product of government (in)action. If the Constitution wants me to have the right to burn a flag, it may have to do more than to leave untouched the pre-existing distribution of rights and resources; it may have to actively reach into those arrangements and remake them.

Flag burning may seem to some a trivial example, but there are more terrible illustrations. The violence-plagued elections of the late-Reconstruction South show as clearly as anything in our history that formal political equality does not guarantee genuine democracy.[191] The Voting Rights Act notwithstanding, this truism is still valid. If the Constitution pledges to each citizen an opportunity to participate in political debate, it is insufficient to say, as *Johnson* says, that the "rem-

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United States Supreme Court Reaffirms the Very Principles For Which the American Flag Stands, 64 Tul. L. Rev. 265, 270 (1989); The Supreme Court, 1988 Term–Leading Cases, 103 Harv. L. Rev. 137, 249–59 (1989). But see Douglas W. Kmiec, In the Aftermath of *Johnson* and *Eichman*: The Constitution Need Not Be Mutilated to Preserve the Government's Speech and Property Interests in the Flag, 1990 B.Y.U. L. Rev. 577, 577–83, 637–38 (criticizing *Johnson* and *Eichman*); cf. Mark Tushnet, The Flag-Burning Episode: An Essay on the Constitution, 61 U. Colo. L. Rev. 39, 47 (1990) (*Johnson* provoked debate of constitutional proportions among citizenry).

190. Flag Bill Gains in Louisiana, N.Y. Times, May 29, 1990, at A14. The bill did not pass the Louisiana Senate.

191. See Foner, supra note 62, at 342–43, 569–76, 603–04.

edy" for problematic speech is simply "more speech."[192] In a political environment dominated by moneyed interests, genuinely pluralistic debate requires the government to go beyond laissez-faire.

Rather than seeking to prohibit government intervention, First Amendment jurisprudence should acknowledge the pervasiveness of government "action" and forthrightly address the real moral issues at stake. While the Court's protection of flag burners is unexceptionable, the Court's opinions are sadly lacking in this sort of normative discussion. Another little-noticed fact about *Texas v. Johnson* is that on the same day it was decided, the Court handed down another First Amendment decision, *Florida Star v. B.J.F.*,[193] overturning a state court award of damages to a rape victim whose name had been published—contrary to state law—in a newspaper. Comparing these two holdings illustrates the Court's blindness to the relationship between speech and private power. Mr. Johnson's speech is protected precisely because it is powerless; under *Brandenburg*, speech that actually may cause insurrection is censurable. In contrast, the Florida Star is a tremendously powerful speaker; it caused real and severe harm to B.J.F.—and to women as a group, to the extent that publicity makes rape victims less likely to report the crime and consequently lessens rapists' fear of punishment. The doctrine underlying both decisions succeeds only in reinforcing existing power relationships.

But this is only half the story. Just as clause-bound interpretation inhibits understanding of past constitutional change, so too it unduly narrows the focus of normative inquiry. Judges deciding First Amendment cases are not free to follow only their conceptions of justice; if nothing else, commitment to a structurally-coherent Constitution exerts interpretive constraint. Because clause-bound scholars reduce the Constitution to a series of discrete philosophical problems, they do not see this constraint. Again, the image of a free speech tradition is deficient. By taking the problem of the First Amendment to be the problem of tolerance in a liberal democratic polity, clause-bound scholars conflate interpretive legitimacy and justice.

Once these distinct criteria are separated, it must be acknowledged that the Court's First Amendment decisions are solidly grounded in the structural relationships and imperatives that animate the post-New Deal Constitution. Who can deny that our Constitution intends, as a first principle, to protect a libertarian sphere—that it presupposes a firm distinction between the state and civil society? In one of the most jurisprudentially significant cases of the past few years, the Supreme Court reaffirmed—unsurprisingly, if to some disappointingly—this basic constitutional distinction.[194] Even political philosophers who reject funda-

192. *Johnson*, 109 S. Ct. at 2547 (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

193. 109 S. Ct. 2603 (1989).

194. See DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998,

mental liberal ideals typically advocate a healthy civil society of one sort or another.[195] It is simply not credible to argue that our constitutional lawmakers have ever rescinded their initial commitment to liberalism.[196]

After the New Deal's eradication of the state/civil society dichotomy in the economic sphere, the Court's relocation of it in the political sphere seems well justified. At the least, contemporary free speech opinions fit with the jurisprudence of earlier eras to produce a coherent, two-centuries-long constitutional narrative. While coherence is no substitute for justice, such a narrative has the genuine value of helping to constitute the United States as a republic and its citizens as republicans. The Supreme Court's fealty to the past enables a continuing conversation between the public and its governing institutions.

If the legal academy is to contribute to this debate, theorists will have to abandon the clause-bound understanding of constitutional change. They will have to explain existing doctrine holistically, as the product of historical and structural determinants. They will have to understand that new free speech regimes will arise only in conjunction with more sweeping changes, and that First Amendment critiques must therefore be linked to broader visions of reform. Finally, they will have to appreciate who the true agents of reform will be. Constitutional reformation cannot and will not be accomplished by the courts alone. Scholars seeking to promote change must bear in mind that judicial decisions are based on fundamental constitutional decisions whose origins lie outside the judiciary.

If we don't like the constitutional law we have, perhaps it is because we don't like the Constitution we have. If the Court's interpretive judgments are valid, then our recourse lies not with the Court but with the lawmakers. For this reason, reflexive opposition to proposals for constitutional change—such as those that followed the flag-burning decision—is misplaced. Efforts to amend the First Amendment ought not to be feared if they will spark a public debate on the constitutional meaning and scope of liberty. Before the academy can welcome such a debate, however, it will have to replace the now-prevalent idea of adjudication as philosophy with a holistically informed understanding of adjudication as interpretation.

In conclusion, I want to suggest that legal scholars have once

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1006 (1989) (holding that father's abuse of child does not constitute state action for purposes of Fourteenth Amendment, even where government agency had cause to know of abuse).

195. See, e.g., Jürgen Habermas, Legitimation Crisis 1–31 (1975); Michael Walzer, Spheres of Justice 31–64 (1982).

196. A recent student note has helpfully demonstrated the Constitution's libertarian commitments by linking them to the liberal principles articulated in the Declaration of Independence. See Dan Himmelfarb, Note, The Constitutional Relevance of the Second Sentence of the Declaration of Independence, 100 Yale L.J. 169, 186 (1990) (Founders' regime was "liberal primarily, democratic only secondarily").

before faced a decision between these two conceptions of constitutionalism. In the early decades of this century, the legal realists launched a devastating attack on the interpretivist orthodoxy.[197] The links between legal realism and the critical legal studies movement have been thoroughly explored,[198] but it is worth pondering for a moment the historical rather than jurisprudential parallels. Two strands are discernible in both movements. First came articles debunking the putative neutrality of law, exposing the power relationships and exploitation that law both enforces and legitimates.[199] Fueled in part by these insights, a second camp of scholarship moved toward legal nihilism, questioning the very possibility of the rule of law.[200]

These two types of argument, though separable, are related. They are related because it becomes much easier to lose one's faith in law the more one is aware of the manifold injustices perpetrated in the name of, and with the help of, law. The realists, having realized that the supposedly neutral right to contract functioned as a right to cheap labor for employers and as no right at all for workers, grew suspicious of the motives of the judges who came up with the right to contract. The contemporary attraction of indeterminacy may similarly be driven by a growing realization among legal scholars that the Court's assumptions about the fairness of the political process and the legitimacy of political resource distributions are unfounded. As it becomes clear that particular legal regimes benefit some and harm others, the essence of the legal craft may itself seem tainted.[201]

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197. For the Realists, however, interpretivism meant reasoning from past judicial decisions; the interpretivism attacked by present-day critics takes as its sources of law authoritative acts by democratically legitimate lawmakers.

198. See, e.g., Note, 'Round and 'Round the Bramble Busb, 95 Harv. L. Rev. 1669, 1669 (1982) (critical legal scholars locate "genesis of today's crisis" in "Realist legacy" and continue abandoned Realist project).

199. Outstanding examples on the legal realist side include Morris R. Cohen, Property and Sovereignty, 13 Cornell L.Q. 8, 11–13 (1927); Morris R. Cohen, The Basis of Contract, 46 Harv. L. Rev. 553, 562–71 (1933); Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 Pol. Sci. Q. 470, 470 (1923). For corresponding critical legal studies work, see Clare Dalton, An Essay in the Deconstruction of Contract Doctrine, 94 Yale L.J. 997, 1106–08 (1985); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1725–37 (1976).

200. The paramount realist statement is Jerome Frank, Law and the Modern Mind (1930) (seeming authority of law derives from unresolved Oedipal conflicts of lawyers and judges). While the realists were inspired by then-(relatively)recent research into human psychology, critical legal studies' claims about indeterminacy borrow instead from literary theory. See, e.g., J.M. Balkin, Deconstructive Practice and Legal Theory, 96 Yale L.J. 743 (1986) (advocating application of literature scholars' theories of "deconstruction" to legal interpretation); Sanford Levinson, Law as Literature, 60 Texas L. Rev. 373 (1982).

201. Specific picturings of the interpretive process may in fact bear this taint. For example, Professor MacKinnon argnes persuasively that the epistemological stance of objectivity or neutrality is distinctively patriarchal, in that it enables men to define as reality their situated perceptions. See MacKinnon, Feminist Theory, supra note 186, at

Yet, we can agree with attacks on law's neutrality while denying law's impossibility. Indeed, claims of radical indeterminacy disappeared after the 1930s in submission to the inescapable reality of the New Deal's success in using law to effect social progress. When law became in tune with the popular consensus on political morality, the process of translation from lawmaker to judge seemed less mysterious and implausible.

There is every reason to hope that this history will be repeated—that the not-too-distant future will see a legal realignment and concomitant revival of legal faith. Just as the realists presaged the New Deal, the critical legal studies movement has been building an intellectual foundation for a political critique of the constitutional status quo. In the 1930s, realist attacks on *Lochner*'s assumptions about the legitimacy of market wealth distributions became part of Roosevelt's political program. Perhaps contemporary scholarly insights into the need for redistribution of political resources will percolate through to the speeches and proposals of present-day reformist politicians.

Instead of rejecting at its outset a debate about free speech, progressive and feminist scholars would best further their goals by sharpening their critiques of contemporary First Amendment jurisprudence, and by developing their work into alternative conceptions of liberty. The remarkable success of Jesse Jackson's candidacy in the 1988 presidential election suggests that leaders espousing such progressive ideas might command considerable popular support.[202] Like-minded members of the legal community can best serve these leaders by carefully explaining the Constitution we have now and by clearly articulating the Constitution we ought to have.

161–70 (1989); Catherine A. MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 Signs 635, 636–37 (1983). But I do not read MacKinnon as ruling out a nonpatriarchal theory of interpretation; she requires only that interpreters not objectify their texts.

202. Jackson received over 7 million votes in the 1988 Democratic Party primaries, about 25% of the party electorate. See Gwen Ifill, Jackson Awaits '2nd Phase' of Campaign, Washington Post, June 8, 1988, at A10. His platform explicitly criticized the plutocratic bias of current political institutions. See, e.g., Excerpts from Jackson's Speech: Pushing Party to Find Common Ground, N.Y. Times, July 20, 1988, at A18 (speech at Democratic convention assailing "economic violence").

For an example of work by a legal scholar toward a vision of constitutional liberty that moves past the current orthodoxy and that might serve as the basis for a new jurisprudence, see Charles A. Reich, The Individual Sector, 100 Yale L.J. 1409 (1991).