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The Emergence of Neutrality

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ABSTRACT. This Article traces two interwoven jurisprudential genealogies. The first of these focuses on the emergence of neutrality in speech and press doctrine. Content and viewpoint neutrality are now the bedrock principles of modern First Amendment law. Yet the history of these concepts is largely untold and otherwise misunderstood. Scholars usually assume that expressive-freedom doctrine was mostly undeveloped before the early twentieth century and that neutrality was central to its modern rebirth. But this view distorts and sometimes even inverts historical perspectives. For most of American history, the governing paradigm of expressive freedom was one of limited toleration, focused on protecting speech within socially defined boundaries. The modern embrace of content and viewpoint neutrality, it turns out, occurred only in the 1960s as the Supreme Court merged earlier strands of rights jurisprudence in novel ways. The emergence of neutrality, this Article shows, was more gradual, more contested, and more contingent than we now assume. Recovering this history reveals the novelty of the modern neutrality paradigm and casts new light on the history of other First Amendment concepts, like prior restraints, low-value speech, and overbreadth.

To understand these developments, it is necessary to trace a second doctrinal genealogy that focuses on the concept of fundamental rights. Older views of expressive freedom were embedded in a different conceptual framework for thinking about rights. And once again, the role of neutrality within this tradition was radically different. Today, neutrality is ubiquitous in rights discourse, reflecting the prevailing view that rights are domains in which people can make their own moral choices. Thus defined, rights need not be absolute, but the government must at least maintain neutrality with respect to values. As this Article reveals, however, this neutrality-based view of rights emerged well into the twentieth century, reflecting a transmogrified synthesis of earlier ideas.

Recovering these older paradigms powerfully illustrates how deeply our current perspectives shape the way that we view the Constitution. Principles that appear to be inherent to the very idea of expressive freedom or the very idea of rights, it turns out, are refracted through a modern lens. Integrating history into rights jurisprudence thus poses a substantial and unresolved challenge, warranting further engagement by scholars and judges. On its own, history cannot dictate whether our approach to rights needs adjustment. But it can refocus attention on values and choices that modern doctrine too often ignores.

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INTRODUCTION

Neutrality is the lifeblood of modern speech and press doctrine. "[A]bove all else," the Supreme Court has declared, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[1] This rule of "content neutrality" presumptively disallows the government from restricting speech based on what a speaker has communicated. For instance, although the government may punish a speaker for having violated a noise ordinance,[2] it generally cannot restrict speech on account of what that person said.[3] The content-neutrality principle thus treats speech and press freedoms as nondiscrimination rules, with content-based restrictions triggering strict scrutiny.[4] There are a few exceptions,[5] but their narrowness underscores the centrality of the content-neutrality requirement.[6] So does the Court's insistence that these exceptions have to be identified using a neutral tradition-based analysis, without weighing the costs and benefits of certain types of speech.[7]

In addition to requiring content neutrality, the First Amendment also disables the government from asserting interests that privilege certain viewpoints

1. Police Dep't. v. Mosley, 408 U.S. 92, 95 (1972). This line is frequently quoted. *See, e.g.*, Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2346 (2020) (quoting this passage); Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (same).

2. *See* Ward v. Rock Against Racism, 491 U.S. 781, 790-91 (1989).

3. *See, e.g.*, Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018). Scholarship on content neutrality is voluminous. *See, e.g.*, Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231 (2012); Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261 (2014); Genevieve Lakier, Reed v. Town of Gilbert, Arizona*, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233. For classic discussions, see John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1485 (1975); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); and Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987). For critical treatments, see, for example, Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427 (2017); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347 (2006); and Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981).

4. *See, e.g.*, *Reed*, 576 U.S. at 163-64.

5. *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 245-46 (2002).

6. *See, e.g.*, *Becerra*, 138 S. Ct. at 2371-72 (emphasizing the narrowness of "unprotected" speech categories). Indeed, even when the government limits "unprotected" speech, the neutrality rule still disallows most content-based subclassifications. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 383-88 (1992).

7. *See* United States v. Stevens, 559 U.S. 460, 468-72 (2010).

over others,[8] thus barring speech-restrictive efforts to instill morality or otherwise shape the way that people think.[9] For instance, even though interests like promoting civic virtue or reducing bigotry might seem compelling, the government cannot defend speech restrictions on those grounds. Doing so "grates on the First Amendment," the Court has explained, "for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression."[10] In this way, modern doctrine circumscribes not only the types of *rules* that the government can use when restricting speech but also the *interests* that it may pursue. For the most part, therefore, the government cannot restrict speech based on communicative harms—that is, harms arising from what someone has expressed.

Yet these neutrality principles are new. American law has always been protective of expression to some extent, but not by requiring content or viewpoint neutrality. Those concepts are twentieth-century innovations. From the Founding through the mid-twentieth century, the freedom of speech entailed a limited right of toleration, not neutrality.[11] To be sure, speakers were still mostly free to

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8. *See, e.g.*, Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 67 (1976); *see also* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 444 (1996) ("[T]he Court almost always rigorously reviews and then invalidates regulations based on viewpoint.").

9. For cases rejecting moral rationales for restricting speech, see Iancu v. Brunetti, 139 S. Ct. 2294, 2300 (2019); and United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 817-18 (2000). Compare *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968), which recognizes greater leeway to suppress the dissemination of sexually explicit materials to minors. For cases rejecting governmental justifications that turn on changing how people think, see cases cited *infra* note 10; and Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2453 (1996). There is some debate over whether the latter principle is properly described in terms of "viewpoint neutrality." Many understand viewpoint neutrality as barring governmental efforts to shape people's thoughts. *See, e.g.*, Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328-32 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986); Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461, 461-62 (1986). Others distinguish the rule against viewpoint-based ends, *see* Volokh, *supra*, at 2427, from the ban on speech-restrictive means designed to change how people think, *see id.* at 2453-54. For now, it is enough to say that these principles belong to the same conceptual family. *Cf.* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 621 (1991) (explaining that content neutrality is "best . . . understood not as a single concept, but as a family of concepts").

10. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc., 515 U.S. 557, 579 (1995). This quotation referred specifically to "noncommercial speech restriction[s]," *id.*, but the Court has endorsed the same principle in commercial-speech cases, *see* Sorrell v. IMS Health Inc., 564 U.S. 552, 577 (2011).

11. In addition to the discussion in this paragraph, see *infra* notes 76-77, 207-210, 245, 248-252, 288-290, 339-342 and accompanying text. For a more detailed sketch of the difference between

decide what to say. Well-intentioned speech on matters of public concern was considered privileged, so the government had to tolerate a wide range of views. Moreover, the rule against prior restraints ensured that speech restrictions could only be imposed by a jury after publication, rather than having a public official determine ahead of time what could be published. But so long as these principles were followed, laws could maintain socially defined limits on public discourse and favor certain messages over others.[12] Thus, many patently non-neutral rules were consistent with older notions of expressive freedom. Indeed, to the extent that neutrality entered the doctrinal picture, content-neutral restrictions of speech were sometimes thought to be *more* constitutionally suspect.[13]

Despite the central role of neutrality today, the current literature lacks any detailed treatment of its jurisprudential history.[14] The conventional view is that

positions of orthodoxy, toleration, and neutrality, see Steven D. Smith, *The Restoration of Tolerance*, 78 CALIF. L. REV. 305, 308-12 (1990). For a parallel taxonomy using the terms assimilationism, pluralism, and individualism, see Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 299-305 (1988). The term "toleration" is not meant to suggest that the government was merely exercising forbearance and could extend or deny speech rights at pleasure.

12. To be sure, modern doctrine still imposes boundaries on speech. But these limits are of a different sort. For the most part, boundaries are now defined either in terms of noncommunicative harms, as recognized in *United States v. O'Brien*, 391 U.S. 367, 381-82 (1968), or in terms of predefined *categories* that preclude legislative or judicial assessments of communicative harms, *see infra* notes 371-374, 399-400 and accompanying text. That said, First Amendment analysis is patently non-neutral in certain domains, like doctrines relating to restrictions of student speech and public-employee speech. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) ("A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school." (quotations omitted)); Garcetti v. Ceballos, 547 U.S. 410, 426 (2006) ("We reject . . . the notion that the First Amendment shields from discipline the expressions employees make pursuant to their official duties."). In contrast to the modern focus on neutrality, the older approach did not preclude legislative or judicial assessments of communicative harms. In other words, it did not reflect a neutrality paradigm.

13. *See infra* notes 91-93, 212-213, 248-257, and 296 and accompanying text.

14. Current accounts are quite brief. *See, e.g.*, Marc O. DeGirolami, *The Sickness unto Death of the First Amendment*, 42 HARV. J.L. & PUB. POL'Y 751, 765-73 (2019); Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 99-100 (1996); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 215-23 (1982). Other scholars have noted the absence of neutrality without tracing its development. *See, e.g.*, John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1116 (2005); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2192-95 (2015); ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 101 (1995); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 121 (1981); David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1707 (1991). Inaccuracies often appear in these accounts. *See infra* note 16 and accompanying text. For broader historical studies of expressive freedom, see, for example, LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS

constitutional protections for speech were absent until the 1930s and '40s,[15] and that the Supreme Court embraced content and viewpoint neutrality in its earliest First Amendment decisions.[16] Neutrality and expressive freedom, the thinking goes, were reborn together. And this lesson is reinforced by the view that *Carolene Products* introduced a values-neutral vision of substantive rights.[17] Indeed, with neutrality so firmly embedded in First Amendment doctrine, other approaches may seem unimaginable. If the First Amendment does anything, the

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IN EARLY AMERICAN HISTORY (1960); MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000); MARK GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920 (1997); and G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299 (1996).

15. The view that the Speech Clause was an empty vessel is widespread. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1180 (6th ed. 2020) ("Because even for originalists there is little guidance from history or the framers' intent as to the meaning of the First Amendment, the Supreme Court inescapably must make value choices as to [First Amendment doctrine]."); Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1298 (1983); David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 33, 33-59 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); Geoffrey R. Stone, *The Story of the Sedition Act of 1798: "The Reign of Witches," in* FIRST AMENDMENT STORIES 13, 23 (Richard W. Garnett & Andrew Koppelman eds., 2012). And historians often posit that protections for expressive freedom were subsumed within police-powers jurisprudence and "did not have any independent force as a constitutional doctrine." Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 34 (2000); *see, e.g.*, G. EDWARD WHITE, LAW IN AMERICAN HISTORY, VOLUME III: 1930-2000, at 692-93 (2019); *see also* David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 562-72 (1981) (describing scholarship taking this view). *But see* Lakier, *supra* note 14, at 2196 ("Speech about matters of public concern received greater constitutional protection than other kinds of speech . . . .").

16. *See, e.g.*, DeGirolami, *supra* note 14, at 771 ("The *Barnette* opinion represented a new commitment to absolute anti-orthodoxy—the view that the government could have no say at all in assessing the communal value of speech."); Heins, *supra* note 14, at 99-100 (attributing viewpoint neutrality to *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943)); Lakier, *supra* note 14, at 2168 ("[D]iscriminat[ion] against speech on the basis of its content . . . was something that the new conception of freedom of speech otherwise disavowed [by 1942]."); Schiller, *supra* note 15, at 68 (mentioning "a presumption that content-based restrictions on speech were unconstitutional"); Stephan, *supra* note 14, at 215 ("Concern about discrimination in the context of free expression emerged as an outgrowth of the general extension of the [F]irst [A]mendment undertaken by the Hughes Court."); Williams, *supra* note 9, at 622 ("The development of free speech doctrine is generally traced to the beginning of the twentieth century. The concern with content discrimination by government was a part of that doctrine from very near the beginning and is in no sense a new idea.").

17. *See, e.g.*, J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 302 (1989) ("The faith of *Carolene Products* was that one could exclude values from the judicial role, and by casting them out substitute the task of purifying the democratic process."). For an effort to historicize the treatment of neutrality in the equal-protection realm, see Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 505-07 (1997).

thinking goes, surely it bans the government from targeting a speaker's message.[18]

This Article challenges these engrained assumptions. Modern views of expressive freedom did not emerge *ex nihilo* in the twentieth century.[19] It only appears that way because our interpretive assumptions about rights are so radically different from those of the past. Nor did the initial wave of speech-protective judicial decisions embrace content or viewpoint neutrality. To be sure, First Amendment law quickly became more protective of heterodox views, and some doctrines that resemble neutrality began to emerge almost immediately. But these developments did not prevent the government from imposing socially defined boundaries on expressive freedom or otherwise elevate neutrality as a central value. In fact, the expressive equality that the Supreme Court embraced was, in some important respects, counter to modern doctrine. Neutrality emerged in a more gradual, more contested, and more contingent manner than we now assume.[20]

In tracing this doctrinal genealogy, this Article also aims to illuminate the development of modern rights jurisprudence, including the role of neutrality. Up until the twentieth century, fundamental rights were bimodal, consisting of retained natural rights (grounded on social-contractarian principles) and fundamental positive rights (grounded largely on common law). The details of these concepts will be spelled out later.[21] But two features bear emphasis here.

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18. A search for "if the First Amendment means anything" leads to such statements. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 565 (1969); Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159, 1165 (1982); *cf.* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 792, 824 (2000) (taking as given that the First Amendment demands viewpoint neutrality).

19. David Rabban ably made this point four decades ago, *see* Rabban, *supra* note 15, at 519, but it is still underappreciated in the literature.

20. Although this Article does not employ Laura Weinrib's focus on nonjudicial sources, it reinforces her critique of how present-day views of expressive freedom and portrayals of its history usually approach the topic in an essentialist way, treating expressive freedom as having a certain form because that *just is* the meaning of the concept. The modern notion that expressive freedom entails neutrality, Weinrib powerfully shows, was constructed by twentieth-century actors. *See* LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE 8-12 (2016); Laura M. Weinrib, *The Sex Side of Civil Liberties:* United States v. Dennett *and the Changing Face of Free Speech*, 30 LAW & HIST. REV. 325, 335-42 (2012); *see also* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 5 (2007) ("[T]he world of civil rights was conceptually, doctrinally, and constitutionally up for grabs."). For other work in this vein, see, for example, SAM LEBOVIC, FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN AMERICA (2016); and JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW (2007).

21. *See* discussion *infra* Sections I.A-II.A.

First, although these rights were often listed in constitutions, they were not distinctively *textual* objects—that is, their force and meaning did not derive from their enumeration. Rather, jurists generally described rights as being grounded in unwritten fundamental law that predated the adoption of constitutions. Enumeration simply marked their existence and fundamentality. Second, jurists typically viewed fundamental rights as grounded in *general law*—that is, "rules that are not under the control of any single jurisdiction, but instead reflect principles or practices common to many different jurisdictions"[22]—thus fostering interpretive fluidity across state, federal, and even English decisions.

In the twentieth century, however, American jurists came to a very different understanding of rights. Reacting to the perceived flaws of *Lochner*-era doctrine, progressives relentlessly attacked both pillars of traditional rights jurisprudence. Natural rights were fictitious, they insisted, and common-law rights needed to be reshaped to promote social ends. As a result, constitutional rights became increasingly unmoored from social-contract theory and common law, especially once new appointments reshaped the Supreme Court from the 1930s onward. Rather than wholly abandon prior views, however, progressive jurists blended earlier strands of rights jurisprudence and began to treat constitutional rights as a species of positively enacted federal law, with federal judges assuming a special guardianship over their interpretation and enforcement.

This reconceptualization of fundamental rights did not necessarily point toward particular interpretive outcomes. But in a liberal era of secularism, individualism, and social fragmentation, what gradually emerged by the early 1970s was a notion of rights as spheres of personal liberty, free from socially prescribed ideas of morality.[23] The very idea of a "right" thus came to embrace a sense of neutrality with respect to values.[24] And with this transformation, it became second nature to see the First Amendment as guaranteeing a privileged sphere of individual autonomy—protected by a requirement of neutrality—rather than as

22. Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505 (2006).

23. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 205 (1996) ("[B]ecause we are a liberal society committed to individual moral responsibility, . . . *any* censorship on grounds of content is inconsistent with that commitment."); Suzanna Sherry, *Selective Judicial Activism: Defending* Carolene Products, 14 GEO. J.L. & PUB. POL'Y 559, 570 (2016) ("Personal rights are about preventing political majorities from imposing their values on individuals who may not share those values."). For an introduction to debates about neutrality in liberal theory, see generally PERFECTIONISM AND NEUTRALITY: ESSAYS IN LIBERAL THEORY (Steven Wall & George Klosko eds., 2003).

24. This is not to say that values are irrelevant when *defining* rights in the first place. *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 388-89 (2009).

securing a limited right of toleration. In other words, the development of neutrality in modern expressive-freedom law was interconnected with a broader shift in the very idea of constitutional rights.

The story begins in Part I with an older understanding of expressive freedom under the First Amendment and its state-level counterparts. From the Founding through the early twentieth century, the government could restrict expression to promote the public good, subject to the rule against prior restraints and the privilege of discussing matters of public concern in good faith.[25] Neutrality was not required. In other words, Americans did not yet treat speech and press rights as nondiscrimination rules that made content-based restrictions presumptively unconstitutional and that forbade efforts to shape the way that people think. Indeed, even laissez-faire jurists recognized authority to restrict speech "tending to do harm to the public morals."[26] Instead, the dominant paradigm was one of toleration—premised on private ordering within socially defined boundaries.[27]

In some ways, this earlier law of expressive freedom recognized certain notions of equality—or, one might say, "neutrality."[28] From the very beginning, equality of citizenship rights was axiomatic, thus barring the government from arbitrarily favoring certain speakers over others.[29] Nor was the government allowed to enforce uniformity of political and religious thought.[30] Equality was also reflected in the rule prohibiting the government from punishing people for holding certain beliefs, no matter how dangerous those views might seem.[31] In these ways, the law of expressive freedom embraced what might be described as forms of "neutrality." My goal in contrasting earlier views with the modern notions of content and viewpoint neutrality, then, is simply to show how ideas of

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25. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 287 (2017). For ease of exposition, this Article often refers to "the government." Even before "incorporation," jurists viewed federal speech and press rights as parallel to those secured at the state level. *See infra* notes 118-121 and accompanying text.

26. CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 192 (Da Capo Press 1971) (1886). For Christopher G. Tiedeman's association with laissez-faire constitutionalism, see Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1436 & n.15. As Stephen A. Siegel observes, "Laissez-faire constitutionalism was far more supportive of the regulatory state than current libertarian doctrine," though Tiedeman "was far closer to a libertarian position." *Id.* at 1436 n.15.

27. As previously noted, modern First Amendment doctrine imposes boundaries of a very different sort, organized around a paradigm of neutrality. *See supra* note 12.

28. Neutrality has many meanings, and some of them are oppositional. *See generally* Andrew Koppelman, *The Fluidity of Neutrality*, 66 REV. POL. 633 (2004).

29. *See* sources cited *infra* notes 44-45, 55, 60-62, 63-67, 69, 76-78.

30. *See* discussion *infra* Section I.A.

31. *See* sources cited *infra* note 63.

expressive freedom have changed, not to claim that all other potential variants of neutrality were missing, too.[32] My argument is simply that older notions of equality did not entail or presage the modern principles of content and viewpoint neutrality.

As described in Part II, these longstanding views of expressive freedom eventually began to change alongside broader jurisprudential shifts, including the acceptance of a more functional approach to legal interpretation. Rather than view law as a self-contained system of historically derived rules, jurists began to construe legal traditions by assessing their social functions. At the outset, however, reinterpretations of speech and press freedoms did not deny legislatures the power to restrict expression based on content or viewpoint. Laws could still target communicative harms. In fact, statutory restrictions of certain messages were sometimes *harder* to challenge than speech-restrictive applications of neutral rules.

Part III then traces the doctrinal moves that eventually culminated in an embrace of neutrality. Although content and viewpoint neutrality are generally paired today,[33] they did not emerge together. Moreover, neither principle initially arose in its modern form. For instance, judges in the 1940s articulated a nascent version of content neutrality as a way of confining the scope of First Amendment analysis—not as a presumptive rule against content-based speech restrictions. It was only in the late 1960s and early 1970s that the Supreme Court fully embraced content and viewpoint neutrality by shifting and merging earlier strands of doctrine. At that point, what had initially begun as a functional reinterpretation of traditional rules became something else entirely. Tied to a broader evolution in jurisprudence, the paradigm of expressive freedom shifted from toleration to neutrality.[34]

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32. My reason for taking this approach is expositional. To see our constitutional past on its own terms, we have to begin by appreciating its foreignness. But while this Article highlights non-neutral facets of earlier law, my aim is not to claim that it was entirely non-neutral in every sense of "neutral."

33. *See, e.g.*, Kagan, *supra* note 8, at 414; David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 196-202 (1988).

34. This shift was not instant, and older ways of thinking lingered for several decades. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 399-403 (1992) (White, J., concurring). Moreover, debates have continued over how to define and apply these neutrality principles. For an insightful discussion of how speech doctrine has shifted toward more formalist conceptions of neutrality, see Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2119 (2018).

Part IV considers implications of this history. In an age when anxiety about expressive freedom is growing,[35] retracing our steps is especially warranted. History alone may not tell us how to address contemporary problems. But studying our past can help us realize that modern perspectives are grounded in twentieth-century choices, not original or inexorable commands.

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Before proceeding, it is worth making a few remarks about methodology. This Article focuses on internal legal perspectives. It aims to show *how* certain legal ideas changed, not *why* they changed. Nor does it aim to say anything about the real-world impact of legal developments. Such an account would no doubt be valuable, but exploring the external causes and effects of legal change is not the point of this Article. External developments are mentioned at various times to underscore an obvious point: the internal story was linked to a broader socio-political context. But my goal here is simply to recover internal legal perspectives and trace how they changed over time.[36]

Along similar lines, this Article examines what people said about the law, not what they privately thought about it.[37] Of course, public statements do not necessarily capture what people really think. For instance, judges who disagree with existing precedent might try to move doctrine incrementally rather than reveal

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35. *See* DeGirolami, *supra* note 14, at 782-801 (surveying modern anxieties about free speech). Scholarly critiques often invoke the specter of "Lochnerism." *See, e.g.*, Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1392-93 (2017); Howard M. Wasserman, Bartnicki *as* Lochner*: Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 421, 421-24 (2006). Critiques of this sort are old. *See* Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1918 (2016). For a discussion of their changing valence, see Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241 (2020).

36. This Article is modeled on the Cambridge School of intellectual history—focusing on ideas themselves, not motives. *See, e.g.*, Quentin Skinner, *The Principles and Practice of Opposition: The Case of Bolingbroke Versus Walpole*, *in* HISTORICAL PERSPECTIVES: STUDIES IN ENGLISH THOUGHT AND SOCIETY 93 (Neil McKendrick ed., 1974). For further discussion of this method and its value, see JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 16-18 (2018); and 1 QUENTIN SKINNER, VISIONS OF POLITICS: REGARDING METHOD 96-99, 124-27 (2002). This Article differs from most "Cambridge School" scholarship by focusing on legal rhetoric, reflecting *internal* views of doctrine. But this approach still embraces—indeed, emphasizes—the importance of context and is thus a form of "holistic" intellectual history. *See* Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 941-44 (2015) (discussing methods of intellectual history).

37. This distinction between legal discourse and private understandings is not the same as the difference between internal and external points of view. For instance, jurists might share an *internal* understanding of the law yet adopt different rhetorical strategies for describing the law—perhaps for *external* reasons or perhaps based on conflicting views about the proper relationship between legal rhetoric and the law.

their views all at once. And perhaps what judges think is what *really* counts as "the law."[38] This Article does not take a side in that jurisprudential debate.[39] But it does take a surface-level view of doctrine, focusing on legal rhetoric. Doing so has limits, but it should still be of value to a wide range of scholars and jurists.

So far, this framing may seem familiar, and perhaps even old fashioned.[40] But this Article departs from traditional doctrinal scholarship by treating the internal perspective itself as being fluid, not fixed. Most doctrinal histories retell the "official story" in *our terms*—explicitly focusing on Supreme Court opinions and implicitly adopting modern attitudes about the nature of constitutional rights.[41] By contrast, my goal is to analyze whatever materials political and legal elites previously considered authoritative and to analyze those materials using *their* interpretive assumptions, not ours.

For that reason, this Article evaluates different types of sources over time. To recover attitudes about expressive freedom in the nation's first century, it examines a wide range of evidence, including the political and philosophical ideas that undergirded how Americans thought about rights. As the narrative moves into the twentieth century, it begins to concentrate on state and federal judicial decisions. And by the 1930s, the focus is almost entirely on U.S. Supreme Court opinions. That evidentiary shift is deliberate and tracks with changes in the way that American elites conventionally thought about the authority to interpret and enforce rights.

This methodology thus dovetails with my broader goal of showing that the histories of expressive freedom and fundamental rights are interconnected. The early twentieth century witnessed a revolution in views about the nature of rights—where they came from; the identity of their interpretive guardians; their means of enforcement; and their relationship to history, the common law, and

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38. On the relationship between law and discursive practices, see, for example, William Baude & Stephen E. Sachs, The Official Story of the Law (Mar. 24, 2021) (unpublished manuscript) (on file with author); Richard Primus, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44, 54-60 (2016); and Mikołaj Barczentewicz, *The Illuminati Problem and Rules of Recognition*, 38 OXFORD J. LEGAL STUD. 500, 504 (2018).

39. My focus on legal rhetoric is not meant to suggest that this is the correct or even the best way of writing about the history of legal doctrine. But it is, in my view, a valuable form of scholarship.

40. *See* Cynthia Nicoletti, *Writing the Social History of Legal Doctrine*, 64 BUFF. L. REV. 121, 121 (2016) ("A more than passing concern with doctrine might well serve to mark someone as old-fashioned these days . . . ."). It is worth noting that Nicoletti emphasizes the continuing relevance of doctrinal history. *See id.* at 139.

41. This feature is especially evident in First Amendment scholarship, which often assumes that the law of expressive freedom originated with Justices Holmes and Brandeis. *See* sources cited *supra* notes 14-15 and accompanying text.

morality. In order to understand the way that internal views of expressive freedom were shifting, then, we also need to recognize how the interpretive lens was changing. To borrow from Jonathan Gienapp, we cannot "keep[] the structure of [legal] conventions constant between present and past while merely filling in that structure with discreet component content [about particular doctrines]."[42] And that is especially true with respect to rights.

Doctrinal genealogies of this sort can be especially valuable in opening our eyes to new ways of thinking about topics that we otherwise tend to view uncritically.[43] Today, our understandings of expressive freedom and of rights are so infused with ideas of neutrality that those who dissent from the modern orthodoxy are often portrayed as challenging the very concept of free speech or the very concept of rights. Tracing doctrinal genealogies from an internal standpoint can at least free our minds from this type of liberal essentialism.[44]

At the same time, doctrinal genealogies have limits as methods of critique. For example, this Article does not explore the causes or effects of neutrality, and therefore it cannot address the ways that neutrality might perpetuate or alleviate longstanding social or political inequalities.[45] Indeed, it does not aspire to be a critique of neutrality at all. The current liberal order may well be worth keeping. But this Article does challenge the notion that neutrality was baked into the core of the First Amendment and the very definition of rights from the beginning. American law did not, in fact, fully embrace these ideas until well into the twentieth century.

I. FROM THE FOUNDING TO THE TWENTIETH CENTURY

American jurists used to think very differently about expressive freedom. For most of our history, speech and press freedoms entailed two common-law rules—first, a prohibition on prior restraints and, second, a privilege of speaking

42. Gienapp, *supra* note 36, at 941. Regardless of whether one describes this inquiry as a "highly limited version of the historical inquiry," William Baude & Steven E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 813 (2019), a principal claim of this Article is that recovering the law of the past requires a deep sensitivity to changes in the internal perspective.

43. *See, e.g.*, Charles Barzun & Dan Priel, *Jurisprudence and (Its) History*, 101 VA. L. REV. 849, 855 (2015).

44. Of course, a genealogical account of this sort is unnecessary to show that "free speech" and "rights" are not essentialist concepts *as a linguistic matter*. For that lesson, one need only glance outside the United States, where these terms often take on very different meanings. But that type of inquiry is not likely to change the essentialist views of positivists who view liberal neutrality as inherent to *American* speech rights.

45. For a discussion of such limits, see Charles Barzun, *Causation, Legal History, and Legal Doctrine*, 64 BUFF. L. REV. 81, 87 (2016).

in good faith on matters of public concern—along with a requirement that the government could act only to promote the public good. These principles ensured toleration of dissenting views, and they reflected notions of equality in some respects. But they did so without embracing content or viewpoint neutrality in their modern forms. That is, American jurists during this period did not view expressive freedom as a nondiscrimination principle that rendered content-based rules presumptively unconstitutional or that disabled the government from trying to shape the way that people think. Indeed, in some ways those modern ideas invert earlier attitudes about expressive freedom.

A. The Founding

The absence of neutrality at the Founding is evident in a host of non-neutral restrictions of speech. For instance, rules against profanity, blasphemy, and sedition all targeted communicative harms and were justified as ways of shaping how people thought.[46] These types of laws existed in most, if not all, American states.[47] They were irregularly enforced but uniformly upheld.[48] Understanding their compatibility with speech and press freedoms, however, requires taking a step back and appreciating the broader landscape of rights jurisprudence.

At the Founding, rights discourse was organized around the idea that rights of citizenship were secured in a "social contract" or "social compact." The social contract was the imagined agreement by which disaggregated individuals in a state of nature formed a political society and became citizens of that polity. On this view, citizenship rights actually preceded the formation of a government through a constitution.[49] Their fundamental status, therefore, did not depend on constitutional enumeration. Moreover, these rights were thought to be part of each state's fundamental law. Most fundamental rights were thus defined by *general* fundamental law.[50]

Social-contractarian rights took two forms. First, there were retained natural rights, which were prepolitical rights that individuals retained when forming a

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46. *See infra* text accompanying notes 65-69, 76-78.

47. *See* Campbell, *supra* note 25, at 310 & n.285; PHILLIP I. BLUMBERG, REPRESSIVE JURISPRUDENCE IN THE EARLY AMERICAN REPUBLIC: THE FIRST AMENDMENT AND THE LEGACY OF ENGLISH LAW 57-58, 235, 326-28 (2010).

48. *See* BLUMBERG, *supra* note 47, at 58, 66-71, 187-242, 319, 324, 328-37.

49. For further discussion of these social-contractarian principles and their relevance to rights discourse, see Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 87-99 (2017).

50. For further discussion of general fundamental law and its application to Founding Era rights discourse, see Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321, 336-49 (2021).

political society. These rights included all human freedoms, such as speaking, writing, and publishing.[51] Second, social-contractarian thinkers also recognized a set of fundamental positive rights, which specified things that the government had to do or could not do. Examples of these rights included the warrant requirement and the right to confront witnesses. Generally speaking, the content of fundamental positive rights was defined by the common law.[52] For simplicity, the remainder of this Article will refer to the first strand of fundamental rights jurisprudence as "natural rights" and the second as "common-law rights."

Both types of rights had structural and substantive implications. Structurally, natural rights undergirded republican government. Because *the people* retained their rights to liberty and property, the thinking went, all laws restricting those rights had to be made and enforced by the people themselves. In other words, only legislatures and juries could limit expression.[53] Licensing schemes that authorized executive or judicial officers to decide what could be published were thus prohibited. And in this way, natural-rights principles bolstered the common-law right against "prior restraints."[54]

Substantively, natural-rights principles dictated that the government could act only to promote the public good, not factional private interests. As William Blackstone explained, civil liberty entailed "natural liberty, so far restrained by human laws . . . as is necessary and expedient for the general advantage of the public."[55] For the most part, assessing the public good was not a mathematical endeavor. Rather, it turned on factual and valuative assessments that were left to

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51. *See* Campbell, *supra* note 25, at 264-65, 268-69.

52. *See id.* at 290-94.

53. *See* Campbell, *supra* note 49, at 97-98; Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517, 527-28, 531-33 (2019). A disputed exception was judicial contempt. *See, e.g.*, Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 329 (Pa. 1788). A related but far more contested view that emerged in the late 1790s posited that the peoples of the several states—not the people of the United States—retained control over speech and press rights. From this perspective, only state institutions could restrict expression. *See* Campbell, *supra*, at 549, 555, 559-60; Kevin R. Gutzman, *A Troublesome Legacy: James Madison and "The Principles of '98,"* 15 J. EARLY REPUBLIC 569, 583-89 (1995); H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689, 690-96 (1994). Like the rule against prior restraints, this reading of the First Amendment was structural. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 36-37 (1998).

54. *See* Campbell, *supra* note 53, at 531-32. This rule also effectively shielded printers from liability for unpublished materials found at a printer's office. *See* JEAN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT 201-02 (David Lieberman ed., Liberty Fund, Inc. 2007) (1771).

55. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *125.

the people themselves, acting through legislatures and juries.[56] Nonetheless, two well-recognized principles helped specify what it meant for the government to pursue the common good.

First, laws had to be *public regarding*, meaning they had to be directed toward the benefit of the society. Preventing sin and saving souls were not valid ends. "[P]rivate vices," William Blackstone explained, "cannot be, the object of any municipal law" unless "by their evil example, or other pernicious effects, they may prejudice the community."[57] Thus, the government could not enforce morality *as such*, but as the Pennsylvania Supreme Court explained, "an offence may be punishable, if in its nature and by its example, it tends to the corruption of morals."[58] Similarly, when the Founders defended governmental support for religion, they emphasized the social benefits of religiosity, not divine salvation.[59]

Second, social-contract theory posited that citizens joined the political society on equal terms and that governmental acts therefore had to reflect equal regard for each citizen.[60] This did not, of course, forbid classifications that disadvantaged some people more than others. Indeed, because many rights could be restricted to promote the public good, equal rights did not foreclose the possibility of egregiously inequitable laws.[61] But at least in theory, the underlying ob-

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56. *See* Campbell, *supra* note 53, at 527-28, 531-33. Judges thus had a very circumscribed role in enforcing natural rights. *See* Campbell, *supra* note 49, at 92-98. For further discussion of Founding Era notions of the judicial role and their application to speech and press freedoms, see Campbell, *supra* note 25, at 263-64, 276, 287, 302 n.252, 311-12.

57. 2 BLACKSTONE, *supra* note 55, at *41; *see, e.g.*, James Wilson, *Of the Nature of Crimes; and the Necessity and Proportion of Punishments*, *in* 2 COLLECTED WORKS OF JAMES WILSON 1087, 1088-90 (Kermit L. Hall & Mark David Hall eds., 2007) (grounding criminal law on harms to society and its members); 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 38 (1795) (same); *see also* JOHN W. COMPTON, THE EVANGELICAL ORIGINS OF THE LIVING CONSTITUTION 23 (2014) (describing the replacement of a "Puritan" view of morals regulation with a more instrumental view).

58. Commonwealth v. Sharpless, 2 Serg. & Rawle 91, 102 (Pa. 1815) (Tilghman, C.J.); *see also id.* at 103 (Yeates, J.) ("[A]lthough every immoral act, such as lying, etc., is not indictable, yet where the offence charged is destructive of morality in general; where it does or may affect every member of the community, it is punishable at common law.").

59. *See* ELLIS M. WEST, THE FREE EXERCISE OF RELIGION IN AMERICA: ITS ORIGINAL CONSTITUTIONAL MEANING 70, 114, 170, 176, 187-88 (2019).

60. *See, e.g.*, NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT 176, 178-79, 181 (1793); WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 161-74 (Rita Kimber & Robert Kimber trans., 2001).

61. *See* William J. Novak, *The Legal Transformation of Citizenship in Nineteenth-Century America*, *in* THE DEMOCRATIC EXPERIMENT: NEW DIRECTIONS IN AMERICAN POLITICAL HISTORY 85, 94-97 (Meg Jacobs, William J. Novak & Julian E. Zelizer eds., 2003).

jective of every law had to be the advancement of the general welfare. The quintessential violation of this principle was serving private factional interests, like the personal interests of politicians.[62]

Beyond these two general principles, the Founders also recognized specific limits on the regulation of thoughts or beliefs. The first of these was a prohibition on punishing people for their thoughts. The basic premise of this rule was that individuals cannot control their own minds.[63] Some Founders also tied the inviolability of thoughts and beliefs to the requirement that governmental acts had to promote the public good. "The business of civil government is to protect the citizen in his rights, to defend the community from hostile powers, and to promote the general welfare," Connecticut jurist Oliver Ellsworth explained. Thus, he concluded, "[c]ivil government has no business to meddle with the private opinions of the people."[64]

Within these limits, however, laws could restrict speech to achieve social goals. The government "has a right to prohibit and punish gross immoralities and impieties," Ellsworth explained, "because the open practice of these is of evil example and public detriment."[65] "For this reason," he continued, "I heartily approve of our laws against drunkenness, profane swearing, blasphemy, and professed atheism."[66] These laws were not aimed at punishing thoughts alone. Instead, they sought to stem the harmful consequences of expressing those thoughts.[67] "[W]hen the majority shall conceive a restraint upon contumelious treatment of a generally received religion to be necessary," Massachusetts politi-

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62. *See* Campbell, *supra* note 49, at 94. For further discussion, see Alan Gibson, *Ancients, Moderns and Americans: The Republicanism-Liberalism Debate Revisited*, 21 HIST. POL. THOUGHT 261, 287, 292-96 (2000).

63. *See* Campbell, *supra* note 25, at 280-81.

64. Oliver Ellsworth, *A Landholder No. 7* (Dec. 17, 1787), *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 451 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber & Margaret A. Hogan eds., 1983); *see also, e.g.*, JAMES SULLIVAN, A DISSERTATION UPON THE CONSTITUTIONAL FREEDOM OF THE PRESS IN THE UNITED STATES OF AMERICA 36 (Boston, David Carlisle 1801) ("Wherever one man, or one body of men can erect and maintain a coercive tribunal in favor of their own opinions, and in opposition to that of those who differ from them, there is an end of all free inquiry: and the right of private judgment no longer exists."); 4 BLACKSTONE, *supra* note 55, at *53 ("[A]ll persecution for diversity of opinions, however ridiculous or absurd they may be, is contrary to every principle of sound policy and civil freedom.").

65. Ellsworth, *supra* note 64, at 451.

66. *Id.*

67. *See, e.g.*, Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 404 (Pa. 1824); People v. Ruggles, 8 Johns. 290, 294-98 (N.Y. 1811); *cf.* 2 SWIFT, *supra* note 57, at 322 ("Blasphemy is so indicative of an abandoned heart, and injurious to the morals, that no one can question the propriety of punishing it.").

cian James Sullivan wrote, "which restraint . . . may advance the interest and security, and promote the happiness of the whole, . . . they have a right to lay it."[68] In this limited respect, he noted, "opinion[s] may, and ought to be restrained."[69]

At the same time, however, the Founders also prized open debate and recognized the harms of suppressing political and religious dissent.[70] Consequently, well-intentioned statements were privileged, at least regarding matters of public concern. "[E]very citizen," Pennsylvania judge Thomas McKean explained in 1788, enjoys "a right of investigating the conduct of those who are entrusted with the public business."[71] But that privilege, as renowned New York jurist James Kent observed, only applied when a speaker communicated "with good motives, and for justifiable ends."[72] This common-law rule went beyond the ban on prior restraints by offering a limited right against subsequent punishments,[73] reflecting a belief that vibrant public debate was essential to maintaining an informed citizenry.[74] In these ways, then, Founding Era law was protective of different views.

The basic paradigm of expressive freedom, however, was one of toleration, not neutrality.[75] So long as the government adhered to fundamental common-

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68. SULLIVAN, *supra* note 64, at 39.

69. *Id.* at 38.

70. Concerns about self-dealing and arbitrary rule were core to constitutional thinking during this era. *See* JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 110-18 (1989). Relatedly, writers recognized that government officials were not "infallible" and might act for "short-sighted, and perhaps [self-]interested" reasons. 3 JAMES BURGH, POLITICAL DISQUISITIONS; OR, AN ENQUIRY INTO PUBLIC ERRORS, DEFECTS, AND ABUSES 247 (London, Edward and Charles Dilly 1775); *see also* Campbell, *supra* note 53, at 533-34 (discussing these concerns).

71. Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 325 (Pa. 1788); *see* Campbell, *supra* note 25, at 280-87; ALEXANDER HAMILTON MODERNIZES ANDREW HAMILTON'S DEFENSE OF ZENGER (*PEOPLE V. CROSWELL*, 1804), *reprinted in* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON: EARLY AMERICAN LIBERTARIAN THEORIES 377, 379 (Leonard W. Levy ed., 1966) ("The liberty of the press consisted in publishing with impunity, truth with good motives, and for justifiable ends, whether it related to men or to measures."); Respublica v. Dennie, 4 Yeates 267, 270 (Pa. 1805) ("It is no infraction of the law to publish temperate investigations of the nature and forms of government . . . [but not] those which are plainly accompanied with a *criminal intent* . . . .").

72. People v. Croswell, 3 Johns. Cas. 337, 394 (N.Y. 1804) (Kent, J.). For further discussion of subsequent case law applying this privilege, see *infra* notes 105-118 and accompanying text.

73. *See* Campbell, *supra* note 25, at 280-87 (discussing how Founding Era speech and press freedoms encompassed more than just the rule against prior restraints).

74. This was a staple of Founding Era thought, including among proponents of the Sedition Act. *See id.* at 283-86.

75. To my knowledge, Founding Era debates did not address the validity of wholly incidental restrictions on speech. *Cf.* Michael W. McConnell, *The Origins and Historical Understanding of*

law rules—the ban on prior restraints and the privilege of speaking on matters of public concern—non-neutral restrictions of speech were acceptable when necessary to promote the public good. For instance, sedition laws could and did target only false and malicious attacks on the government and its officials, not statements *supporting* the government or attacks on others.[76] Blasphemy laws could and did target only attacks on Christianity, not pro-Christian messages or attacks on other religions.[77] In addition to being facially discriminatory, these laws were premised on limiting the spread of dangerous ideas.[78]

Of course, not everyone supported sedition and blasphemy laws.[79] But their reasons almost never included an insistence on neutrality. Most critics of the Sedition Act of 1798, for instance, accepted the legality of sedition prosecutions but argued that they had to take place at the state level.[80] That was Thomas Jefferson's position.[81] A much smaller group favored a broader right of toleration, arguing that speech on matters of public concern should receive nearly absolute protection.[82] These arguments presupposed that people have diverse views, that

Free Exercise of Religion, 103 HARV. L. REV. 1409 (1990) (discussing the treatment of incidental restrictions on religious exercise). This Article does not speculate on how the Founders might have addressed that issue. Rather, my point is that they did not embrace a categorical or even presumptive ban on content-based restrictions or on efforts to shape public thought.

76. *See, e.g.*, Sedition Act of 1798, ch. 74, 1 Stat. 596; *see also* Campbell, *supra* note 53, at 530 n.49 (collecting scholarship recognizing the legality of sedition laws). But most Founders opposed earlier aspects of the English law of seditious libel. For an excellent survey, see David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985).

77. *See, e.g.*, Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 405, 409 (Pa. 1824); *cf.* Wesley J. Campbell, *Religious Neutrality in the Early Republic*, 24 REGENT U. L. REV. 311, 337-38 (2012) (noting that early blasphemy cases "reveal a marked preference for an individual liberty conception of religious freedom rather than one based on governmental neutrality"). For longer treatments of blasphemy law, see Note, *Blasphemy and the Original Meaning of the First Amendment*, 135 HARV. L. REV. 689 (2021); Sarah Barringer Gordon, *Blasphemy and the Law of Religious Liberty in Nineteenth-Century America*, 52 AM. Q. 682 (2000); LEONARD W. LEVY, BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE 401-23 (1993); and BLUMBERG, *supra* note 47, at 318-37.

78. *See, e.g.*, People v. Ruggles, 8 Johns. 290, 297-98 (N.Y. 1811).

79. *See* BLUMBERG, *supra* note 47, at 322 (noting "isolated and ineffective dissent" against blasphemy laws).

80. *See* Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109, 129-35.

81. *See* Michael P. Downey, Note, *The Jeffersonian Myth in Supreme Court Sedition Jurisprudence*, 76 WASH. U. L.Q. 683, 694-99 (1998).

82. *See, e.g.*, TUNIS WORTMAN, A TREATISE CONCERNING POLITICAL ENQUIRY AND THE LIBERTY OF THE PRESS 150 (The Lawbook Exch., Ltd. 2003) (1800) ("The reasoning of the present work will be exclusively confined to a consideration of the effects of Misrepresentations in public or

citizens enjoyed a right to state their opinions, and that the government should act only in the public interest, without deliberate self-dealing.[83] None of these arguments, however, embraced neutrality.

But a few people did. Some insisted that the government should have no authority to regulate opinions—including their dissemination.[84] Everyone generally agreed that the government could not punish people for what they believed and that changing the way people thought was not a valid end of government.[85] For some advocates, however, categorical limits on the means and ends of governmental authority extended beyond internal matters of belief. Instead, the entire field of opinion was wholly beyond state authority, except to protect against direct violations of the rights of others.[86] A "perfect neutrality" among

political transactions."); ST. GEORGE TUCKER, *View of the Constitution of the United States*, *in* VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 91, 236 (Liberty Fund, Inc. 1999) (denying that "the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it"); GEORGE HAY, AN ESSAY ON THE LIBERTY OF THE PRESS, SHEWING, THAT THE REQUISITION OF SECURITY FOR GOOD BEHAVIOR FROM LIBELLERS, IS PERFECTLY COMPATIBLE WITH THE CONSTITUTION AND LAWS OF VIRGINIA 7, 26-28 (Richmond, Samuel Pleasants, Jr. 1803) (speech on "matters of public concern" should not trigger criminal liability); *see also* HORTENSIUS [GEORGE HAY], AN ESSAY ON THE LIBERTY OF THE PRESS RESPECTFULLY INSCRIBED TO THE REPUBLICAN PRINTERS THROUGHOUT THE UNITED STATES (Philadelphia, Aurora Office 1799).

83. *See, e.g.*, JOHN THOMSON, AN ENQUIRY, CONCERNING THE LIBERTY, AND LICENTIOUSNESS OF THE PRESS, AND THE UNCONTROULABLE NATURE OF THE HUMAN MIND 20 (New York, Johnson & Stryker 1801) ("[Expressive freedom presupposes that] a great variety of opposite opinions must occur. It also presupposes that the *people* would pass their judgment upon the proceedings of Congress."). On political-entrenchment concerns, see Campbell, *supra* note 53, at 547, 555-56, 561. Notably, these premises about expressive freedom were not in dispute. *See* Campbell, *supra* note 25, at 284-86; Campbell, *supra* note 53, at 552-54. But Republicans accurately recognized that Federalists used the Sedition Act to punish constitutionally privileged statements. *See* Campbell, *supra* note 25, at 283-84.

84. The chief expositor of this view was the Welsh philosopher Richard Price. *See* RICHARD PRICE, OBSERVATIONS ON THE IMPORTANCE OF THE AMERICAN REVOLUTION, AND THE MEANS OF MAKING IT A BENEFIT TO THE WORLD 23-24 (London, 1784). Virginia jurist St. George Tucker later repeated Price's argument. *See* TUCKER, *supra* note 82, at 376-77; *see also* DEBATES IN THE HOUSE OF DELEGATES OF VIRGINIA, IN DECEMBER, 1798, ON RESOLUTIONS BEFORE THE HOUSE ON THE ACTS OF CONGRESS, CALLED THE ALIEN AND SEDITION LAWS 7 (Richmond, Collins & Co. 1829) (remarks of John Taylor) ("The right of opinion . . . should be held sacred. . . . [The Creator] deemed it a sacrilege for Government to undertake to regulate the mind of man. It was a subject by no means within its powers.").

85. *See supra* notes 57-59, 63-64; *see also* TUCKER, *supra* note 82, at 371-72 (advocating for an absolute "right of personal opinion . . . in all speculative matters, whether religious, philosophical, or political").

86. *See* PRICE, *supra* note 84, at 23-24, 46; TUCKER, *supra* note 82, at 375-77.

ideas was preferable, Richard Price wrote, with government "aim[ing] at nothing but keeping the peace . . . ."[87]

Reasoning along these lines had some influence in Founding Era debates about governmental power to promote religion.[88] But categorical denials of state power over expression were vanishingly rare.[89] Nor should this be surprising. The jurisdictional separation of civil and religious affairs that grounded liberal views of religious freedoms reinforced the government's role in advancing public morality through *non*-religious means.[90] Moreover, neutrality actually ran directly *against* the more prevalent strand of liberal thought. On this view, speech-restrictive regulations were allowed, but the government should avoid using broad and overinclusive prohibitions and instead punish only those communicative acts that were socially harmful.[91] In the late 1780s, for example, Pennsylvanians argued that public morals should be preserved through targeted suppression of immoral plays rather than by banning all theater performances. "To regulate the theatre – every thing that has an immoral tendency should be prohibited," one writer insisted, noting that "every exceptionable play, now extant, should be altered, or rejected, and none but those that have the good of mankind for their object, should be acted."[92] The modern focus on content and viewpoint

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87. PRICE, *supra* note 84, at 24. Additionally, in some contexts the term "free press" referred to a norm that printers publish materials reflecting different views. This norm was akin to a common-carrier obligation. *See* ROBERT W. T. MARTIN, THE FREE AND OPEN PRESS: THE FOUNDING OF AMERICAN DEMOCRATIC PRESS LIBERTY, 1640-1800, at 3 (2001).

88. *See* Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295, 339; Jack N. Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245, 259-60 (1990).

89. *See* Campbell, *supra* note 53, at 530-31 (noting the wide acceptance of carefully circumscribed bans on seditious libel, even among more liberal writers). What is often called the "libertarian" strand of Founding Era thought focused on a broad reading of the right to discuss public affairs, not a right against any content-based or viewpoint-based restrictions of expression. *See supra* note 79. For an astute study of how these republican ideas informed Founding Era views about seditious libel, see Rabban, *supra* note 76.

90. *See* WEST, *supra* note 59, at 207; Hamburger, *supra* note 88, at 312.

91. Canonical defenses of speech and press freedoms insisted on curtailing only harmful expression and opposed categorically banning all unlicensed publishing or all speech on public affairs. *See* Thomas Gordon, *Of Freedom of Speech: That the Same Is Inseparable from Publick Liberty* (1720), *reprinted in* 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS: OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 110, 110-11 (Ronald Hamowy ed., 1995); THOMAS HAYTER, AN ESSAY ON THE LIBERTY OF THE PRESS CHIEFLY AS IT RESPECTS PERSONAL SLANDER 18 (London, J. Raymond 2d ed. 1755); *see also* Eric Nelson, *"True Liberty": Isocrates and Milton's Areopagitica*, 40 MILTON STUD. 201, 211-12 (2001) (noting the same feature of John Milton's attack on prior restraints).

92. *Arguments in Favour of the Drama, Letter from a Gentleman in Lancaster, to His Friend in This City*, PA. PACKET & DAILY ADVERTISER, Feb. 10, 1789, at 2.

neutrality, by contrast, flips this approach. Today, laws targeting harmful views are *more* suspect.[93]

B. The Next Century

At least in its basic outlines, the law of expressive freedom remained stable throughout the nineteenth century.[94] As was true at the Founding, expressive freedom entailed specific common-law rules—particularly the rule against prior restraints and the privilege of speaking in good faith on public matters—along with the general natural-rights principle that the government could act only to promote the common good. Neutrality was still missing from the discussion. If anything, the regulability of socially harmful speech became more engrained in the nineteenth century.[95]

At the federal level, controversies in the Antebellum period about the law of expressive freedom focused on whether Congress had *any* power to restrict expression. The most prominent episode, for instance, involved a proposal to suppress abolitionist literature by prohibiting access to the federal mails. Some thought that this limit was within congressional power.[96] Others thought that the First Amendment categorically withdrew *all* federal power over speech.[97] An intermediate group advocated federal reliance on state law to determine which

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93. *See supra* note 8 and accompanying text.

94. This claim is not meant to deny diversity at particular times, or shifts across time, respecting the specifics of doctrine. *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 627 (1990) (noting "many local and chronological variations"). *See generally* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 567-80 (2006) (discussing diversity within the common law tradition). In my view, however, there is no evidence of a conceptual shift toward a more "libertarian" approach to speech and press rights by the mid-nineteenth century. *But see* Kurt T. Lash, *Two Movements of a Constitutional Symphony: Akhil Reed Amar's* The Bill of Rights, 33 U. RICH. L. REV. 485, 492 (1999); Kurt T. Lash, *Beyond Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 447, 449, 466-67 (2009).

95. *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 152-55 (1996); GEOFFREY R. STONE, SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY 154-68 (2017).

96. *See* Clement Eaton, *Censorship of the Southern Mails*, 48 AM. HIST. REV. 266, 270 (1943).

97. *See, e.g.*, Richard R. John, *Hiland Hall's "Report on Incendiary Publications": A Forgotten Nineteenth Century Defense of the Freedom of the Press*, 41 AM. J. LEGAL HIST. 94, 102 (1997) ("Unlike modern libertarians, Hall freely conceded that the individual states retained a broad measure of authority to censor publications that they deemed injurious. While such a concession might seem strange today, it was taken-for-granted in the early republic that powers prohibited to the federal government might well be reserved to the states.").

publications could be suppressed.[98] None of these positions centered around neutrality.[99]

At the state level, debates in this period also did not turn on neutrality. When Southern states *egregiously* suppressed abolitionist advocacy,[100] for instance, Republicans responded by defending the inviolability of "freedom of speech and of the press, on this and every other subject of domestic and national policy. . . ."[101] Yet it was hardly an innovation to say that Americans should not be punished simply for speaking in good faith about public affairs. The proponents of the Sedition Act had agreed with that proposition.[102] Republicans were protesting Southern noncompliance with widely accepted rights.

Traditional views of speech and press freedoms remained in place after the Civil War, too. The rule against prior restraints continued to ensure that the people themselves, through legislatures and juries, would mark the limits of expressive freedom.[103] And although less noticed by scholars,[104] the privilege of speaking and publishing on matters of public concern continued to provide a bounded

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98. *See* 12 REG. DEB. app. at 74 (1836).

99. An essay by William Leggett seems to provide the closest case of support for a neutrality principle. *See* William Leggett, *The Abolitionists*, EVENING POST, Aug. 8, 1835, *reprinted in* 2 A COLLECTION OF THE POLITICAL WRITINGS OF WILLIAM LEGGETT, SELECTED AND ARRANGED, WITH A PREFACE BY THEODORE SEDGWICK, JR. 10-11 (Charles Gregg ed., Arno Press 1970) (1840) ("If the Government once begins to discriminate as to what is orthodox and what is heterodox in opinion, what is safe and what is unsafe in its tendency, farewell, a long farewell to our freedom."). Early postal laws were non-neutral in important respects, *see* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2309-16 (2021), but federal law barred the Postmaster from discriminating, *see* Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671, 711-12, 716 (2006). The Supreme Court later upheld Post Office authority "to refuse its facilities for the distribution of matter deemed injurious to the public morals." *Ex parte* Jackson, 96 U.S. 727, 736 (1877).

100. *See* CURTIS, *supra* note 14, at 132.

101. CONG. GLOBE, 36th Cong., 1st Sess. 2321 (1860) (proposal of Sen. James Harlan); *see also, e.g.*, CONG. GLOBE, 36th Cong., 1st Sess., app. at 205 (1860) (remarks of Rep. Owen Lovejoy) (discussing Southern violations of expressive freedom). Moreover, evidence indicates that the Fourteenth Amendment was designed in part to provide federal protection for speech and press freedoms. *See* AMAR, *supra* note 53, at 137-294; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS, 42-71, 91, 129-30 (1986); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 155-61, 204-10 (2014).

102. *See* Campbell, *supra* note 25, at 283.

103. This understanding of expressive freedom is highlighted in cases denying judicial power to enjoin speech. *See, e.g.*, People v. Most, 64 N.E. 175, 178 (N.Y. 1902); Flint v. Hutchinson Smoke-Burner Co., 19 S.W. 804, 806 (Mo. 1892); Dailey v. Superior Ct., 44 P. 458, 459 (Cal. 1896).

104. *See* Rabban, *supra* note 15, at 562-72.

right of toleration.[105] As one treatise put it, "[e]very person has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose."[106] This was, as one court noted, "the universal rule."[107] It applied both in civil and criminal cases.[108] And although jurists sometimes disagreed about the scope of the privilege, they widely recognized its existence and constitutional status.[109]

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105. *See, e.g.*, *Ex parte* Curtis, 106 U.S. 371, 377 (1882) (Bradley, J., dissenting); Winston v. English, 44 How. Pr. 398, 409-10 (N.Y. Sup. Ct. 1873); Gilman v. McClatchy, 44 P. 241, 243 (Cal. 1896); Miner v. Post & Tribune Co., 13 N.W. 773, 775 (Mich. 1882); Diener v. Star-Chronicle Pub. Co., 132 S.W. 1143, 1148-49 (Mo. 1910); Cooper v. People *ex rel.* Wyatt, 22 P. 790, 797-98 (Colo. 1889) (opinion of Hayt, J.). *See generally* ERNST FREUND, THE POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS §§ 471-479 (1904) (analyzing speech and press freedoms). To be sure, there were suggestions that constitutional protections for expressive freedom were limited to the rule against prior restraints. *See, e.g.*, Patterson v. Colorado *ex rel.* Att'y Gen. of Colo., 205 U.S. 454, 462 (1907); *see also* Thomas Raeburn White, *Constitutional Provisions Guaranteeing Freedom of the Press in Pennsylvania*, 52 AM. L. REG. 1, 6 (1904) (noting, though rejecting, the argument that the rule against prior restraints was the only constitutionally recognized common-law protection for expressive freedom).

106. MARTIN L. NEWELL & MASON H. NEWELL, THE LAW OF SLANDER AND LIBEL IN CIVIL AND CRIMINAL CASES 516 (4th ed. 1924).

107. *Diener*, 132 S.W. at 1149.

108. For civil cases, see cases cited *supra* note 105. For criminal cases, see, for example, State v. McKee, 46 A. 409, 413 (Conn. 1900); State v. Fish, 102 A. 378, 378 (N.J. 1917); State *ex rel.* Haskell v. Faulds, 42 P. 285, 287-88 (Mont. 1895); and Commonwealth v. Brown, 1 Pa. D. 565, 568 (Ct. of the Quarter Sessions of the Peace 1892). An honest purpose was generally required in criminal cases, but the truth was usually a complete defense in tort cases. *See* Marc A. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 790-805 (1964). Crucially, however, the rule that truthful statements do not give rise to civil liability was not premised on the rights of *speakers*. Rather, it was formulated because the rights of *plaintiffs* were not abridged by truthful statements. *See, e.g.*, Alderman v. French, 18 Mass. (1 Pick.) 1, 2-3 (1822); BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN; WITH A COMMENTARY ON STATE RIGHTS, AND ON THE CONSTITUTION AND POLICY OF THE UNITED STATES 253 (Books for Libraries Press 1970) (1832); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 15, 21 (Da Capo Press 1971) (1827).

109. *See supra* notes 105-108; *infra* notes 113-118. For judicial decisions from the Antebellum period, see BLUMBERG, *supra* note 47, at 341-49, though readers should note that Blumberg mistakenly treats speech and press freedoms as limited to the rule against prior restraints, without also emphasizing the privilege of speaking in good faith on matters of public concern. For later judicial decisions, see RABBAN, *supra* note 14, at 129-76. For a recent study of the truth defense in the nineteenth century, see Sandra Davidson, *The Rocky Road to Truth as a Defense: Libel Construction in the Nineteenth Century*, *in* AN INDISPENSABLE LIBERTY: THE FIGHT FOR FREE SPEECH IN NINETEENTH-CENTURY AMERICA 135-60 (Mary M. Cronin ed., 2016), though readers should note that Davidson does not recognize the important distinction between using truth to undermine a *plaintiff's* claim of reputational injury and using truth to further a *defendant's* assertion of constitutional privilege. *See supra* note 108.

Delineating what counted as a matter of public concern was not easy.[110] One leading treatise defined matters of public concern as "[a]ll political, legal, and ecclesiastical matters."[111] But this was just a crude summary. For instance, discussion of grand-jury proceedings (certainly a "legal" matter) was not included, but the privilege did extend to criticisms of art, literature, and theater performances, regardless of any political, legal, or ecclesiastical content.[112] Judges mostly located the boundaries of the category by looking to the common law. This entailed heavy reliance on earlier decisions,[113] as well as reference to the underlying rationales of speech and press freedoms when the existing case law was unclear.[114] But judges sometimes made *ipse dixit* declarations about what matters were suitable for public discussion, or they deferred to legislative judgments.[115]

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110. This Article makes no claim about the uniformity, stability, or coherence of this category. *See supra* note 94. My goal is simply to recover the basic outlines of how American jurists viewed the law of expressive freedom.

111. *See* W. BLAKE ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER; WITH THE EVIDENCE, PROCEDURE, AND PRACTICE, BOTH IN CIVIL AND CRIMINAL CASES, AND PRECEDENTS OF PLEADINGS 40 (Boston, Little, Brown & Co. 1881); *see also* D. M. Mickey, *Libel*, *in* 13 THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW 329 (Northport, Edward Thompson Co. 1890) (repeating this phrase). Doctrine often treated "comment[ing] on matters of public interest" as distinct from making statements of fact. *See* ODGERS, *supra*, at 32-33. For a concise summary, see David A. Logan, *Tort Law and the Central Meaning of the First Amendment*, 51 U. PITT. L. REV. 493, 501-04 (1990).

112. *See* ODGERS, *supra* note 111, at 41; THOMAS MCINTYRE COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 561-63 (Boston, Little, Brown & Co. 5th ed. 1883). For discussion of the changes made in Cooley's fifth edition, see NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 181-82 (1986).

113. Reflecting its general-law status, contemporary treatises typically cited English and American cases to delineate this category. *See, e.g.*, NEWELL, *supra* note 106, at 643-724. Most cases related to civil defamation suits, but the constitutional dimension of the freedom of speech was well recognized in criminal cases as well. *See, e.g.*, State v. Boyd, 91 A. 586, 587-88 (N.J. 1914); State v. Fox, 127 P. 1111, 1112 (Wash. 1912); People v. Most, 64 N.E. 175, 178 (N.Y. 1902).

114. *See, e.g.*, Briggs v. Garrett, 2 A. 513, 523 (Pa. 1886). Historical and purposive reasoning was also used to construe the rule against prior restraints. *See, e.g.*, Cowan v. Fairbrother, 24 S.E. 212, 215 (N.C. 1896); Howell v. Bee Pub. Co., 158 N.W. 358, 359 (Neb. 1916). Notably, what we would now identify as purposive arguments tended to be more circumscribed. *See* Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 997-99 (2021) (comparing and contrasting the traditional "mischief rule" with modern purposivism).

115. *See, e.g.*, State v. Pioneer Press Co., 110 N.W. 867, 868-69 (Minn. 1907) ("[I]f, in the opinion of the Legislature, it is detrimental to public morals to publish anything more than the mere fact that the execution has taken place, then, under the authorities and upon principle, the appellant was not deprived of any constitutional right in being so limited."). Sometimes, however, courts mentioned that legislative judgments were constrained by "the standard of the common law." *Most*, 64 N.E. at 178.

The intent requirement further underscores the non-neutral limits on speech and press freedoms. Speech on matters of public concern was privileged, but such speech could not be aimed at undermining the public good.[116] And the values used to make that assessment were *societal* values, not ones determined by the speaker.[117] Thus, as Robert Post observes, the privilege "carried within it a strong normative sense of the proper spirit in which public discussion should be conducted."[118] Speech and press freedoms were protective of different views on matters of public concern, but they did not demand viewpoint neutrality in the modern sense of disallowing speech restrictions designed to promote public morality or otherwise shape the way that people think. The privilege guaranteed toleration within socially defined bounds, not neutrality.

From a modern perspective, it may seem puzzling that the procedural and substantive dimensions of the law of expressive freedom were specified mostly by the common law. Today, common-law decisions are generally treated as ordinary law, not as constitutional law. Indeed, a leading critique of *Lochner*-era jurisprudence is that the Supreme Court erred by conflating common-law rights and constitutional rights.[119] Moreover, today, we usually think of the common law as decisional law that varies from state to state.[120] But these are modern ideas that emerged later in the twentieth century. For much of American history, jurists understood the common law as a variant of general law and viewed many

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116. *See, e.g.*, Riley v. Lee, 11 S.W. 713, 714 (Ky. 1889) (requiring "good motive"); *Briggs*, 2 A. at 521 (Pa. 1886) (requiring "proper motive"); *see also* Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366, 1389 (2016) ("[T]he good intentions were seen as the exculpating element, and truth was an evidence of those intentions.").

117. *See, e.g.*, State v. Van Wye, 37 S.W. 938, 939 (Mo. 1896) ("In a government of law, the lawmaking power must be recognized as the proper authority to define the boundary line between license and licentiousness; and it must likewise remain the province of the jury—the constitutional triers of the fact—to determine when that boundary has been passed." (quotations omitted)).

118. Robert C. Post, *Defaming Public Officials: On Doctrine and Legal History*, 12 AM. BAR FOUND. RSCH. J. 539, 552 (1987) (reviewing ROSENBERG, *supra* note 112); *see also* Post, *supra* note 94, at 627-29 (discussing the connection between the privilege and civility norms); Lindsay Rogers, *Federal Interference with the Freedom of the Press*, 23 YALE L.J. 559, 574 (1914) (same). Some commentators recognized the need for greater subtlety in defining malicious intent in order to preserve vibrant public discourse, but even these more liberal interpretations of the privilege did not extend to expression undertaken with criminal intent. *See, e.g.*, FREUND, *supra* note 105, § 476.

119. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 165-66 (1996) (Souter, J., dissenting); Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 874-75 (1987).

120. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). For an introduction to general law, see Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1261-65 (2017).

(but not all) common-law rules as fundamental in status.[121] These were, as one court put it, "general principle[s] . . . of universal application in all free governments."[122]

Finally, the government could restrict expression only to promote the public good. But in contrast to courts' enforcement of common-law protections, they rarely struck down legislation as not advancing the public good.[123] Speech and press freedoms did not prevent the government from restricting expression in new ways.[124] Nor was neutrality required. "[T]here is no doubt," Ernst Freund noted in his treatise, "that speech and press may not be used to corrupt public morals, and obscene or profane utterances by word of mouth, in writing or in print may be made punishable offenses."[125] As we will see, however, courts were becoming more active in other contexts, enforcing limits on legislative power.

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121. *See* Gienapp, *supra* note 50, at 340-42; Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681, 805-07 (1997). Notably, all Supreme Court Justices in the late nineteenth century shared this understanding of general fundamental rights, despite disagreeing about the Fourteenth Amendment's Privileges or Immunities Clause. *See* Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. ILL. L. REV. 1433, 1443-46.

122. Rich v. Flanders, 39 N.H. 304, 335 (1859) (Sargent, J.). On this view, speech and press freedoms had the same meaning under state and federal constitutional guarantees. *See, e.g.*, State *ex rel.* Liversey v. Judge of Civil Dist. Ct., 34 La. Ann. 741, 743 (1882); FREUND, *supra* note 105, at § 471; WILLIAM G. HALE, THE LAW OF THE PRESS: TEXT, STATUTES, AND CASES 273 (1923); *see also* G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 62 (2005) ("Both sets of rights were given comparable solicitude . . . .").

123. An illustration is "service letter" laws, which required employers to provide terminated employees with a written explanation for their termination. *See* Note, *The Service Letter Laws*, 36 HARV. L. REV. 195, 196-97 (1922). Some courts declared these laws unconstitutional on free speech grounds because, in their view, the laws did not advance a public interest. *See, e.g.*, Wallace v. Georgia, C. & N. Ry. Co., 22 S.E. 579, 579-80 (Ga. 1894); Atchison, Topeka & Santa Fe Ry. Co. v. Brown, 102 P. 459, 460-61 (Kan. 1909); St. Louis Sw. Ry. Co. v. Griffin, 171 S.W. 703, 705 (Tex. 1914). Other courts, however, upheld these statutes because of legislative leeway to restrict speech to promote the public good. *See, e.g.*, St. Louis Sw. Ry. Co. v. Griffin, 154 S.W. 583, 586 (Tex. Civ. App. 1913), *rev'd*, 171 S.W. 703 (Tex. 1914); Chi., Rock Island & P. Ry. Co. v. Perry, 259 U.S. 548, 555 (1922). For another example of speech-restrictive legislation struck down using general police-powers analysis, see *Ex parte* Kearny, 55 Cal. 212, 225 (1880).

124. *See* State v. McKee, 46 A. 409, 411 (Conn. 1900).

125. FREUND, *supra* note 105, at § 472; *see also, e.g.*, Robertson v. Baldwin, 165 U.S. 275, 281 (1897) ("publications injurious to public morals"); State v. McKee, 46 A. 409, 414 (Conn. 1900) ("contagion of moral diseases"); JAMES PATERSON, THE LIBERTY OF THE PRESS, SPEECH, AND PUBLIC WORSHIP: BEING COMMENTARIES ON THE LIBERTY OF THE SUBJECT AND THE LAWS OF ENGLAND 5 (London, Macmillan & Co. 1880) ("[A]nother limit to free speech and writing is Immorality.").

C. Enforcing Natural Rights

From the Founding through the beginning of the twentieth century, it was axiomatic that the government could only act to promote the public good. On this view, the government could regulate rights to advance genuine public aims, but it could not "subvert the rights themselves" by restricting them without a public end in view.[126] Despite agreement on this point, virulent debates raged over whether and how judges should enforce this principle.[127] Some commentators denied that judges had any such power,[128] but others insisted that judges should recognize the invalidity of legislative acts that aimed to promote private interests at the expense of the general welfare.[129]

For the nation's first century, courts did not view general limits on state police powers as questions of federal law.[130] But toward the end of the nineteenth century, the Supreme Court shifted course. Rights "must be exercised subject to such general rules as are adopted by society for the common welfare," the Court explained in one of the mid-1880s challenges to San Francisco's discriminatory

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126. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 114 (1873) (Bradley, J., dissenting); *see also* Campbell, *supra* note 25, at 275 (discussing the distinction between regulating and abridging rights). Justice Bradley was in dissent in the *Slaughter-House Cases*, but he captured a common premise of American constitutionalism that the majority also embraced, although not as federal constitutional law. *See* Campbell, *supra* note 121, at 1444-47.

127. The classic citation is *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798), in which Justices Chase and Iredell debated whether judges could enforce "the great first principles of the social compact," as Chase put it. For an important clarification about the scope of Chase's argument, see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 42-43 (2004).

128. For discussion and sources recognizing limits to this ends-means analysis, see HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 62-63 (1897). Some took an extremely narrow view of the ends-means test. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("The adjudged cases in which statutes have been held to be void, because unreasonable, are those in which the means employed by the legislature were not at all germane to the end to which the legislature was competent.").

129. For perhaps the most famous exposition of this view in the context of property rights, see THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 354-58 (Boston, Little, Brown & Co. 7th ed. 1906) (1871).

130. *See Slaughter-House Cases*, 83 U.S. 36. The scope of the police powers did sometimes come up in cases involving, for instance, state power to regulate commerce and contracts. *See* Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 837-52 (2020). Courts also enforced limitations arising out of principles of general fundamental law in diversity cases. *See* Michael G. Collins, *Before* Lochner *— Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1288 (2000).

laundry regulations.[131] The thrust of these decisions was that legislatures had to consider everyone's interests impartially, without favoring some classes of persons over others. Equality was essential. But this principle did not rigidly restrict state power.[132] The liberty being protected, the Court explained, was "liberty regulated by just and impartial laws."[133]

Not surprisingly, a public-good requirement proved difficult to administer. In *Soon Hing v. Crowley*, for example, the challengers insisted that an ordinance was grounded on "antipathy and hatred" toward Chinese immigrants.[134] As a theoretical matter, such discrimination was patently unlawful. Writing for the majority, however, Justice Field responded that "courts cannot inquire into the motives of the legislators in passing [statutes], except as they may be disclosed on the face of the acts, or infer[a]ble from their operation."[135] Legislatures had to pursue valid public objectives, but judges could not directly enforce this rule. "The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile," Field explained.[136] Instead, the invidious or arbitrary character of legislation needed to be evident through its design or operation.[137]

In the decades that followed, the Supreme Court struggled simultaneously to enforce the public-good requirement and to maintain formalist modes of legal analysis. In case after case, the Court recognized state authority to regulate liberty and property to advance the general welfare.[138] And it noted that assessing

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131. Soon Hing v. Crowley, 113 U.S. 703, 709 (1885). The quotation referred to the "right of work," but the point applied to other natural rights. *See infra* note 138. For background, see David E. Bernstein, Lochner, *Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 232-41 (1999).

132. The Court was not suggesting that all laws had to operate with perfect formal equality. *See* Barbier v. Connolly, 113 U.S 27, 31-32 (1885).

133. *Soon Hing*, 113 U.S. at 709.

134. *Id.* at 710.

135. *Id.*

136. *Id.* at 711.

137. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 372-74 (1886). *See generally* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1812-35 (2008) (surveying judicial inquiries into legislative purpose from 1870 to 1930).

138. *See, e.g.*, Crowley v. Christensen, 137 U.S. 86, 89 (1890); Lochner v. New York, 198 U.S. 45, 53 (1905). The Court also articulated a principle of deference to state-court judgments regarding "whether [legislation] is well calculated to promote the general and public welfare . . . ." Welch v. Swasey, 214 U.S. 91, 105 (1909). For surveys of these cases, see HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE & DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 19-61 (1995); and 2 G. EDWARD WHITE, LAW IN AMERICAN HISTORY: FROM RECONSTRUCTION THROUGH THE 1920S, at 349-548 (1st ed. 2016).

the public good was quintessentially a legislative task—not a judicial one.[139] Nonetheless, as Justice Harlan observed in *Mugler v. Kansas*, judges had a role in ensuring that legislative claims to promote the public good were not "mere pretences."[140] The path forward, he proposed, was for judges to ensure that the legislation was "fairly adapted" to a legitimate end.[141]

Using this ends-means test, the Justices sporadically invalidated statutes. The most famous example, of course, was *Lochner v. New York*, which overturned a state law limiting the working hours of bakers.[142] Generally, however, the Court took a deferential approach to reviewing statutes.[143] The stated goal of the ends-means test was to ensure that legislatures had acted within the scope of their powers—not to reevaluate their judgments.[144] Nor did the test purport to limit the range of public-regarding interests that the government could pursue.[145]

In addition to an ends-means test, judges also identified categories of laws that were deemed not to promote the public interest. These decisions usually relied on common-law traditions or *ipse dixit* statements about the boundaries of governmental power.[146] When holding that state and local governments must

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139. *See, e.g.*, Munn v. Illinois, 94 U.S. 113, 134 (1877); Mugler v. Kansas, 123 U.S. 623, 661 (1887).

140. 123 U.S. at 661.

141. *Id.* at 662.

142. 198 U.S. 45. Another famous example was *Meyer v. Nebraska*, which held that a statute requiring children to be taught in English "is arbitrary and without reasonable relation to any end within the competency of the State." 262 U.S. 390, 403 (1923).

143. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, at 102-04 (1990); *see also* MICHAEL J. PHILLIPS, THE *LOCHNER* COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S, at 31-62 (2001) (arguing that the Court's substantive due-process jurisprudence during the *Lochner* era was more deferential than is conventionally assumed). Judicial invalidations of statutes escalated in the 1920s. *See* Victoria F. Nourse, *A Tale of Two* Lochner*s: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 772 (2009).

144. *See* William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of* Mahon, 86 GEO. L.J. 813, 835 (1998) ("These police power cases thus turned on the use of a formalist, categorical rule: if the end were to promote health, safety, or morality and if the means were suited to the end, the statute was valid."); *see also* Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RSCH. L. & SOCIO. 3, 6-8 (1980) (explaining how this approach was grounded in classical legal thought); Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 23-36 (1991) (same).

145. To be sure, questions remained over what sorts of aims promoted the public interest. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1, 17-18 (1915) (stating that "removal of . . . inequalities" cannot be an end in and of itself "without [some] other object in view"); *see also* Siegel, *supra* note 144, at 8-12 (discussing debates over paternalism).

146. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-36 (1925).

compensate property owners for takings, for instance, the Court emphasized the fundamentality of that principle at common law.[147] In another line of cases, the Court limited the ability of governments to regulate businesses not "affected" or "clothed" with a public interest.[148] Such efforts to classify "public" and "private" realms were common at that time.[149]

To summarize, *Lochner*-era Fourteenth Amendment decisions featured a general ends-means test alongside a set of more specific categorical rules circumscribing legislative power. In this way, Fourteenth Amendment doctrine paralleled the law of expressive freedom, which recognized an overarching public-good requirement alongside specific rules that banned prior restraints and that privileged well-intentioned speech on matters of public concern. For the time being, natural rights and common-law rights were still the twin pillars of fundamental-rights jurisprudence.

II. A CHANGING LEGAL LANDSCAPE

As the *Lochner* era continued, profound changes were taking shape in attitudes about law. "Legal realism" was emerging.[150] But studies of First Amendment law usually omit these jurisprudential developments. Instead, they typically describe the flowering of expressive freedom as a story of Whiggish progress: the seeds of contemporary doctrine were planted in the famous dissents of Justice Holmes and Justice Brandeis, they began to germinate in the

147. *See* Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 235-36 (1897); *see also* Treanor, *supra* note 144, at 832 (recognizing the anachronism of describing this decision in terms of "incorporation").

148. For one of the leading cases in this series, see *Tyson & Brother v. Banton*, 273 U.S. 418, 431 (1927). For a discussion of this category, emphasizing how businesses affected with a public interest could still be regulated by law, see generally William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 139, 139-76 (Naomi R. Lamoreaux & William J. Novak eds., 2017). The Court retreated from this view in *Nebbia v. New York*, stating that "[i]t is clear that there is no closed class or category of businesses affected with a public interest . . . ." 291 U.S. 502, 536 (1934).

149. *See* Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 477-95 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986)).

150. Given the different meanings of "realism," this Article generally avoids that label and instead uses the term "functionalism." For uses of the term "realism" to describe changes in the *internal* perspective, see, for example, LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 13-14 (1996); and William E. Nelson, Brown v. Board of Education *and the Jurisprudence of Legal Realism*, 48 ST. LOUIS U. L.J. 795, 799 & n.36 (2004).

1930s, and—except for a temporary withering in the 1950s—they steadily ascended into their natural form. And how could it have been otherwise? The very essence of expressive freedom, the thinking goes, is neutrality.[151]

This traditional narrative is a myth. Content and viewpoint neutrality were not there from the start. Ideas that *resembled* these concepts were present, so tracing a superficial chain of title back to the beginning is not hard to do. Some notions of equality were there. But deceptive resemblances can obscure our ability to understand the past. Modern principles, it turns out, emerged only after several decades of doctrinal twists and turns.

Jurisprudential shifts were crucial to this story and need to be brought to the fore, focusing particularly on how jurists revised and blended the natural-rights and common-law-rights traditions. In short, rights jurisprudence and the "law of interpretation" were both changing.[152] This Part begins with a summary of these broader developments, which will then enable us to see that Justice Holmes, Justice Brandeis, and their intellectual heirs did not construct First Amendment doctrine from scratch. Their innovations were transformative, but more through a process of reinterpretation than wholesale invention.[153] And once early developments are understood in this way, the absence of neutrality becomes even clearer.

A. The Fall of Natural Rights

The new jurisprudential turn toward functionalism responded to perceived flaws in what scholars often call "classical legal thought."[154] When Justice

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151. A particularly stark example is Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 26 (1975) ("Although the principle of equal liberty of expression is inherent in the [F]irst [A]mendment, it has only recently received full and explicit articulation in an opinion of the Supreme Court.").

152. *See generally* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082 (2017) ("Interpretation isn't just a matter of language; it's also governed by law. This 'law of interpretation' determines what a particular instrument 'means' in our legal system.").

153. *Cf.* White, *supra* note 14, at 326 ("The categorist dimensions of Brandeis's methodology in *Whitney* suggest that he intended to turn late nineteenth-century orthodox jurisprudence on its head.").

154. For summaries of classical legal thought, see J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 388-93; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 9-31 (1992); and WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937, at 64-123 (1998). The shift from classical thought to realism did not represent a clean break. *See* BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST

Holmes famously insisted that law "cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics,"[155] his critique was aimed at a way of thinking about law that purported to be more logical and deductive than he thought feasible or desirable. As Laura Kalman explains, critics like Holmes believed it was fallacious to view law "as a system of neutral rules that judges mechanically applied to reach the one legally 'correct' decision."[156] Instead, these critics advanced a new interpretive paradigm that championed the judge's responsibility to construe legal rules in light of their social functions.

The foundational work in this tradition was future-Justice Oliver Wendell Holmes Jr.'s *The Path of the Law*. "[A] body of law," he explained, "is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words."[157] Holmes was not saying that traditions should be ignored. Indeed, he was a positivist who thought that earlier decisions were constitutive of the law. But law was not an end in itself. Instead, it was a means to achieving social goals. Inherited legal traditions, Holmes argued, should thus be understood with a "conscious articulate reference to the end in view."[158]

This functional turn in legal interpretation—sometimes described in terms of the rise of "Progressive Jurisprudence"[159]—had profound implications for constitutional law. Most importantly, the functionalists argued for doctrinal evolution, and they embraced a limited form of judicial agency in that "living" process.[160] The "living problems in our own land and law," Benjamin Cardozo argued, required a "method of free decision" in constitutional law that would

DIVIDE: THE ROLE OF POLITICS IN JUDGING 67-69 (2010) (emphasizing realism's continuity with the past). But threads of continuity do not disprove that legal thought changed substantially. *See* Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 753 n.18 (2013).

155. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (Mark DeWolfe Howe ed., 1963) (1881); *see also* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 620-23 (1908) (critiquing the formalism of classical jurisprudence).

156. KALMAN, *supra* note 150, at 16. *See generally* BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998) (examining the work of legal realist Robert Hale and progressive critiques of laissez-faire constitutionalism and neoclassical law and economics).

157. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

158. *Id.*

159. Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 497-500 (1996).

160. *See* Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 191-92 (1997). The emphasis on "evolution" coincided with broader intellectual developments. *See, e.g.*, Theodore Schroeder, *The Historical Interpretation of "Freedom of Speech and of the*

enable the "great generalities of the constitution [to] have a content and a significance that vary from age to age."[161] His point was not that judges could do whatever they wanted. "The judge, even when he is free, is still not wholly free," Cardozo cautioned. "He is not to innovate at pleasure."[162] Rather, the method of free decision, Cardozo argued, "supplements the declaration, and fills the vacant spaces, by the same processes and methods that have built up the customary law."[163] Judges still had to interpret and apply the law. But Cardozo was proposing a different conception of what that entailed.

This functional perspective called for a different approach to the common-law strand of rights jurisprudence. Legal rules and traditions, on this view, needed to be continually reassessed in light of their social functions. "Clauses guaranteeing to the individual protection against specific abuses of power," Justice Brandeis characteristically explained, "must have a . . . capacity of adaptation to a changing world."[164] Interpretation thus required realistic and reasoned analysis, not dogmatic reliance on the views of the past or *ipse dixit* declarations about the nature of things. As Cardozo stated, "[W]hen [judges] are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance."[165]

The functional turn also prompted a new way of thinking about natural rights. Critics of classical legal thought still accepted that governments could only act to promote the common good.[166] And they acknowledged that judges could help check legislative abuse using an ends-means test. "[T]he mere fact that an enactment purports to be for the protection of public safety, health or morals," Justice Holmes explained, "is not conclusive upon the courts."[167] Instead

Press"—Part I—General Considerations, 70 CENT. L.J. 184, 187-88 (1910) ("In the scientific aspect, our social and political institutions, like all natural phenomena, are but special manifestations of the all-pervading law of evolution."). *See generally* EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE (1973) (discussing how scientific developments impacted socio-political thought, including views of law).

161. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 17 (1921).

162. *Id.* at 141.

163. *Id.* at 17.

164. Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting).

165. CARDOZO, *supra* note 161, at 67. This approach was reflected in many areas of constitutional law, *see, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 448 (1934), as well as statutory interpretation, *see, e.g.*, United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 543-44 (1940).

166. *See, e.g.*, Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 369 (1916); Walton H. Hamilton, *Affectation with Public Interest*, 39 YALE L.J. 1089, 1111 (1930).

167. Otis v. Parker, 187 U.S. 606, 608 (1903).

of abandoning *Lochner*'s ends-means test, then, the functional strategy combined deference to legislative judgments, on the one hand,[168] and more realistic and scientific appraisals of competing interests, on the other.[169]

With these developments, the earlier boundary-setting use of the ends-means test gave way to an avowedly substantive notion of judicial oversight. In other words, rather than merely ensuring that legislatures stayed within their proper domains, the ends-means test became a way of ensuring that legislative judgments were substantively reasonable.[170] Of course, judges needed to approach this task with a profound sense of humility given their institutional limits. But with the rise of evidence-based "sociological jurisprudence," jurists were also open to a limited reevaluation of the facts,[171] particularly where the original reasons for legislative intervention had disappeared.[172] In these ways, the natural-rights tradition survived, with judicial review continuing to serve as a partial backstop against arbitrary deprivations of liberty.

Terrified of the ghosts of *Lochner*, however, progressive proponents of functionalism denounced the idea of natural rights.[173] Instead, they incorporated the public-good requirement into their account of due process.[174] None of this had anything to do with narrowing the types of interests that legislatures could pursue when limiting individual liberty or property. And so, from a practical standpoint, the twin pillars of rights jurisprudence were mostly still intact. But the lens through which jurists viewed these longstanding principles had begun to fundamentally change.

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168. *See* Siegel, *supra* note 144, at 10-11; *see, e.g.*, Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

169. *See infra* notes 170-172; *see, e.g.*, *Lochner*, 198 U.S. at 45, 67-72 (Harlan, J., dissenting).

170. *See* Treanor, *supra* note 144, at 856 ("Holmes's . . . decisions reworked and restructured the basic concepts of substantive due process and rejected its formalist approach."). It should go without saying that *Lochner*-era decisions evaluated the substantive reasonableness of legislative judgments, even as judges claimed to merely ensure that legislatures had acted within their powers. The shift precipitated by the functional turn was to make that reality more explicit in the doctrine.

171. *See, e.g.*, Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 519-21 (1924) (Brandeis, J., dissenting).

172. *See, e.g.*, Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48 (1924).

173. *See, e.g.*, Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 346-48 (1915).

174. Actually, this was not a wholly "progressive" development. The notion that due process required factual review was well recognized by all the Justices. *See, e.g.*, W. & Atl. R.R. v. Henderson, 279 U.S. 639, 642 (1929); *see also* Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 960 (1927) ("Fortunately, the present tendency is toward a closer scrutiny of the factual situation and, in the case of certain of the justices, toward a general use of scientific testimony."). For a discussion of changing conceptions of the Constitution and the common law during the *Lochner* era, see Siegel, *supra* note 144, at 78-90.

B. Holmes, Brandeis, and the First Amendment

Due-process debates during the *Lochner* era framed the Court's earliest interpretations of the First Amendment. Rather than viewing speech and press freedoms in isolation, the Justices approached issues of expressive freedom in much the same way that they approached other questions relating to fundamental rights. The core issue in these cases was familiar: how to reconcile governmental authority to promote the public good with judicial protection for personal rights. And since the validity of governmental efforts to promote public morality were still taken for granted, any broad emphasis on neutrality would not have made any sense. Instead, as we will see, Justice Holmes and Justice Brandeis took a different approach, calling on judges to identify case-specific harms before treating speech as unprivileged.

These developments were hardly inevitable. Indeed, progressive legal elites initially paid little attention to First Amendment issues.[175] Nor did the functional interpretive approach necessarily suggest a more capacious view of expressive freedom. "[T]he individual interest in free belief and opinion," Roscoe Pound wrote in 1915, "must always be balanced with the social interest in the security of social institutions and the interest of the state in its personality."[176] If speech "actively disturbs the public peace or shocks the moral feelings of the community," he continued, "social interests must be weighed over against the individual interest."[177] Along similar lines, Pound proposed narrowing prior-restraint doctrine.[178] Most controversies, however, focused on issues of economic regulation, not expressive freedom.

A wave of prosecutions initiated during World War I highlighted the persistence of traditional understandings of speech and press rights. "All citizens are free to express their views on all public questions," one judge explained at the

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175. For discussion of progressive views of speech rights, see GRABER, *supra* note 14.

176. Roscoe Pound, *Interests of Personality* [Concluded], 28 HARV. L. REV. 445, 454 (1915).

177. *Id.* at 455. Pound even suggested that political speech could be suppressed in extraordinary circumstances. *Id.* at 456. He also emphasized, however, the social importance of protecting "free belief and free expression of opinion as guarantees of political efficiency and instruments of social progress." *Id.* at 453.

178. *See* Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 668 (1916).

time, "so long as they are actuated by honest purposes . . . ."[179] Indeed, the privileged status of speech on public matters was well recognized.[180] This rule, however, was not especially protective of speech. In a famous trio of Espionage Act decisions, for instance, the Supreme Court held that juries could infer malicious intent if speech on political affairs posed a "clear and present danger" of social harm.[181]

After voting to affirm the convictions in these three cases, however, Justice Holmes noticed a problem. If criticisms of the war tended to cause harm, and if a jury could infer malicious intent based on that tendency, then the law could effectively ban criticisms of the war. From a formalist standpoint, this result was unproblematic. A jury finding of criminal intent was enough to formally negate the privilege.[182] But from a functional standpoint, matters looked different. After

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179. *Charge to the Jury of United States District Court, Western District of Washington, Relating to Anticonscription Circulars and Meetings Previous to Passage of Selective-Service Act, and Conspiracy Under Section 6, Penal Code, to Prevent, Hinder, or Delay by Force the Execution of the War Resolution of April 6, 1917, and National-Defense Act (Act of June 3, 1916)*, *in* U.S. DEP'T OF JUST., INTERPRETATION OF WAR STATUTES: BULLETIN NO. 70, at 1, 8 (1918).

180. *See* James Parker Hall, *Free Speech in War Time*, 21 COLUM. L. REV. 526, 532 (1921) (noting that there are "legal precedents in abundance" regarding an intent requirement). Many scholars have explored Justice Holmes's views. *See, e.g.*, David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97, 183 (1982); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1207-08 (1983); Yosal Rogat & James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion–The Speech Cases*, 36 STAN. L. REV. 1349, 1350-51 (1984); BRAD SNYDER, THE HOUSE OF TRUTH: A WASHINGTON POLITICAL SALON AND THE FOUNDATIONS OF AMERICAN LIBERALISM 274-90 (2017). Holmes had already suggested that it would be an "unjustifiable restriction of liberty" if a statute were "construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general." Fox v. Washington, 236 U.S. 273, 277 (1915); *see also* Geoffrey R. Stone, *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411, 447 ("Justice Holmes was not embracing the most extreme version of the bad tendency/constructive intent standard, which essentially equated all criticism of the war with unlawful intent, but was . . . treating proof of specific intent as a distinct evidentiary requirement.").

181. *See* Schenck v. United States, 249 U.S. 47, 52 (1919); *see also* Frohwerk v. United States, 249 U.S. 204, 209 (1919) (applying *Schenck*); Debs v. United States, 249 U.S. 211, 216 (1919) (same). For one of many works emphasizing the initially limited scope of the "clear and present danger" test, see Fred D. Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. AM. HIST. 24 (1971). Moreover, the fact that *some* of a defendant's speech might be constitutionally privileged, "being part of a general program and expressions of a general and conscientious belief," did not insulate the defendant from liability for unprivileged speech. *Debs*, 249 U.S. at 215.

182. The Espionage Act of 1917 required specific criminal intent, thus negating any claim of constitutional privilege. *See* Note, *The Espionage Act and the Limits of Legal Toleration*, 33 HARV. L. REV. 442, 442 (1920) [hereinafter Note, *The Espionage Act*]. It was less clear whether that was true of the 1918 amendments. *Id.* at 443.

all, the government might obtain unwarranted guilty verdicts, and even the mere threat of prosecution could discourage well-intentioned political speech.[183]

Justice Holmes addressed this problem in a dissenting opinion in *Abrams v. United States*.[184] He began by construing the federal statue at issue as requiring specific intent to undermine the war effort, not just knowledge that obstruction might result.[185] Holmes then linked this specific-intent element to the freedom of speech. "It is only the present danger of immediate evil or an intent to bring it about," he explained, "that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."[186] A mere tendency to cause harm would not make speech unprivileged, he insisted. Rather, absent direct evidence of specific intent, the government had to show that the speech posed a "clear and imminent danger."[187] In essence, Holmes was articulating a higher threshold for proving intent.[188]

In the final two paragraphs of his *Abrams* dissent, Justice Holmes shifted to a different problem. "[E]ven if what I think the necessary intent were shown," he observed, "the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but *for the creed that they avow*."[189] And on *that* issue, Holmes took a nearly absolutist position, asserting that "no one has a right even to consider [a person's creed] in dealing with the charges before the Court." Holmes defended this principle in a famous concluding paragraph:

> Persecution for the expression of opinions seems to me perfectly logical . . . . But [the theory of the Constitution is] that the ultimate good

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183. *See* Stone, *supra* note 180, at 448-49 (discussing Zechariah Chafee's recognition of this problem); Rabban, *supra* note 180, at 1281 (discussing Ernst Freund's recognition of this problem). Justice Brandeis, joined by Justice Holmes, later emphasized the judicial responsibility to ensure that juries were "judging in calmness." *See* Schaefer v. United States, 251 U.S. 466, 483 (1920) (Brandeis, J., dissenting).

184. 250 U.S. 616 (1919).

185. *Id.* at 626-27 (Holmes, J., dissenting).

186. *Id.* at 628.

187. *Id.* at 627.

188. This focus on intent underscores that Justice Holmes was not proposing "radical revisions of prevailing law," as some scholars have suggested. David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 892 (1986); *see also* Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255, 1262-63 (2014) (describing Holmes's dissent in *Abrams* as having first introduced intent in speech jurisprudence); Rogat & O'Fallon, *supra* note 180, at 1387 (discussing intent and concluding that "one may justifiably doubt that Holmes had yet worked out a coherent principle of clear and present danger, even for himself").

189. *Abrams*, 250 U.S. at 629 (Holmes, J., dissenting) (emphasis added).

> desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out . . . . I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[190]

In Holmes's view, the government could impose punishment only for the harms that speakers intended and caused,[191] not for errors in their beliefs. Speech restrictions thus had to be grounded on particular communicative harms, not merely on opposition to the ideas themselves. The government could not suppress the dissemination of ideas as such.[192]

Justice Holmes and Justice Brandeis further developed this idea in *Gitlow v. New York*[193] and *Whitney v. California*.[194] Both cases involved challenges to criminal bans on advocating the violent overthrow of the government. Invoking a qualified privilege of commenting on public affairs,[195] the defendants asserted that states could not categorically forbid advocacy of certain political ideas

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190. *Id.* at 616, 630-31.

191. Thus, for instance, even if Abrams's speech was unprivileged, he could only be punished for *his contribution* to undermining the war effort. *Id.* at 629; *see also* Bogen, *supra* note 180, at 186 (recounting Holmes's view that proscribable speech not only had to be maliciously intended but also had to further the unlawful purpose).

192. *See also* Frohwerk v. United States, 249 U.S. 204, 206 (1919) ("[T]he First Amendment [prohibits] legislation against free speech as such"). The limits of Justice Holmes's approach are illustrated by his vote to affirm in *Gilbert v. Minnesota*, 254 U.S. 325 (1920), upholding a conviction for disrupting military recruitment by advocating pacifism. The speech was designed to affect recruitment, Justice McKenna concluded, and therefore "[i]t was not an advocacy of policies or a censure of actions that a citizen had the right to make." *Id.* at 333. Unlike the majority, Justice Brandeis focused on the face of the law rather than Gilbert's conduct. *See id.* at 334-36 (Brandeis, J., dissenting). The law, he wrote, applied regardless of motives and regardless of whether the nation was at war. Its object was "not acts but beliefs." *Id.* at 335. Brandeis's point was that the law applied regardless of whether a particular speaker's expression would likely lead to unlawful acts. For further discussion of this idea, see *infra* notes 193-213 and accompanying text.

193. 268 U.S. 652 (1925).

194. 274 U.S. 357 (1927).

195. *See* Brief for Plaintiff-in-Error at 20-21, *Gitlow*, 268 U.S. 652 (No. 770) ("[E]xpress[ion of] an idea or proposal relating to government" could be punished when "a substantive evil is attempted" or the utterance of the words created "a clear and present danger of such substantive evil"). The essence of the defendant's argument in *Gitlow* was that the prosecution needed to make a *case-specific* showing of harm. An example nicely captured the point: "[T]o approve assault in a soliloquy is not a crime." *Id.* at 32.

through direct prohibitions or limits on freedom of association.[196] The eminent civil-liberties attorneys in *Whitney* further argued that the syndicalism statute violated the Equal Protection Clause by "discriminat[ing] between differing opinions," without tying this argument to the First Amendment.[197] In both cases, the majority upheld the convictions based on legislative power to "punish those who abuse [expressive] freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace."[198] In their view, states could nip dangerous ideas in the bud.[199]

Justice Holmes and Justice Brandeis construed the First Amendment more capaciously than did the majority. Legislatures, they thought, could not outright ban the dissemination of "social, economic and political" views.[200] All ideas, Holmes insisted in *Gitlow*, "should be given their chance and have their way."[201] To be sure, speech could be curtailed when necessary "to protect the State from destruction or from serious injury, political, economic or moral," as Brandeis noted in *Whitney*.[202] But states could not restrict the advocacy of certain ideas

196. The prosecution in *Gitlow* relied on the defendant's own statements, whereas the defendant in *Whitney* had associated with a group that had unlawful aims. *See Gitlow*, 268 U.S. at 645; *Whitney*, 274 U.S. at 364-66.

197. Brief of Plaintiff-in-Error at 80, *Whitney*, 274 U.S. 357 (No. 3). When noting this argument, Justice Brandeis's clerk (and future New Dealer) James Landis observed, "I do not think you will want to treat [this argument]." Letter from James Landis, Law Clerk, to Louis Brandeis, J. (Aug. 21, 1926), https://iiif.lib.harvard.edu/manifests/view/drs:14737316$147i [https://perma.cc/L2EX-HY2B]. Another memo, which was unsigned but presumably written by Brandeis's subsequent clerk, stated, "Contention that statute denies the equal protection of the laws in that it strikes those seeking a change and not those seeking to preserve the status quo certainly needs no mention. It struck at the danger." Memorandum from Law Clerk to Louis Brandeis, J. (Oct. 27, 1926), https://iiif.lib.harvard.edu/manifests/view/drs:14737316$273i [https://perma.cc/8R63-UK77].

198. *Gitlow*, 268 U.S. at 667; *see also id.* at 670 ("[W]hether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration."); *Whitney*, 274 U.S. at 371.

199. *See Gitlow*, 268 U.S. at 669-70. In *Whitney*, the majority focused on the jury finding of criminal intent as a basis for rejecting the claimed privilege. *See Whitney*, 274 U.S. at 366-67.

200. *See Whitney*, 274 U.S. at 374 (Brandeis, J., concurring).

201. *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting); *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (invoking the "free trade in ideas" and "competition of the market").

202. *Whitney*, 274 U.S. at 373 (Brandeis, J., concurring).

without a case-specific showing that the speech was unprivileged. Rather, speakers could only be punished for the particular communicative harms that they intended and caused.[203] Ideas *as such* were protected.

In making this argument, Justice Holmes and Justice Brandeis were embracing a familiar distinction in rights jurisprudence between "prohibitions" and "regulations."[204] Prohibitions restricted classes of activity, some instances of which were not harmful, whereas regulations targeted only harmful activities.[205] Existing police-powers doctrine generally allowed prohibitions when necessary to promote the public good.[206] But states only had power to *regulate* vested property rights.[207] In *Gitlow* and *Whitney*, Holmes and Brandeis insisted that freedom of speech had a comparable status, and that the government therefore generally lacked "power to *prohibit* dissemination of social, economic and political doctrine."[208]

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203. In contrast to the majority, Justice Holmes and Justice Brandeis asserted that the prosecution in *Gitlow* and *Whitney* needed to show a "clear and present danger," despite legislatures having already determined that the category of speech at issue was socially harmful. *See Gitlow*, 268 U.S. at 672-73 (Holmes, J., dissenting); *Whitney*, 274 U.S. at 374 (Brandeis, J., concurring).

204. *See, e.g.*, McCloskey v. Tobin, 252 U.S. 107, 108 (1920) (upholding a ban on solicitation as a "regulation," not a "prohibition," because the ban "aims to bring the conduct of the business into harmony with ethical practice of the legal profession, to which it is necessarily related").

205. For instance, bans on drinking alcohol can be described as "prohibitions," whereas bans on drunk driving can be described as "regulations." *Cf.* Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 137-38 (1874) (Field, J., concurring) ("[T]he prohibition of sale [of alcohol] in any way, or for any use, is quite a different thing from a regulation of the sale or use so as to protect the health and morals of the community."). To be sure, the distinction between "prohibitions" and "regulations" was hardly self-evident—particularly in those instances where the activity merely posed a risk of harm or created a harm that would likely only materialize in the aggregate. The majority in *Gitlow*, for instance, plainly thought that the syndicalism statute "regulated" speech. *See Gitlow*, 268 U.S. at 664-70.

206. *See, e.g.*, Booth v. Illinois, 184 U.S. 425, 429 (1902) ("If . . . the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts [generally] cannot interfere . . . ."); Otis v. Parker, 187 U.S. 606, 609 (1903) (quoting *Booth*); *see also* Adams v. Tanner, 244 U.S. 590, 599 (1917) (Brandeis, J., dissenting) ("[T]he scope of the police power is not limited to regulation as distinguished from prohibition.").

207. *See, e.g.*, Barry Cushman, Carolene Products *and Constitutional Structure*, 2012 SUP. CT. REV. 321, 334-49; *see also* FREUND, *supra* note 105, at §§ 58-62 (discussing state power to impose prohibitions).

208. *Whitney*, 274 U.S. at 374 (Brandeis, J., concurring) (emphasis added). Justice Brandeis's opinion in *Whitney* drew from a draft opinion in another case, *Ruthenberg v. Michigan*, which was dismissed after the defendant died. In that earlier draft, Brandeis's emphasis on the statute's prohibitory character is especially evident, referring to "[s]tatutes imposing absolute prohibition, as distinguished from regulation." Louis Brandeis, Draft Opinion in *Ruthenberg v. Michigan*, https://iiif.lib.harvard.edu/manifests/view/drs:14737316$167i [https://perma.cc/3LXZ-5WFT]. Indeed, Brandeis's eventual reference to "[p]rohibitory legislation" conveyed

The problem with the syndicalism laws, then, was not that they singled out anarchist or communist messages or sought to suppress communicative harms. The government could still punish the *harmful* expression of certain ideas. But Justice Holmes and Justice Brandeis thought that the First Amendment demanded a case-specific showing that the speech was unprivileged. It was unconstitutional, in their view, to categorically exclude certain ideas from public discourse—that is, to *prohibit* the dissemination of particular messages—even though *regulations* of speech were still allowed.[209] Not coincidentally, this understanding of speech rights dovetailed with ordinary due-process analysis, where judges were responsible for appraising the facts to ensure that the government was not arbitrarily restricting rights.[210]

Justice Holmes and Justice Brandeis had thus articulated a view of expressive freedom that bears a superficial but misleading resemblance to modern neutrality principles. These Justices sometimes evaluated statutes on their face, focusing on what the government had done, not merely on the individual's conduct.[211] And in so doing, they treated all ideas as equal in the sense that the government could not categorically withdraw any idea from public discourse. To prohibit ideas as such would be to abridge the speech and press rights themselves, not curtail their abuse. But this embrace of "the traditional American ideal of toleration of opinion," as the *New Republic* put it,[212] was decidedly *not* an endorsement of content or viewpoint neutrality in their modern forms. Quite the contrary. At

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the same idea. *Whitney*, 274 U.S. at 374 (Brandeis, J., concurring); *see also* Memorandum from James Landis, Law Clerk, to Louis Brandeis, J. (Aug. 16, 1926), https://iiif.lib.harvard.edu/manifests/view/drs:14737316$142i [https://perma.cc/NKW3-SA54] (discussing whether cases "fall within the classification of regulation than that of prohibition"). Notably, Brandeis did not embrace a *categorical* bar on prohibitory speech restrictions. Rather, because prohibitions were "so stringent," he explained, they required heightened justifications, else they become "unduly harsh or oppressive." *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring). Thus, prohibitory laws were "ordinarily" unconstitutional. *Whitney*, 274 U.S. at 374; *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (insisting that the dissemination of ideas as such could be suppressed only if their dissemination "so imminently threaten[s] immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country").

209. Notably, the majority did not seem to disagree in principle. *See Gitlow*, 268 U.S. at 664-65. Rather, they thought that the statute was best construed as a regulation of harmful speech. *See id.* at 664-70.

210. *See supra* notes 171-174 and accompanying text.

211. *See Abrams*, 250 U.S. at 629 (Holmes, J., dissenting) (noting that the government had likely punished the defendants "for the creed that they avow"); *Gitlow*, 268 U.S. at 672-73 (Holmes, J., dissenting) (arguing that communicative harms must be shown in each case, notwithstanding legislation to the contrary); *Whitney*, 274 U.S. at 373-74 (Brandeis, J., concurring) (same). Of course, the "clear and present danger" test also called for as-applied judicial analysis to ensure that the speech had, in fact, posed a clear and present danger of harm.

212. *The Call to Toleration*, NEW REPUBLIC, Nov. 26, 1919, at 360.

least with respect to content-based limits on arguably privileged speech,[213] Holmes and Brandeis were insisting that speech restrictions had to be linked to communicative harms, not that the government lacked power to address those harms.

C. The Functional First Amendment

Although Justice Holmes and Justice Brandeis did not prevail in the 1920s, their ideas gained currency on the Supreme Court by the end of the 1930s.[214] Without attempting an exhaustive survey of the cases, this Section highlights several key developments through the early 1940s. It shows how the Justices reinterpreted earlier doctrines through a more functional lens.

Before jumping into the cases, it is worth briefly considering their genesis as due-process claims. Today, due-process claims and incorporated-rights claims are treated as entirely distinct, thus making it easy to defend a neutrality-based approach to some rights but not to others.[215] But this crisp separation had not emerged by the late 1930s. At that time, due process included a right to challenge

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213. Once again, this discussion does not address wholly incidental speech restrictions since that issue was not presented in these cases. *See supra* note 75. The issue became contested later. *See infra* Section II.D.

214. Cases throughout the 1930s reflected the gradual shift, and my point here is not to assert clean, categorical breaks. The functional turn was evident, for instance, in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 443 (1934). And, in the First Amendment context, the Court partly embraced a more functional approach in *Grosjean v. American Press Co.*, 297 U.S. 233, 240-42 (1936). Justice Sutherland initially planned to decide the case based on the Equal Protection Clause but later adopted arguments from a draft concurrence written by Justice Cardozo. *See* RICHARD C. CORTNER, THE KINGFISH AND THE CONSTITUTION: HUEY LONG, THE FIRST AMENDMENT, AND THE EMERGENCE OF MODERN PRESS FREEDOM IN AMERICA 164-66 (1996). The resulting opinion reflected an amalgam of different ideas. Sutherland, for instance, adopted a formal rule against special taxes on newspapers but also wrote that the form of the tax was "itself suspicious" and that such taxes are "seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." *Grosjean*, 297 U.S. at 250-51. Indeed, Louisiana had levied the tax on larger newspapers in an apparent effort to suppress criticisms of the Huey Long political machine. *See* CORTNER, *supra*, at 72-73, 78-79, 83-86.

215. *Compare* Lawrence v. Texas, 539 U.S. 558, 589 (2003) (Scalia, J., dissenting) (stating in a due process case that "a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation"), *with* Iancu v. Brunetti, 139 S. Ct. 2294, 2300 (2019) (stating in a First Amendment case that a statute is unconstitutional when it "distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them").

the *substance* of the law by showing that a restriction of liberty was unwarranted.[216] And so-called "incorporated" rights still operated in largely *procedural* ways. Speech and press freedoms, for instance, secured a right against administrative censorship in advance of publication — a specific rule about how the government could restrict speech. And, at least in certain circumstances, these rights also called for case-specific evaluations of privilege — again, a specific rule about the processes needed to restrict speech.[217] Thus, it made perfect sense for *Carolene Products* to highlight enumerated-rights cases as a subset of due-process cases that warranted more searching judicial review.[218] Speech and press rights and due-process rights were still largely on the same doctrinal track.

Recognizing this overlap between the First Amendment and due process underscores the initial absence of neutrality. When regulating other forms of liberty, legislatures could address any type of social harm. And because early speech cases were due-process cases, it would have been extremely odd to think that the government somehow lacked power to address communicative harms. Nor was there any reason to think that it was illegitimate for the government to try to

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216. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938); Skinner v. Oklahoma, 316 U.S. 535, 544 (1942) (Stone, C.J., concurring); *see also* Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 991-94 (1999) (discussing how the Court expanded judicial appraisal of the factual predicates of legislation).

217. Early vagueness and overbreadth doctrines were oriented toward maintaining this case-by-case review. *See, e.g.*, Stromberg v. California, 283 U.S. 359, 369-70 (1931); Herndon v. Lowry, 301 U.S. 242, 259 (1937); Thornhill v. Alabama, 310 U.S. 88, 96-97 (1940). In addition, Justice Holmes and Justice Brandeis had argued that case-by-case review had to be maintained even in the face of legislative judgments that certain types of speech were harmful. *See supra* notes 193-213 and accompanying text (discussing Gitlow v. New York, 268 U.S. 652 (1925), and Whitney v. California, 274 U.S. 357 (1927)).

218. *See Carolene Prods.*, 304 U.S. at 152 n.4. In the first paragraph, added at Chief Justice Hughes's request, Justice Stone called for judicial protection of enumerated rights, and in the second paragraph, he suggested a heightened need for judicial protection of democratic processes. *See* Peter Linzer, *The* Carolene Products *Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277, 282-83 (1995). It is also worth mentioning the early suggestion that the Privileges or Immunities Clause supplies a limit on state authority to regulate expression. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 511-16 (1939) (Roberts, J.).

shape the way that people think.[219] Promoting public morality was plainly a legitimate basis for restricting liberty in due-process cases.[220] In sum, neutrality could only emerge later on, once due-process cases and incorporated-rights cases moved onto separate doctrinal tracks.

To be sure, the government could not punish the dissemination of ideas as such. "[T]he legislative intervention can find constitutional justification only by dealing with the abuse," Chief Justice Hughes wrote in *De Jonge v. Oregon*.[221] "The rights themselves must not be curtailed."[222] This principle guaranteed a certain degree of equality by ensuring that the government could not wholly exclude certain opinions from public debate. The law had to target the *abuse* of speech, not merely the dissemination of the ideas themselves. As we have seen, however, this meant that the government could *only* target harmful speech, not that it was *unable* to target harmful speech.[223] To be sure, the Court sometimes required that harms be "clear and present," lest the suppression of "abuses" *effectively* restrict speech and press rights themselves. But that rule was needed precisely because communicative harms were still cognizable. None of the Justices viewed the First Amendment as a nondiscrimination rule that generally forbade targeting communicative harms.

To ensure that the government only restricted unprivileged "abuses," the Justices began to call for a more careful and realistic appraisal of costs and benefits. "[W]here legislative abridgment of [speech and press] rights is asserted," Justice Roberts explained in *Schneider v. State*, "the courts should be astute to examine

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219. My point here, of course, is not that *all* forms of content discrimination were valid or that *all* viewpoint-based governmental interests were legitimate. For instance, any means of classification—whether speech restrictive or not—had to be designed to promote the public good, and the government could not target certain ideas *as such*.

220. *See, e.g.*, *Whitney*, 274 U.S. at 373 (Brandeis, J., concurring) ("[A]lthough the rights of free speech and assembly are fundamental . . . [t]heir exercise is subject to restriction, if . . . required in order to protect the State from destruction or from serious injury, political, economic or moral."); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 602 (1940) (Stone, J., dissenting) ("[The government] may suppress religious practices dangerous to morals, and presumably those also which are inimical to public safety, health and good order."). Because morals regulations were widely accepted, debates focused instead on the validity of paternalistic regulations, addressing situations where individuals were mostly harming themselves. *See* Siegel, *supra* note 144, at 8-12.

221. 299 U.S. 353, 364-65 (1937).

222. *Id.* at 365.

223. *See supra* Part II.B. It is thus unsurprising that four members of the *Gitlow* and *Whitney* majorities joined Chief Justice Hughes's unanimous opinion in *De Jonge*.

the effect of the challenged legislation."[224] Relying on "[m]ere legislative preferences or beliefs respecting matters of public convenience," he continued, was inappropriate with respect to "rights so vital to the maintenance of democratic institutions."[225] As the Court put it a year later, judges had a responsibility to "weigh the circumstances" in order to preserve "the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth."[226] This was quintessential due-process analysis but with less deference to the government because of the social importance of privileged speech.

Alongside a more realistic evaluation of competing interests, the Justices also embraced their own agency in defining, and redefining, enumerated constitutional rights. "The very purpose of a Bill of Rights," Justice Jackson wrote in *West Virginia State Board of Education v. Barnette*, "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[227] The judge's task, he explained, was one of "translating the majestic generalities of the Bill of Rights . . . into concrete restraints"—a duty, he noted, that should "disturb self-confidence."[228] Indeed, Jackson continued, "changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment."[229] The echoes of Justices Holmes, Brandeis, and Cardozo could not have been louder.

Another factor that bolstered this increased sense of judicial agency was the shift away from viewing fundamental common-law rights as a species of general law. Instead, judges began to treat First Amendment protections for expressive freedom as distinctively *federal* in character. Consequently, well-settled issues suddenly appeared unresolved, and the Speech and Press Clauses began to look more like empty vessels.[230] With incorporated rights now viewed as a species of

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224. 308 U.S. 147, 161 (1939); *see also, e.g.*, Bridges v. California, 314 U.S. 252, 268 (1941) ("We may appropriately begin our discussion of the judgments below by considering how much, as a practical matter, they would affect liberty of expression.").

225. *Schneider*, 308 U.S. at 161.

226. Thornhill v. Alabama, 310 U.S. 88, 95-96 (1940) (quoting *Schneider*, 308 U.S. at 161).

227. 319 U.S. 624, 638 (1943). For other sources reflecting this view, see *infra* note 312 and accompanying text.

228. *Id.* at 639.

229. *Id.* This lack of guidance, Justice Jackson explained, flowed in large part from changed assumptions about the role of the government and "closer integration of society." *Id.* at 639-40.

230. *See* Bridges v. California, 314 U.S. 252, 263-68 (1941); *see, e.g.*, Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 1 ("The United States Supreme Court had no occasion to pass on the constitutionality of legislation making obscenity a crime for more

federal law, the Justices were positioned to interpret them anew, without being encumbered by earlier state case law.[231]

Drawing on the functional turn and the shift away from general law, the Court began to depart from the traditional scope of existing rules and to focus instead on the social functions of expressive freedom. This shift was especially evident in decisions limiting governmental power to require permits for speech-related activities,[232] including solicitation,[233] distribution of fliers,[234] and parades.[235] In these cases, invocations of history were typically brief.[236] Nor did the Justices seem to care that longstanding precedent allowed the government to regulate speech on public property, like streets and parks.[237] Rather, their focus was on the broader social consequences of expressive freedom.

An overriding concern in these cases was curbing arbitrary administrative suppression of public discourse. Discretionary licensing was unconstitutional, the Justices explained, because it could be used as "an instrument of arbitrary suppression of opinions on public questions."[238] "[T]his Court denies any place

than one hundred and fifty years after the adoption of the First Amendment."); Brief of American Civil Liberties Union as an Amicus Curiae at 5, Doubleday & Co. v. New York, 335 U.S. 848 (1948) (No. 11), 1948 WL 47136, at *5 ("State power in the field of this case has not been tested heretofore in this Court because not until 1925 in the *Gitlow* case . . . was it recognized that, under the Fourteenth Amendment, the States must conform to the same standards of freedom of expression as, under the First Amendment, are applicable to the Federal Government . . . .").

231. *See* Campbell, *supra* note 121, at 1453-54.

232. Some of these cases also implicated the right of free exercise of religion. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303-05 (1940).

233. *See, e.g.*, Schneider v. State, 308 U.S. 147 (1939); *Cantwell*, 310 U.S. 296.

234. *See, e.g.*, Lovell v. City of Griffin, 303 U.S. 444 (1938); *Schneider*, 308 U.S. 147; *Cantwell*, 310 U.S. 296.

235. *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941).

236. *See, e.g.*, *Cantwell*, 310 U.S. at 303-04; *Cox*, 312 U.S. at 574; *Schneider*, 308 U.S. at 160-61. The Court did invoke history in a highly abstract sense in *Lovell*, describing the dangers of prior restraints and stating that "[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." 303 U.S. at 451-52.

237. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (Roberts, J.). The term "public fora" emerged later. This decision reflected the broader jurisprudential decline of the public/private divide. At the end of the nineteenth century, the Justices held that the government had wide latitude to restrict speech on public property. *See* Davis v. Massachusetts, 167 U.S. 43, 47 (1897); *see also* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1721-23 (1987) (discussing *Hague* and *Davis*). Some cases, however, did recognize limits on licensing schemes that enabled arbitrary discretion. *See, e.g.*, Anderson v. City of Wellington, 19 P. 719, 723 (Kan. 1888).

238. *Cox*, 312 U.S. at 577-78 (summarizing earlier decisions). In *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 151 (1946), the Court applied this principle to a public subsidy (namely, eligibility for

to administrative censorship of ideas or capricious approval of distributors," the Justices declared.[239] By contrast, nondiscretionary permitting schemes were allowed because they did not replicate the dangers of censorship.[240] In this limited sense, a version of neutrality began to emerge as a First Amendment principle, grounded in a more functional interpretation of the rule against prior restraints.[241]

While these shifts were underway, the Supreme Court also abandoned a values-laden understanding of intent that, in its practical effect, had limited the privilege of disseminating certain religious or political views. In *Cantwell v. Connecticut*, the Court overturned the incitement conviction of Jesse Cantwell—a Jehovah's Witness adherent—for playing an anti-Catholic record in a predominantly Catholic community.[242] According to the Court, Cantwell was simply trying to proselytize in good faith.[243] Of course, longstanding doctrine stipulated that disseminating religious or political views in good faith could not be made criminal.[244] Notably, however, the Court was now defining good faith in more individualistic terms, with less emphasis on community norms.[245] Even though

lower postal rates), thus embracing the earlier dissenting views of Justice Brandeis and Justice Holmes. *See* United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 417-36 (1921) (Brandeis, J., dissenting); *id.* at 436-38 (Holmes, J., dissenting).

239. Jones v. Opelika, 316 U.S. 584, 595 (1942).

240. *See, e.g.*, *Cox*, 312 U.S. at 576-77.

241. Informed by the functional turn, judges sometimes argued that laws with discriminatory *effects* should be closely scrutinized, too. *See, e.g.*, Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 606-07 (1940) (Stone, J., dissenting). For discussion of the Jehovah's Witness cases, see Kessler, *supra* note 35, at 1941-56.

242. 310 U.S. 296, 300-11 (1940).

243. *Id.* at 309-10.

244. *See supra* notes 105-118 and accompanying text.

245. *See* Post, *supra* note 94, at 629-32. *Cantwell* was an important step, but the Court was not yet embracing neutrality in its modern sense. *Cf. id.* at 631. The approach in *Cantwell* was to focus first on the individual, without looking to the audience, to decide whether speech was privileged. Importantly, antisocial views were protected. Having defined the protected sphere, the Justices then recognized that interests turning on the antisocial character of the speech—and the resulting communicative harms—were generally insufficient to warrant suppression. In *effect*, this approach resembles modern doctrine. But the relevant constitutional harm was not discrimination as such. *Cf.* Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335 (2020); Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016); R.A.V. v. St. Paul, 505 U.S. 377 (1992). Nor was the Court categorically rejecting governmental interests that turned on communicative effects. *Cf.* Sorrell v. IMS Health Inc., 564 U.S. 552 (2011); Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985). Rather, the Court treated these interests as insufficient to warrant the suppression of privileged speech. The First Amendment, in other words, did not remove these sorts of interests from the constitutional ledger. It merely specified that these interests could not justify the suppression of well-intentioned but antisocial views.

"the contents of the record not unnaturally aroused animosity,"[246] the Justices denied any "intentional discourtesy."[247]

As they curtailed arbitrary administrative suppression and redefined intent requirements, however, the Justices did not require *legislatures* to maintain content or viewpoint neutrality. In fact, one doctrinal presumption still pointed in the opposite direction. When a law restricted public debate "without any reference to language itself," judges were to scrutinize the restriction carefully.[248] When a law specifically targeted certain messages, however, judges had to be *more* deferential to the government.[249] The rationale was straightforward. Legislative restrictions of "a particular kind of utterance," Justice Black explained in *Bridges v. California*, came "encased in the armor wrought by prior legislative deliberation."[250] Although this principle echoed part of the majority's reasoning in *Gitlow* and *Whitney*, it also accorded with the views of Justice Holmes and Justice Brandeis, who had argued for *less* deference to legislatures,[251] not *negative* deference. Laws that targeted particular messages could still be challenged,[252] but not based on any general requirement of neutrality.

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246. *Cantwell*, 310 U.S. at 311.

247. *Id.* at 310; *see also id.* at 308-09 ("It is not claimed that he intended to insult or affront the hearers by playing the record.").

248. *See* Herndon v. Lowry, 301 U.S. 242, 258 (1937) (quoting Gitlow v. New York, 268 U.S. 652, 670 (1925)).

249. *See, e.g.*, *id.* at 257-58; *see also Cantwell*, 310 U.S. at 307 (1940) (emphasizing the importance of legislative judgments). Today, laws that target particular messages are generally considered viewpoint discriminatory, whereas applications of content-neutral statutes are treated as "content based" if the rationale for applying the statute depends on what the speaker communicated. *See* Holder v. Humanitarian L. Project, 561 U.S. 1, 27-28 (2010).

250. 314 U.S. 252, 260-61 (1941); *see* Robert E. Cushman, *Some Constitutional Problems of Civil Liberty*, 23 B.U. L. REV. 335, 343 (1943) ("[T]he clear and present danger test is limited to those cases in which the law does not forbid language as such," whereas "the bad tendency doctrine . . . is the yardstick by which the Court measures the constitutionality of laws which punish language thought to be objectionable or dangerous."); Mark Tushnet, *The Hughes Court and Radical Political Dissent: The Cases of Dirk De Jonge and Angelo Herndon*, 28 GA. ST. U. L. REV. 333, 343 (2012) (describing this bifurcated review of targeted and nontargeted restrictions of speech).

251. *See* Whitney v. California, 274 U.S. 357, 378-79 (1927) (Brandeis, J., concurring).

252. *See Herndon*, 301 U.S. at 258 ("[T]he penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered."); *Bridges*, 314 U.S. at 260-61. By this point, the Court had begun to backtrack, often sub silentio, from *Gitlow* and *Whitney*, which had held that targeted legislative restrictions of speech eliminated the need for case-specific showings of harm. But the Justices had not rejected the idea that legislative judgments about the harmfulness of certain speech were entitled to substantial weight. *See* Robert McCloskey, *Free Speech, Sedition and the Constitution*, 45 AM. POL. SCI. REV. 662, 663-64 (1951).

The idea that *statutes* targeting certain messages would be *less* problematic flips current doctrine on its head,[253] but it made perfect sense back then. From a jurisprudential standpoint, it was still axiomatic that constitutional freedom entailed liberty regulated *by law*, not arbitrary command. This gave legislators a key role in setting the boundaries of natural rights, including speech and press freedoms.[254] Legislative judgments were not unassailable, but they still had pride of place. And from a practical standpoint, existing threats to free expression were still overwhelmingly administrative. "Probably ninety [percent] of the serious issues relating to freedom of speech and press arise from the alleged arbitrary and ruthless enforcement of broadly drawn statutes," one commentator remarked in 1943.[255] Thus, as Laura M. Weinrib observes, reformers "were neither abandoning a prewar faith in robust popular democracy nor embracing, at least initially, a radical new vision of constitutional constraint."[256] Initial free-speech decisions simply did not reflect a libertarian assault on legislative value judgments.[257]

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253. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828-29 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.") (citations omitted).

254. *See, e.g.*, Jones v. Secs. & Exch. Comm'n, 298 U.S. 1, 23-24 (1936); *id.* at 32 (Cardozo, J., dissenting); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 596 (1940); Hague v. Comm. for Indus. Org., 307 U.S. 496, 514, 516 (1939) (Roberts, J.); Garfield v. United States *ex rel.* Goldsby, 211 U.S. 249, 262 (1908); Halter v. Nebraska, 205 U.S. 34, 42-43 (1907); Crowley v. Christensen, 137 U.S. 86, 89 (1890). Of course, statutes themselves had to be nonarbitrary, and courts were beginning to defer less to legislative judgments in civil-rights cases. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 & n.4 (1938). This development did not, however, suggest equivalence between legislative and administrative decisions.

255. Cushman, *supra* note 250, at 343; *see also* Schiller, *supra* note 15, at 3 ("Administrative regulation of speech was pervasive."). Indeed, proponents of civil liberties had already begun calling for heightened protection of civil liberties in the administrative realm. *See* Schiller, *supra* note 15, at 89 ("By the late 1930s and early 1940s, fears about administrative absolutism had entered the writings of New Dealers and other previous supporters of administrative expertise."); Laura M. Weinrib, *From Public Interest to Private Rights: Free Speech, Liberal Individualism, and the Making of Modern Tort Law*, 34 LAW & SOC. INQUIRY 187, 213 (2009) [hereinafter Weinrib, *From Public Interest*] ("By the mid-1930s, . . . the early Progressive confidence in regulation had begun to erode."); Laura Weinrib, *Against Intolerance: The Red Scare Roots of Legal Liberalism*, 18 J. GILDED AGE & PROGRESSIVE ERA 7, 18 (2019) ("Increasingly, . . . the toleration of dissenting ideas emerged as a necessary check on administrative authoritarianism.").

256. Weinrib, *From Public Interest*, *supra* note 255, at 215.

257. *See id.* at 216 ("[L]ike so many of his Progressive colleagues, [Zechariah Chafee] questioned the authority of the courts to override explicit legislative policy prohibiting speech."); *see also, e.g.*, Cushman, *supra* note 250, at 343 ("[I]n holding these laws valid under the test of bad tendency the courts are extending to the judgment and discretion of the legislature a judicial

But concerns about administrative censorship nonetheless facilitated an eventual constriction of legislative power. This occurred as the Court began to cross-pollinate among traditional common-law principles, leading to a more blended and functional account of expressive freedom that stretched across different domains of governmental authority. In particular, rather than treat the rule against prior restraints and the privilege of speaking on matters of public concern as distinct doctrines, the Court began to gradually blur them together. And it did so by drawing on a unified narrative about the benefits of expressive freedom and the dangers of administrative suppression.

No case better illustrates this functional blending of earlier categories than *Thornhill v. Alabama*.[258] While participating in a labor strike, Byron Thornhill had successfully urged a nonunion worker to not cross the picket line. He was then convicted of violating a state law that banned people from loitering or picketing near a business for the purpose of "hindering, delaying, or interfering with or injuring any lawful business . . . ."[259] Thornhill insisted that his picketing activities were constitutionally privileged.[260]

Writing his first majority opinion, Justice Murphy recognized that the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."[261] And he described labor disputes as matters of public concern—a conclusion that fit with the Court's abandonment of earlier decisions treating

tolerance which, broadly applied, we have come to regard as one of the principal earmarks of a liberal judge.").

258. 310 U.S. 88 (1940). The Court also blurred categories in *Near v. Minnesota*, 283 U.S. 697, 737-38 (1931), which expanded the reach of prior-restraint doctrine but then also embraced exceptions for at least certain categories of speech that was unprivileged, thus blurring previously distinct common-law rules. *Near* and *Thornhill* were thus similar, even though *Near* was less transparent about its approach.

259. *Thornhill*, 310 U.S. at 91.

260. *Id.* at 92-93.

261. *Id.* at 101-02.

contract negotiations as private matters.[262] But Thornhill still faced a serious obstacle. In context, his "request" that the nonunion worker not cross the picket line could easily be viewed as coercive.[263]

Rather than evaluate the circumstances of Thornhill's acts, however, Justice Murphy argued that the law should be "judged upon its face."[264] Ex ante prior restraints, he noted, were evaluated on their face, too. But "the character of the evil inherent in a licensing system" was not limited to abuses of power in particular cases.[265] Rather, "the pervasive threat inherent in its very existence" stifled discussion by leaving public debate subject to "harsh and discriminatory enforcement."[266] And so too, Murphy observed, of ex post restrictions when laws were broad enough to cover privileged speech. The basic problem of an overbroad statute, he explained, was that it effectively delegated to prosecutors a power "to censure comments on matters of public concern."[267] As a practical matter, then, the "threat of censorship" was just as present.[268] Notably, "censorship" referred to *administrative* control over expression.[269]

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262. *See id.* at 103 ("Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."); *see also* Thomas v. Collins, 323 U.S. 516, 532 (1945) ("The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly.").

263. *See* Brief for Respondent at 12-23, *Thornhill*, 310 U.S. 88 (No. 514), 1940 WL 47039; *see, e.g.*, Sarros v. Nouris, 138 A. 607, 610 (Del. Ch. 1927); McMichael v. Atlanta Envelope Co., 108 S.E. 226, 229 (Ga. 1921); A.R. Barnes & Co. v. Chi. Typographical Union, No. 16, 83 N.E. 940, 944-45 (Ill. 1908). Indeed, a similar argument prevailed in a case the following year. *See* Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293-94 (1941). Progressive lawyers had insisted on a broader definition of coercion during the *Lochner* era. *See, e.g.*, Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470 (1923). And a broad notion of coercion enabled the NLRB to restrict employer speech during collective bargaining without abridging the freedom of speech. *See* NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 477 (1941); Ken I. Kersch, *How Conduct Became Speech and Speech Became Conduct: A Political Development Case Study in Labor Law and the Freedom of Speech*, 8 U. PA. J. CONST. L. 255, 284-95 (2006).

264. *Thornhill*, 310 U.S. at 96. In part, Justice Murphy defended this view using due-process analysis that closely resembled the reasoning in *Stromberg v. California*, 283 U.S. 359, 369 (1931).

265. *Thornhill*, 310 U.S. at 97.

266. *Id.* at 97-98.

267. *Id.* at 97. Justice Murphy treated "comments on matters of public concern" as "activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." *Id.*

268. *Id.* at 98. This may have been a reference to what later came to be known as "chilling effects."

269. *See, e.g.*, Pentuff v. Park, 138 S.E. 616, 621 (N.C. 1927) (quoting Cowan v. Fairbrother, 24 S.E. 212, 215 (N.C. 1896)) (distinguishing "exemption from censorship" and "security against [speech-restrictive] laws enacted by the legislative department"). Works that advanced a more

Justice Murphy had thus taken distinct First Amendment rules, interpreted them in a functional way, and then creatively merged their analytical structures based on their shared functions.[270] He began with the rule against ex ante prior restraints, next ascribed certain functions to that rule (i.e., preserving public discussion and preventing discriminatory enforcement), then argued that prosecutorial discretion raised the same concerns ex post, and finally concluded that it was therefore proper to apply facial analysis to protect the constitutional privilege of "commenting on matters of public concern." Yet again, the functional approach was paramount.

None of this is to say that the Justices were discarding older categories. *Thornhill* drew on a functional account of prior-restraint doctrine but otherwise left that doctrine in place.[271] And the Court also continued to recognize traditional limits on the scope of privileged speech. In *Valentine v. Chrestensen*, for instance, it unanimously held that appending political speech to commercial advertising did not trigger the privilege of speaking on matters of public concern when done "with the intent, and for the purpose, of evading the [advertising

expansive conception of expressive freedom also used the term "censorship" in its traditional sense. *See, e.g.*, COOLEY, *supra* note 112, at 521 ("The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters . . . ."); ZECHARIAH CHAFEE, FREEDOM OF SPEECH IN WAR TIMES 8 (1919) ("A death penalty for writing about socialism would be as effective suppression as a censorship."). At first, Justice Black and Justice Douglas used the term "censorship" in its conventional sense. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 494 (1949) (Black, J.); United States v. Rumely, 345 U.S. 41, 56-57 (1953) (Douglas, J., concurring). The term was mostly used in reference to administrative restrictions of speech ex ante, but it could also be used in reference to such restrictions ex post. *See, e.g.*, Niemotko v. Maryland, 340 U.S. 268, 285-86 (1951) (Frankfurter, J., concurring). These concerns also reached judicial restrictions. *See, e.g.*, Coleman v. MacLennan, 98 P. 281, 284 (Kan. 1908) (mentioning "court censorship through injunctions against publication"); *see also* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931). A limited definition of "censorship" is consistent with the Court's conclusion in *FCC v. Pacifica Foundation* that "the subsequent review of program content is not the sort of censorship at which the [Radio Act of 1927] was directed." 438 U.S. 726, 737 (1978). For a counterexample, see Note, *The Espionage Act*, *supra* note 182, at 445 (referring to prior governmental censorship, but also "subsequent censorship by prosecutions for seditious libel as was then practiced in England").

270. The Court made a similar interpretive move in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). *See* 12 WILLIAM M. WIECEK, THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941-1953, at 153 (2006) ("[*Cantwell*] held the permit statute void as imposing a prior restraint, but under the religion clauses, not the press clause, thereby extending a doctrine originating in regulation of the press into whole new territory."). My previous discussion of *Cantwell* related to the incitement conviction, not this licensing requirement. *See supra* notes 242-247 and accompanying text.

271. To be clear, prior-restraint doctrine itself was not static. My point here is simply that although *Thornhill* relied on a blended functional account of speech and press freedoms, it did not formally abandon the distinction between "prior restraints" and "subsequent punishments."

law]."[272] And in *Chaplinsky v. New Hampshire*, it unanimously held that hurling epithets at a police officer was not privileged because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[273] The analytical focus of these cases was still on the nature of the speech at issue—not the neutrality of the law or of the governmental rationale for restricting speech.

But *Chaplinsky* deserves further comment. Today, the decision stands as a narrow exception to the requirement of content neutrality.[274] Yet it bears repeating: no such rule existed in the early 1940s. Indeed, as we have seen, existing doctrine made it *harder* for claimants to prevail when a legislature had specifically proscribed particular harmful messages.[275] But if neutrality was not at issue, why did the Court identify "certain well-defined and narrowly limited classes" of unprivileged speech?[276]

The answer lies in the way the Justices were trying to circumvent the perceived errors of *Gitlow* and *Whitney*. In *Chaplinsky*, the defendant argued that his

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272. 316 U.S. 52, 55 (1942). The defendant had appended a "protest against official conduct" to commercial advertising and argued that he thus was, as the Court described, "engaged in the dissemination of matter proper for public information." *Id.* That phrasing appears in a variety of legal sources as a synonym for matters of public concern. *See, e.g.*, ME. CONST. of 1819, art. I, § 4; PA. CONST. of 1790, art. IX, § 7; *cf.* Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 301-02 (1941) (Black, J., dissenting) (defending the "[f]reedom to speak and write about public questions"); Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722, 731 (1942) (Black, J., dissenting) (describing the right "to express themselves publicly concerning an issue . . . of public importance").

273. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Chaplinsky had argued that he

> had the right to criticize the complaining witness as a public official openly acting in a wrongful manner, and also to criticize the local municipal government by the use of any language that he desired to employ as long as he did not induce or ask others to use violence against the local municipal government to overthrow the same.

Appellant's Brief at 10, *Chaplinsky*, 315 U.S. 568 (No. 255). He also argued that the statute was unconstitutional on its face. *See, e.g.*, Appellant's Reply Brief at 1, *Chaplinsky*, 315 U.S. 568 (No. 255) ("The statute has been construed so as to prohibit the speaking of the truth concerning any matter of public concern when it is offensive to others.").

274. *See, e.g.*, Lakier, *supra* note 14, at 2168 ("[T]he Court [in *Chaplinsky*] found itself in the difficult position of allowing the government to discriminate against speech on the basis of its content, even though this discrimination was something that the new conception of freedom of speech otherwise disavowed.").

275. *See supra* notes 248-252 and accompanying text. In *Chaplinsky*, the judgment was not actually "legislative" in the sense that it came from a legislature. Rather, it came from a state court's construal of the common law. But, after *Erie*, that view at least counted as the law of New Hampshire.

276. *Chaplinsky*, 315 U.S. at 571-72.

conviction was invalid because state law banned certain messages without requiring a case-specific showing of harm.[277] This argument challenged the reasoning in *Gitlow* and *Whitney*, which had held that the facial validity of a speech-targeting statute effectively barred as-applied claims. And by 1942, a majority of the Justices thought that Justice Holmes and Justice Brandeis had made the better argument.[278] But the Court was not ready to entirely abandon the logic of *Gitlow* and *Whitney*.

Instead, the Court held that the New Hampshire law did not restrict *any* constitutionally privileged speech. "The statute, as construed," Justice Murphy observed, "does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace."[279] But rather than defer to a legislative judgment about the inherent harmfulness of certain messages, Murphy instead relied on tradition. "There are certain well-defined and narrowly limited classes of speech," he explained, "the prevention and punishment of which have never been thought to raise any Constitutional problem."[280] The doctrinal significance of *Chaplinsky*, then, was its holding that only historically recognized categories of unprivileged speech could be entirely banned without any case-specific showing of harm. *Gitlow* and *Whitney* were thus circumscribed. But the Court's reasoning—and the legal backdrop of its decision—had nothing to do with the modern idea of content neutrality.

Nor did neutrality undergird the famous decision the following year in *West Virginia State Board of Education v. Barnette*.[281] To be sure, Justice Jackson's majority opinion includes a host of enduring phrases that are often construed as

277. New Hampshire's breach-of-the-peace rule was facially invalid, he argued, because it extended to offensive behavior that was privileged, including "honest criticism of government, religion, politics, social functions, or any other subject." Appellant's Brief, *supra* note 273, at 14; *see also id.* at 18 ("[State law] permits conviction for the exercise of the right of free speech even where there is no clear and present danger of violence or threatened violence or breach of the peace."). Chaplinsky also claimed that the application of the law was constitutionally invalid because his virulent denouncement of the job performance of a police officer was privileged as a truthful criticism on matters of public concern. *See, e.g.*, *id.* at 10; Appellant's Reply Brief, *supra* note 273, at 3.

278. *See, e.g.*, Bridges v. California, 314 U.S. 252, 261-63 (1941); *see also* Dennis v. United States, 341 U.S. 494, 507 (1951) (plurality opinion) ("Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale.").

279. *Chaplinsky*, 315 U.S. at 573.

280. *Id.* at 571-72.

281. 319 U.S. 624 (1943).

paeans to neutrality.[282] Efforts "to coerce uniformity of sentiment in support of some end thought essential" were futile and dangerous, Jackson insisted, and "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard."[283] Instead, he explained, minority opinions must be tolerated, at least where "harmless to others [and] to the State."[284] Then, in one of his most memorable lines, Jackson declared: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox . . . ."[285]

Barnette was protective of minority views, reflecting increasing concerns about arbitrary discrimination at home and terrifying examples of totalitarianism abroad.[286] But Justice Jackson was not embracing content or viewpoint neutrality. His constitutional vision was one of toleration and pluralism—disallowing official orthodoxy but not requiring neutrality.[287] Indeed, Jackson was deeply hostile to placing artificial limits on the legislature's ability to balance social and individual interests.[288] And *Barnette* did not suggest otherwise. Jackson rejected

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282. *See* sources cited *supra* note 16. For a criticism of *Barnette* along these lines, see Steven D. Smith, Barnette*'s Big Blunder*, 78 CHI.-KENT L. REV. 625 (2003), though Smith does acknowledge that *Barnette* "is susceptible to . . . more benign interpretations," *id*. at 627. For a subsequent treatment that is more critical of a "neutrality" reading, see Steven D. Smith, *"Fixed Star" or Twin Star?: The Ambiguity of* Barnette, 13 FIU L. REV. 801, 824-25 (2019), arguing that "[t]he better interpretation of *Barnette* is that it prohibits governments from compelling citizens to affirm things they do not believe." *See also* Paul Horwitz, *A Close Reading of* Barnette*, in Honor of Vincent Blasi*, 13 FIU L. REV. 689, 725 (2019) (agreeing with Smith's conclusion).

283. *Barnette*, 319 U.S. at 640-41.

284. *Id.* at 642.

285. *Id.*

286. *See* L.A. Powe, Jr., *Evolution to Absolutism: Justice Douglas and the First Amendment*, 74 COLUM. L. REV. 371, 379 (1974) (describing concerns about arbitrary discrimination against Jehovah's Witnesses); Richard Primus, Note, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423, 423 (1996) (describing the influence of concerns about totalitarianism on constitutional jurisprudence).

287. In spatial terms, orthodoxy would demand being in a particular place, pluralism would allow freedom of movement within socially defined boundaries, and neutrality would allow individuals to set their own boundaries.

288. *See, e.g.*, Jones v. Opelika, 316 U.S. 584, 595 (1942) ("The ordinary requirements of civilized life compel [an] adjustment of interests. The task of reconcilement is made harder by the tendency to accept as dominant any contention supported by a claim of interference with the practice of religion or the spread of ideas."). *Barnette* also acknowledged the legitimacy of the government's desire to foster "[n]ational unity as an end." *Barnette*, 319 U.S. at 640.

compelled "orthodox[y]," "coerce[d] uniformity," and "[c]ompulsory unification" with respect to particular messages.[289] The state, he insisted, had to be tolerant of dissenting ideas and could not force individuals to affirm views that they did not believe. But toleration of this sort—a ban on official orthodoxy—is not equivalent to neutrality.[290]

D. The Preferred-Freedoms Conflict

As we have seen, the Court in the early 1940s generally treated the constitutional privilege of speaking on matters of public concern as a "preferred" freedom but not one that was "absolute." Criminal intent negated it.[291] And it was defeasible, as stated in *Thornhill*, where a "clear danger of substantive evils [arose] under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[292] Alongside this substantive privilege, the Court also rejected prior restraints and disfavored other modes of restricting speech that gave administrators or judges too much discretion.[293]

But while all the Justices favored broader security for expression, this Section describes how they increasingly parted ways over the scope and strength of these standards. One group, led by Justice Black and Justice Douglas, favored more robust protections for speakers, while another group, led by Justice Frankfurter and Justice Jackson, took a far more limited view of expressive freedom.[294] As we will see, ideas of neutrality became increasingly prominent during the 1940s,

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289. *Barnette*, 319 U.S. at 640-42.

290. At a high enough level of generality, of course, any content-based limit on speech could be described as establishing expressive orthodoxy, just as bans on foie gras and haggis could be described as establishing gastronomical orthodoxy. But this wordplay does not capture Justice Jackson's thinking. He was not equating anti-orthodoxy with neutrality. The problem at hand was coerced affirmation of a particular ideology—that is, an effort to establish orthodoxy—not suppression of harmful speech.

291. *See* Taylor v. Mississippi, 319 U.S. 583, 589 (1943) (concluding that a restriction of speech was unconstitutional in part because the speaker did not have "an evil or sinister purpose"); *see also* Hartzel v. United States, 322 U.S. 680, 690 (1944) (Reed, J., dissenting) (arguing that subversive speech was not privileged because of criminal intent).

292. Thornhill v. Alabama, 310 U.S. 88, 105 (1940). Rather than referring to the privilege as "defeasible," one might say that speech creating a clear and present danger was beyond the scope of the privilege. However, in my view, the language of defeasibility better captures how the Justices conceptualized the privilege.

293. *See supra* notes 232-235, 238-241.

294. *See* Stephen A. Siegel, *The Death and Rebirth of the Clear and Present Danger Test*, *in* TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF PROFESSOR MORTON J. HORWITZ 211, 215 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009).

though not in ways that directly map onto current doctrine. Perhaps the most important development of this period, however, was the way that First Amendment law increasingly departed from earlier traditions.

For the Black-Douglas camp, neutrality made no constitutional difference. Their focus was on ensuring that privileged freedoms were secured against all legal threats. In *Murdock v. City of Jeannette*, for instance, the Court held that a Jehovah's Witness adherent could not be forced to pay a nondiscriminatory licensing fee in order to sell religious literature.[295] Writing for the majority, Justice Douglas insisted that the neutrality of the law was "immaterial."[296] What mattered was the encroachment on constitutionally "preferred" freedoms.[297] For the rest of the decade, a slim majority took this position time and again. Laws that did not target speech, like trespassing laws, nonetheless triggered careful judicial review when applied to constitutionally privileged acts.[298]

By contrast, the group led by Justice Frankfurter and Justice Jackson generally treated neutral laws as raising no constitutional concerns unless they vested too much discretion in executive or judicial officers.[299] But this position still did

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295. 319 U.S. 105, 116-17 (1943).

296. *Id.* at 115. Indeed, the fact that the license tax was "flat" rather than "apportioned" made it *more* constitutionally suspect. *See id.* at 113-14. *But see* Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 134 (1992) (treating an "apportioned" parade fee as more constitutionally suspect because "[t]he fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content"). Justice Douglas wrote that "a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful." *Murdock*, 319 U.S. at 116. This passage seems to mean that those harms were insufficient to counterbalance the right—not that the right itself was defined in reference to the neutrality of the means or ends of the law.

297. *See, e.g.*, Jones v. Opelika, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting). In *Murdock*, the privileged conduct was a "religious rite." 319 U.S. at 109-10. For a discussion of Justice Douglas's struggle to put boundaries on the range of conduct protected by the Free Exercise Clause, see Kessler, *supra* note 35, at 1971-74.

298. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 509 (1946); United States v. C.I.O., 335 U.S. 106, 139-40, 144 (1948) (Rutledge, J., concurring). *Marsh* is usually remembered as being about state action, but the crucial fact for Justice Black was the restriction of privileged conduct. *Marsh*, 326 U.S. at 509-10.

299. *See, e.g.*, *Murdock*, 319 U.S. at 118 (Reed, J., dissenting); *id.* at 134-35 (Frankfurter, J., dissenting); *Marsh*, 326 U.S. at 512 (Reed, J., dissenting); Prince v. Massachusetts, 321 U.S. 158, 177 (1944) (Jackson, J., concurring in the judgment). This approach had initially enjoyed widespread support on the Court. *See* Schneider v. State, 308 U.S. 147, 160-61 (1939); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594-95 (1940); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting a "narrower scope for operation of the presumption of constitutionality when legislation appears *on its face* to be within a specific prohibition of the Constitution" (emphasis added)). Notably, this approach to neutrality was not formalistic. *See Murdock*, 319 U.S. at 134-35 (Frankfurter, J., dissenting).

not reflect neutrality in its modern form. In particular, it did not disallow the government from suppressing communicative harms or posit that non-neutral laws were presumptively unconstitutional. Rather, for Frankfurter and Jackson, neutrality was a way of *limiting* the coverage of the First Amendment.[300] On this view, only targeted restrictions of speech called for careful judicial analysis to ensure that the restriction did not target disfavored views merely because of hostility to the views themselves. Following Justices Holmes and Brandeis, Frankfurter and Jackson thought that government could not *prohibit* the expression of harmful ideas; it could only *regulate* their dissemination by restricting the harmful expression of those ideas. And judicial review was needed to ensure that the former did not come under the guise of the latter.[301]

But while they generally voted together, Justice Frankfurter and Justice Jackson likely had different jurisprudential reasons for using neutrality as a screening device. For Frankfurter, the preeminent concern was how to cabin judicial review, not how to interpret the First Amendment.[302] Restrictions of political discourse, Frankfurter observed, "come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."[303] But this approach was grounded more on a bifurcated theory of judicial review than an interpretation of the First Amendment. Speech, he thought, was generally regulable in promotion of the public good. Indeed, Frankfurter vehemently denied that enumerated liberties enjoyed a "preferred position."[304]

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300. For the standard work on "coverage" and "protection," see Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981). Once again, this Article takes no position on whether governmental targeting of communicative harms was a threshold aspect of First Amendment coverage in earlier eras. *See supra* notes 75, 213.

301. *See, e.g.*, Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring); Murdock v. City of Jeannette, 319 U.S. 105, 139 (1943) (Frankfurter, J., dissenting); United States v. Ballard, 322 U.S. 78, 94-95 (1944) (Jackson, J., dissenting); *see also infra* notes 334 and 344 and accompanying text (documenting more examples).

302. *See, e.g.*, *Gobitis*, 310 U.S. at 594-95.

303. Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring); *see also* Am. Fed'n of Lab. v. Swing, 312 U.S. 321, 325-26 (1941) (describing the constitutional limits on a state's attempt to ban picketing).

304. *See, e.g.*, *Kovacs*, 336 U.S. at 90-96 (Frankfurter, J., concurring). Ted White argues that Justice Frankfurter embraced bifurcated review in the early 1940s and then became disillusioned with that project later that decade. *See* White, *supra* note 14, at 338-40. Respectfully, I think White is mistaken. To see why, we must disentangle three issues. First, Frankfurter thought that speech *was* a preferred freedom in the sense that certain encroachments upon speech called for more searching judicial review than was ordinarily warranted in due-process cases. Second, he thought that speech was *not* a preferred freedom in the sense that *incidental* restrictions triggered heightened review. Third, he thought that speech was *not* a preferred freedom in the

Justice Jackson, by contrast, took a more capacious view of the judicial role and a somewhat more interpretive view of rights. Judges, he explained in *Barnette*, had "the task of translating the majestic generalities of the Bill of Rights . . . into concrete restraints on officials dealing with the problems of the twentieth century . . . ."[305] Unlike Justice Black and Justice Douglas, however, Jackson tended to view rights in terms of limits on governmental power—not as shields around certain types of behavior.[306] Thus, while Jackson rejected state authority to force objecting students to salute the flag,[307] he also insisted that applying nondiscriminatory taxes to religious and expressive activities raised no First Amendment concerns.[308] In other words, Jackson's approach was largely framed by an inclination to treat rights as limitations on powers.

Put in highly stylized terms, one could say that Justice Frankfurter's approach was grounded on the remnants of the natural-rights tradition, whereas Justice Jackson's approach was grounded on the legacy of common-law rights. For Frankfurter, the common good was paramount, whereas for Jackson, rights could operate as specific limits on governmental powers. But the functional turn

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sense that speech rights operated as individualistic claims *against* the public good. Frankfurter consistently held all three views throughout the 1940s. On the first principle, he and his colleagues had no disagreement. And on the second and third principles, he quickly noted his disagreements. *See Murdock*, 319 U.S. at 134-35 (Frankfurter, J., dissenting) (second principle); Bridges v. California, 314 U.S. 252, 279 (1941) (Frankfurter, J., dissenting) (third principle). My reading of Frankfurter's stated hostility to the "preferred freedoms" paradigm in the late 1940s is that he was responding to the successful use of that label by Justice Black and Justice Douglas in promoting the second and third principles—not that he changed his mind about the first principle.

305. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943); *see also id.* ("Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard."). *See generally* ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 22 (1941) ("The Supreme Court is also the voice of the Constitution in vindicating the rights of the individual under the federal Constitution against both the national and state governments.").

306. *See, e.g.*, *Barnette*, 319 U.S. at 635-36; *Ballard*, 322 U.S. at 92-95 (Jackson, J., dissenting). This feature of Justice Jackson's jurisprudence is recognized in Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 280-81 (2000). But *contra* Bybee, *supra*, at 289, Jackson did not think that the First Amendment wholly barred Congress from restricting speech. When Jackson wrote that the First Amendment "exclude[d]" Congress from restricting speech, he was referring to what "some would" infer, *not* what *he* inferred. Terminiello v. Chicago, 337 U.S. 1, 28 (1949) (Jackson, J., dissenting).

307. *See Barnette*, 319 U.S. at 640-42.

308. *See, e.g.*, Follett v. Town of McCormick, 321 U.S. 573, 579-83 (1944) (Roberts, Frankfurter & Jackson, JJ., dissenting). For another illustration of Justice Jackson's use of content neutrality to limit the coverage of the First Amendment, see *Kovacs*, 336 U.S. at 97 (Jackson, J., concurring) ("No . . . infringement of free speech arises unless such regulation or prohibition undertakes to censor the contents of the broadcasting.").

in rights jurisprudence blurred distinctions between these two frameworks. An approach to judicial review that allowed judges to second-guess legislative assessments was not all that different from an approach to traditional common-law rights that allowed judges to reshape those rules based on their social functions. And with respect to expressive freedom, the conceptual overlap between a democracy-reinforcing account of judicial review and a democracy-reinforcing account of speech rights made this convergence especially striking.[309]

Other Justices, meanwhile, sought to define privileged spheres of individual liberty. In doing so, they abandoned the idea that laws targeting certain messages should receive greater deference than neutral laws. "[I]t is the character of the right, not of the limitation, which determines what standard governs," Justice Rutledge explained in *Thomas v. Collins*.[310] Consequently, the "clear and present danger" test applied to any restriction of preferred freedoms.[311] Legislatures still had to decide how to balance "the concrete clash of particular interests," Rutledge observed. "But in our system," he insisted, "where the line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition."[312] This was not an embrace of neutrality, but at least the Court had eschewed what had been in some sense an *anti*-neutrality aspect of First Amendment law.

At the same time, the earlier boundaries of privileged speech became less pronounced. The category of speech on matters of public concern, for instance, lost its formalist edges, now encompassing previously unprivileged matters.[313] This shift was most notable with respect to speech concerning labor relations,

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309. *See, e.g.*, JACKSON, *supra* note 305, at 284 (discussing the Court's "stamping out attempts by local authorities to suppress the free dissemination of ideas, upon which the system of responsible democratic government rests").

310. 323 U.S. 516, 530 (1945). Justice Frankfurter later claimed that Justice Rutledge's opinion was not an opinion of the Court because Justice Jackson had concurred "only to say that he agreed that the case fell into 'the category of a public speech, rather than that of practicing a vocation as solicitor.'" *Kovacs*, 336 U.S. at 94 (Frankfurter, J., concurring) (quoting *Thomas*, 323 U.S. at 548). Some scholars, however, dispute that "Jackson was concurring only in result." Linzer, *supra* note 218, at 299.

311. *Thomas*, 323 U.S. at 530. It should be noted, however, that the applicability of the "clear and present" danger standard was disputed even after *Thomas*. For a discussion of this issue, see Chester James Antieau, *The Rule of Clear and Present Danger: Scope of Its Applicability*, 48 MICH. L. REV. 811 (1950). For an argument against using the clear and present danger test to evaluate incidental restrictions of speech, see Wallace Mendelson, *Clear and Present Danger—from* Schenck *to* Dennis, 52 COLUM. L. REV. 313 (1952).

312. *Thomas*, 323 U.S. at 531-32; *see also, e.g.*, Pennekemp v. Florida, 328 U.S. 331, 335 (1946) ("The Constitution has imposed upon this Court final authority to determine the [First Amendment's] meaning and application.").

313. *See, e.g.*, Bridges v. California, 314 U.S. 252, 268-69 (1941).

which was of central concern to the New Deal Justices. "Free discussion concerning the conditions in industry and the causes of labor disputes," the Court declared, was "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."[314] Whether speech was well-intentioned or addressed a matter of public concern also became far less pressing once the Court became more receptive to facial claims of vagueness and overbreadth.[315] And that shift, too, reflected the functional turn. Case-by-case assessments, Justice Rutledge warned in *Thomas v. Collins*, would underprotect privileged speech, effectively "compel[ling] the speaker to hedge and trim."[316] Concerns about "chilling effects" thus called for extending judicial protection for expression beyond the scope of the traditional privilege.

With these changes, a crucial inflection in speech doctrine was beginning to take shape. In some sense, the common-law strand of speech and press rights was fading as the Justices moved away from traditional rules. Yet the majority was also beginning to signal that speech and press rights were more than just preferred freedoms that called for heightened due-process review.[317] Though not yet fully conceptualized, a more substantive and legalistic notion of speech and press freedoms seemed to be coming into view.

III. THE EMERGENCE OF NEUTRALITY

The functional turn had given rise to new problems and new responses. The rights-enforcement project was no longer one of generally supervising the police powers, coupled with the enforcement of traditional common-law rules. Nor did the Court approach its task with the same interpretive assumptions. Both the landscape and the lens had changed.

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314. *Thomas*, 323 U.S. at 532 (quoting Thornhill v. Alabama, 310 U.S. 88, 102-03 (1940)). This reasoning echoed the progressive critique of *Lochner*-era decisions that drew formalist distinctions between economic and political matters. *See* Luke Norris, *Constitutional Economics*, 28 YALE J.L. & HUMANS. 1, 4-6, 11-34 (2015). Notably, the approach championed by Justice Frankfurter and Justice Jackson was even *less* interested in the older distinction between "public" and "economic" realms. Their "Lochnerism" complaints thus aimed at an increasingly formalist approach to First Amendment rights and the decision to treat speech rights as "preferred freedoms."

315. *See Thomas*, 323 U.S. at 531; Winters v. New York, 333 U.S. 507, 509-10 (1948).

316. *Thomas*, 323 U.S. at 535.

317. By contrast, early vagueness and overbreadth doctrines were oriented largely toward maintaining this case-by-case review, ensuring judicial evaluation of whether verdicts were grounded on privileged conduct. *See, e.g.*, Stromberg v. California, 283 U.S. 359, 369 (1931); Herndon v. Lowry, 301 U.S. 242, 259 (1937); Thornhill v. Alabama, 310 U.S. 88, 96 (1940).

My goal in this Part is to trace the emergence of content and viewpoint neutrality in a way that is comprehensible but that does not convey a false sense of linear progression. One aspect of this story, however, was constant: doctrine became increasingly unmoored from earlier traditions. What had begun as a functional reinterpretation of inherited legal rules gradually morphed into a free-standing functional account that operated mostly on its own, independent of those rules.

A. Increasing Absolutism

Although they disagreed about many things, all the Justices in the early 1940s embraced two principles. First, the government could restrict speech in cases of genuine public need. Second, the government could not restrict speech for its own sake or ban the dissemination of particular ideas. Disagreements lingered, to be sure, about when to require a showing of "clear and present danger" and how restrictive that test should be. But to some degree, all of the Justices embraced a "balancing" approach—weighing speaker interests against countervailing governmental interests.[318] And none insisted that limits on speech had to be independent of social norms. The paradigm was still primarily one of toleration, not neutrality.[319]

During the 1940s, however, the majority of the Justices took an increasingly absolutist approach to speech rights. This Section will briefly trace some of these developments. At the outset, though, it is worth stating the punchline: the suggestions of viewpoint neutrality that emerged by the end of the decade were mostly a byproduct of growing absolutism. Although doctrine was becoming more protective of speakers, neutrality was still not the organizing principle of expressive freedom. The majority of the Justices still viewed speech and press rights as shields around particular preferred freedoms, not as prohibitions on content-based classifications or viewpoint-based interests.

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318. *See* Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71, 87-88; Powe, *supra* note 286, at 379.

319. One should not put much weight on labels, but it is worth noting that the Justices sometimes used the term "toleration." *See, e.g.*, United States v. Ballard, 322 U.S. 78, 87 (1944) (referring to the "widest possible toleration of conflicting views"); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 644 (1943) (Black, J., concurring) (referring to the "widest toleration of conflicting viewpoints").

The backdrop of these developments was a virulent dispute about rights jurisprudence more broadly.[320] Across several constitutional domains, a coalition led by Justice Black and Justice Douglas emphasized the primacy of the federal judiciary in securing fundamental rights, particularly against state violations.[321] In doing so, these Justices took an expansive and legalistic view of enumerated rights and sought to cabin judicial discretion.[322] And instead of relying on common-law traditions, they often rested their decisions on claims about text and original meaning.[323] Meanwhile, the group led by Justice Frankfurter and Justice Jackson resisted this doctrinaire and centralizing approach. Defining rights more as interests than as absolutes, they insisted that states had a crucial role to play in defining the boundaries of civil liberty.[324]

This broader conflict over rights framed debates about speech and press freedoms. The more absolutist approach was especially evident in a narrow definition of "clear and present danger." Social harms had to be "immediate" and needed to "clearly and not dubiously outweigh" speech interests, Justice Rutledge insisted in 1948.[325] At least in tone, this was hardly what Justice Murphy — also a member of the Black-Douglas camp — had described eight years earlier as a judicial obligation to "weigh the circumstances."[326] Even legislative judgments, Justice Rutledge now insisted, had to be free of doubt.[327] With this test,

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320. These legal disputes were paralleled by rancorous personal conflict. *See* Urofsky, *supra* note 318, at 71, 87-88; Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203, 203-04.

321. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947); Adamson v. California, 332 U.S. 46, 82-84, 90-92 (1947) (Black, J., dissenting); Wolf v. Colorado, 338 U.S. 25, 40-41 (1949) (Douglas, J., dissenting).

322. *See* Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 717 (1963); Sylvia Snowiss, *The Legacy of Justice Black*, 1973 SUP. CT. REV. 187, 197-98. Legalistic rules also facilitated the goal of providing nationwide protection for expressive freedom. Prior to its procedural innovations of the 1950s and 60s, *see* Brown v. Allen, 344 U.S. 443 (1953) (holding that federal habeas courts may review federal constitutional claims denied by state courts); Monroe v. Pape, 365 U.S. 167 (1961) (holding that 42 U.S.C. § 1983 creates a civil cause of action against public officials who violate individual constitutional rights), the Court could hardly review thousands upon thousands of claims each year on direct review. For a discussion of how "rationing" concerns are pervasive in modern jurisprudence, see ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING 4 (2019).

323. *See, e.g.*, *Everson*, 330 U.S. at 8-16.

324. *See, e.g.*, *Adamson*, 332 U.S. at 59-68 (Frankfurter, J., concurring); *Wolf*, 338 U.S. at 27-29.

325. United States v. Cong. of Indus. Orgs., 335 U.S. 106, 140 (1948) (Rutledge, J., concurring).

326. Thornhill v. Alabama, 310 U.S. 88, 95-96 (1940) (quoting Schneider v. State, 308 U.S. 147, 161 (1939)).

327. *See Cong. of Indus. Orgs.*, 335 U.S. at 145 (demanding "indubitable public advantage").

one commentator observed, the Justices had begun "to imply that incitement to crime is the only abuse of free expression."[328]

The increasing absolutism of speech rights was especially on display in *Terminiello v. Chicago*.[329] Arthur Terminiello had been convicted of breaching the peace by delivering a racist tirade. When the case reached the Supreme Court, five Justices voted to reverse. The decision ultimately rested on a technical flaw in the jury instructions.[330] But Justice Douglas's majority opinion featured sweeping constitutional protection for speakers, even in riotous circumstances. "The right to speak freely and to promote diversity of ideas and programs," he wrote, is "one of the chief distinctions that sets us apart from totalitarian regimes."[331] This freedom often came with "profound unsettling effects," but it still warranted protection absent "a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[332] To hold otherwise, he claimed, would be to permit the government to impose a "standardization of ideas."[333]

In dissent, Justice Frankfurter and Justice Jackson warned that their colleagues were pulling First Amendment doctrine back into the snares of *Lochner*-era jurisprudence. Suppressing ideas for its own sake was disallowed, they recognized,[334] but legislatures still had room to decide which means were necessary to advance social ends. "If 'the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics,'" Frankfurter wrote in *Winters v. New York*, "neither does it enact the psychological dogmas of the Spencerian era."[335] Legislators, he

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328. Mendelson, *supra* note 311, at 322. Noting this consequence, some commentators argued that the clear and present danger test should be limited or redefined in certain contexts. *See* 1 ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS: A REPORT FROM THE COMMISSION ON FREEDOM OF THE PRESS 59 (1947) (proposing that the clear and present danger test be reformulated in the context of obscenity regulations). *See generally* Leslie Kendrick, *On "Clear and Present Danger,"* 94 NOTRE DAME L. REV. 1653, 1661 (2019) ("The difficulty was, and is, that speech can pose many risks other than in-the-moment positive or negative reactions that could lead to harmful results.").

329. 337 U.S. 1 (1949).

330. Powe, *supra* note 286, at 386.

331. *Terminiello*, 337 U.S. at 4.

332. *Id.*

333. *Id.* at 4-5.

334. *Id.* at 25 (Jackson, J., dissenting) ("It does not appear that the motive in punishing him is to silence the ideology he expressed as offensive to the State's policy or as untrue, or has any purpose of controlling his thought or its peaceful communication to others. There is no claim that the proceedings against Terminiello are designed to discriminate against him or the faction he represents or the ideas that he bespeaks."); *see also* Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring) ("The State cannot of course forbid public proselyting or religious argument merely because public officials disapprove the speaker's views.").

335. 333 U.S. 507, 527 (1948) (Frankfurter, J., dissenting) (citation omitted).

insisted, were far more competent than judges to identify causal links between expression and harmful conduct.[336] Jackson echoed these sentiments in *Terminiello*. "An old proverb warns us to take heed lest we 'walk into a well from looking at the stars,'" he cautioned.[337] The need for public order, Jackson lamented, was being replaced with "a dogma of absolute freedom for irresponsible and provocative utterance."[338]

Even with the Court embracing a more absolutist approach, however, the governing paradigm was still toleration, not neutrality. To be sure, the majority seemed *in effect* to be disabling the government from targeting communicative harms.[339] But Justice Douglas had arrived at that position using an increasingly narrow view of "clear and present danger"—not by articulating anything *especially* problematic about content-based or viewpoint-based restrictions.[340] The core idea was that the dissemination of certain ideas could not be effectively prohibited, no matter how abhorrent. In this sense, the Court was suggesting an "equality of status in the field of ideas," as Alexander Meiklejohn famously put it.[341] But statements of this sort need to be read in context. They underpinned a right of nearly absolute toleration, not a right to neutral treatment.[342]

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336. *Id.* Justice Frankfurter was not saying that the Court had done this as a doctrinal matter but rather that it was doing so "[w]ithout formally professing to do so," through excessive tightening of vagueness doctrine. *Id.*

337. *Terminiello*, 337 U.S. at 14 (Jackson, J., dissenting).

338. *Id.* at 28; *see also, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring) (noting "how easy it is to fall into the ways of mechanical jurisprudence through the use of oversimplified formulas . . . [and] bloodless categories"); Hughes v. Superior Ct., 339 U.S. 460, 466 (1950) ("The constitutional boundary line between the competing interests of society involved in the use of picketing cannot be established by general phrases.").

339. *See* Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465, 1493 (2016).

340. *Terminiello*, 337 U.S. at 4.

341. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (Greenwood Press 1979) (1948).

342. For further discussion, see *supra* note 245. The Court's unanimous decision in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 501-02 (1949), underscores this point. The case obviously involved suppression of communicative harms, making the decision now seem aberrational. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1347 (2005). In 1949, however, none of the Justices conceptualized the First Amendment as generally disabling the government from targeting communicative harms.

B. The Return of Balancing

With the appointment of two new Justices, the Court quickly shifted gears. This Section traces the doctrinal developments in the 1950s, including the embrace of a "balancing" approach to expressive freedom—weighing speaker interests against countervailing governmental interests—and the attendant problems and critiques that flowed from that approach. As we will see, a limited notion of content neutrality became more prominent during this period. And by the end of the decade, Justice Black and Justice Douglas were beginning to articulate notions of neutrality in something much closer to their modern form.

The retreat from nearly absolute toleration was apparent right away with the decision in *American Communications Association v. Douds*, which embraced the limited notion of content neutrality that Justice Frankfurter and Justice Jackson had been championing for a decade.[343] On this view, judges had a special responsibility to evaluate laws that were "either frankly aimed at the suppression of dangerous ideas" or, "although ostensibly aimed at the regulation of conduct, may [have] actually 'be[en] made the instrument of arbitrary suppression of free expression of views.'"[344] But if effects on expression were merely incidental, a "rational connection between the prohibitions of the statute and its objects" would suffice.[345] In modern terms, content-neutral restrictions only triggered rational-basis review, whereas content-based restrictions triggered a more careful judicial balancing test—a "candid and informed weighing of the competing interests," as Frankfurter put it the following year.[346] *Douds* thus abandoned the "preferred freedoms" approach. Speech was to be generally regulable to promote the public good, and the judicial task was simply to ensure that targeted restrictions were not arbitrary.

The Court's embrace of neutrality as a screening device in no way disallowed the government from responding to communicative harms or pursuing viewpoint-based interests. Some expression, Chief Justice Vinson noted in *Douds*,

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343. 339 U.S. 382 (1950).

344. *Id.* at 402-03 (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 516 (1939) (Roberts, J.).

345. *Id.* at 405. This shift then required strained reinterpretations of earlier cases, including *Marsh v. Alabama*, 326 U.S. 501 (1946). *See* Breard v. Alexandria, 341 U.S. 622, 643-44 (1951). Justice Black and Justice Douglas vigorously dissented not only on the substance but also on the Court's failure to overturn some of these earlier cases. *Id.* at 649-50 (Black, J., dissenting).

346. Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring); *see* Siegel, *supra* note 294, at 218 ("From Frankfurter's *Dennis* concurrence, deferential balancing flowered into the general mode of analysis for First Amendment issues."); *see, e.g.*, Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 90-91 (1961) (employing a deferential balancing test).

could be suppressed if "offensive to the moral standards of the community."[347] Moreover, he explained, the government had every right to make a genuine, realistic appraisal of the dangers that certain views posed to society. "[B]eliefs are springs to action," Vinson urged, and to argue that government has *no* power whatsoever to address these harms "is to make a fetish of beliefs."[348] The slippery slope to unlimited governmental thought control, he added, was not a threat "while this Court sits" because judges could address "the problem of balancing the conflicting individual and national interests."[349] Vinson was starkly rebutting the absolutist approach that Justice Douglas had suggested only a year earlier in *Terminiello*.

Subsequent decisions reinforced this limited view of expressive freedom. The plurality in *Dennis v. United States* insisted that, "subject to [judicial] review," the government could determine "that certain kinds of speech are so undesirable as to warrant criminal sanction."[350] The Court followed that suggestion in *Beauharnais v. Illinois* by upholding the conviction of someone who had published a racist screed. Writing for the majority, Justice Frankfurter explained that Illinois could reasonably conclude that "wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community."[351] The new majority also quickly backtracked in *Feiner v. New York* from

347. *Douds*, 339 U.S. at 398. In support of this proposition, Chief Justice Vinson cited cases interpreting the Free Exercise Clause.

348. *Id.* at 409-10; *see also id.* at 435 (Jackson, J., concurring in part and dissenting in part) ("In weighing claims that any particular activity is above the reach of law, we have a high responsibility to do so in the light of present-day actualities, not nostalgic idealizations valid for a simpler age.").

349. *Douds,* 339 U.S. at 410.

350. 341 U.S. at 508 (plurality opinion).

351. Beauharnais v. Illinois, 343 U.S. 250, 259 (1952). Drawing on *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court held that a statute targeting "group libel" was facially valid even without requiring the jury to identify a "clear and present danger" of harm. *Beauharnais,* 343 U.S. at 257, 261, 266.

the more capacious understanding of expressive freedom articulated in *Terminiello*.[352] Justice Black and Justice Douglas continued to insist that speech on matters of public concern warranted rigorous constitutional protection, but they were now in the minority.[353]

The balancing approach that prevailed in the 1950s carried the usual benefits of flexible standards.[354] It was context sensitive and did not artificially elevate some social interests over others using "oversimplified formulas" or "nostalgic idealizations valid for a simpler age."[355] "The task of this Court to maintain a balance between liberty and authority is never done," Justice Jackson wrote, "because new conditions today upset the equilibriums of yesterday."[356] But as is so often true, the benefits of balancing also turned out to be liabilities. And that was particularly evident as an intellectual tide began to swell in favor of so-called "neutral principles."

The basic premise of this view, as Herbert Wechsler famously stated, was that judges should use "criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will."[357] Like others who shared his perspective, Wechsler fervently denied that judges should merely discover and apply earlier legal traditions without considering their underlying social functions.[358] Judges, he thought, thus needed to make some "value choices"

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352. *See* Feiner v. New York, 340 U.S. 315, 319-20 (1951) ("Petitioner was . . . neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered.").

353. *See, e.g.*, *Beauharnais*, 343 U.S. at 270 (Black, J., dissenting); Wieman v. Updegraff, 344 U.S. 183, 193 (1952) (Black, J., concurring); Black v. Cutter Labs., 351 U.S. 292, 303 (1956) (Douglas, J., dissenting); Yates v. United States, 354 U.S. 298, 340, 344 (1957) (Black, J., concurring in part and dissenting in part). By 1959, however, Justice Douglas claimed that speech and press freedoms were "not in terms or by implication confined to discourse of a particular kind and nature." Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

354. *See* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 27 (1992) (discussing perceived tradeoffs in the use of rules and standards).

355. Kovacs v. Cooper, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring) ("oversimplified formulas"); Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 435 (1950) ("nostalgic idealizations"); *see also, e.g.*, Dennis v. United States, 341 U.S. 494, 524-25 (1951) (Frankfurter, J., concurring) (calling for "candid and informed weighing of the competing interests" rather than "announcing dogmas too inflexible for the non-Euclidian problems to be solved"). *See generally* Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1434-35 (1962) (discussing this "balancing" approach).

356. *Douds*, 339 U.S. at 445 (Jackson, J., concurring in part and dissenting in part).

357. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11 (1959). For general discussion of the legal-process school, see NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 205-99 (1995).

358. Wechsler, *supra* note 357, at 18-19.

when constructing legal doctrine.[359] But he urged that judges not rely on their own moral notions to decide cases. Their decisions had to be grounded on *reasoned* decision-making, using articulable principles that could be applied across like cases.[360]

On its own terms, Wechsler was hardly suggesting that the Justices needed to embrace content or viewpoint neutrality.[361] Although critics often distorted his point,[362] Wechsler was not arguing that the principles themselves had to be "neutral" in the sense of being wholly independent of judicial assessments of value.[363] Rather, he was advocating for *principled* and *consistent* decision-making. Any number of different approaches to expressive freedom could be "neutral" under Wechsler's definition.[364]

But at least in some cases, the idea of "neutral principles" posed serious problems for First Amendment doctrine. The Court's "balancing" approach called for a realistic appraisal of all the contending interests, without artificially elevating some and discarding others. But how could moral interests be weighed in the constitutional balance? Was it even possible for judges to evaluate the weight of moral interests?

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359. *Id.* at 19; *see* DUXBURY, *supra* note 357, at 264 ("Process jurisprudence is not entirely antithetical to judicial activism." (citation omitted)).

360. *See* Wechsler, *supra* note 357, at 15 (supporting "reaching judgment on analysis and reasons quite transcending the immediate result that is achieved"). "[N]eutral principles," as one scholar nicely rephrases, are "principles [that] are general and capable of neutral application." DUXBURY, *supra* note 357, at 269.

361. Wechsler did criticize the Court's obscenity cases, but his immediate point was that the Justices needed to articulate the reasons for their per curiam orders. *See* Wechsler, *supra* note 357, at 20-21.

362. Critics unfairly criticized Wechsler for (purportedly) asserting that the selection of principles could be free of value judgments. *See, e.g.*, Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 664-65 (1960). That critique would have applied to Robert Bork but not Wechsler. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7 (1971) (calling for neutrality in "the *definition* and the *derivation* of principles").

363. Much of the controversy that followed Wechsler's article focused on his critique of per curiam desegregation decisions, with many commentators insisting that those decisions were, in fact, principled. *See, e.g.*, Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 31 (1959).

364. Wechsler's notion of neutrality, for instance, would be consistent with reorienting First Amendment doctrine around judicially crafted categories of "protected" and "unprotected" speech, so long as placing cases into those categories did not call for case-specific judicial value judgments. *Cf.* United States v. Stevens, 559 U.S. 460, 469-70 (2010) (describing the government's proposal for a similar approach).

A typical judicial response to values-based indeterminacy problems of this sort was to rely on external criteria instead of "merely personal and private notions."[365] Judges could never fully escape from their own biases, of course. But as best possible, Justice Frankfurter explained, judges faced with legal indeterminacy should strive to make a "detached consideration of conflicting claims" rather than an "*ad hoc* and episodic" judgment.[366]

When considering morals, however, dispassionate balancing increasingly seemed chimerical. For one thing, judges simply lacked the capacity to evaluate the link between morals regulations and social harms.[367] And even if one supposed that certain forms of "immoral" speech produced social harms, how should judges define the relevant boundaries? The problem is illustrated by the statement of a New York judge who relied on these boundaries:

> Our Federal and State Constitutions assume that the moral code, which is part of God's order in this world, exists as the substance of society. The people of this State have acted through their Legislature, on that assumption. We have not so cast ourselves adrift from that code, nor are we so far gone in cynicism, that the word "immoral" has no meaning for us.[368]

By the 1950s, however, it was evident to members of the Supreme Court that moral judgments could not be reduced to legal criteria.[369] As Justice Black put it, "judges possess no special expertise providing exceptional competency to set standards and to supervise the private morals of the Nation."[370]

The Court's initial solution with respect to "obscene" speech was to define obscenity in a more objective way and then treat that category as being entirely

365. Rochin v. California, 342 U.S. 165, 170 (1952).

366. *Id.* at 172.

367. *See* Kalven, *supra* note 230, at 4-5; *cf.* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 911 (1963) ("In all but the simplest situations the factual judgment demanded of the court is difficult or impossible to make through the use of judicial procedures.").

368. Com. Pictures Corp. v. Bd. of Regents, 113 N.E.2d 502, 511 (N.Y. 1953) (Desmond, J., concurring), *rev'd sub nom.* Superior Films, Inc. v. Dep't of Educ., 346 U.S. 587 (1954).

369. *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 532 (1952) (Frankfurter, J., concurring).

370. Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 690 (1959) (Black, J., concurring). Other Justices expressed similar views. *See* Memoirs v. Massachusetts, 383 U.S. 413, 427 (1966) (Douglas, J., concurring); *Kingsley*, 360 U.S. at 701 (Clark, J., concurring). As Justice Harlan summarized in 1966, "no stable approach to the obscenity problem has yet been devised." *Memoirs*, 383 U.S. at 455 (Harlan, J., dissenting).

beyond the scope of the First Amendment.[371] Rather than identifying obscenity in terms of its morally corrupting character, the test would be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"—that is, sexual desire.[372] So defined, the Court announced in *Roth v. United States*, "obscenity is not within the area of constitutionally protected speech or press."[373] In sum, the majority's way to avoid moral decision-making was to redefine obscenity and then treat whether a particular work was obscene as a fact-bound inquiry.[374] At least to some degree, then, *Roth* moved obscenity cases onto their own doctrinal track.

The obscenity cases, however, had exposed problems with allowing the government to prescribe moral boundaries on speech in an increasingly pluralist society. In theory, legislatures could still impose values-based limits on expression.[375] But obscenity cases also powerfully illustrated the tensions between a "balancing" approach and engrained expectations about the judicial role. Deciding whether particular speech acts were constitutionally privileged, Justice Harlan candidly observed, called for "constitutional *judgment* of the most sensitive

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371. Until the mid-1950s, it was taken for granted that the government had power to restrict speech in order to promote public morality. *See, e.g.*, Brief for Appellant at 3, Doubleday & Co. v. New York, 335 U.S. 848 (1948) (No. 11) (acknowledging the power to suppress "obscene writings, so long as that term is narrowly defined and applied"). Legal challenges thus focused on how administrative censorship or judicial injunctions could be used to suppress obscenity. Through the 1930s, the Court upheld such restrictions. *See* Mut. Film Corp. v. Indus. Comm'n, 236 U.S. 230, 244 (1915); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931); Lewis Publ'g Co. v. Morgan, 229 U.S. 288, 298 (1913); United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 413-16 (1921). Decisions in the 1940s and early 1950s then substantially curtailed the ability to suppress obscenity in advance. *See, e.g.*, Winters v. New York, 333 U.S. 507, 518-19 (1948) (holding that publishers of obscene material may bring an overbreadth challenge); Hannegan v. Esquire, Inc., 327 U.S. 146, 157-59 (1946) (overturning *Burleson*, 255 U.S. 407); *Joseph Burstyn, Inc.*, 343 U.S. at 502 (overturning *Mut. Film Corp.*, 236 U.S. 230). Finally, in the 1950s, the Court began to consider curtailing state power to punish obscenity after the fact as well. *See supra* notes 338-355 and accompanying text.

372. Roth v. United States, 354 U.S. 476, 489 (1957).

373. *Id.* at 485.

374. Justice Harlan criticized this strategy. *See id.* at 498 (Harlan, J., concurring in part and dissenting in part) ("I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material . . . ."); *see also* Kalven, *supra* note 230, at 20 (agreeing with Justice Harlan's critique).

375. Justice Harlan argued that the federal government lacked power to abridge speech on moral grounds because "Congress has no substantive power over sexual morality," *Roth*, 354 U.S. at 504 (Harlan, J., concurring in part and dissenting in part), but he also thought that *state* legislatures could conclude "that pornography can induce a type of sexual conduct which a State may deem obnoxious to the moral fabric of society," *id.* at 501-02.

and delicate kind."[376] And "in the last analysis," he admitted, these assessments were often "bound to be but individual subjective impressions."[377] Perhaps so. But "individual subjective impressions" were the antithesis of neutral principles.

For Justice Black and Justice Douglas, the lesson was different. Suppressing whatever "the judge or the jury thinks has an *undesirable* impact on thoughts," they insisted, would "drastically . . . curtail the First Amendment."[378] Moreover, legislative efforts to address "problems of the wayward mind" might turn the government into "the secular arm" of a "religious school of thought."[379] Consequently, they began to reject all morals-based restrictions of speech. "The legality of a publication in this country," Douglas concluded, "should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience."[380]

While *Terminiello* had reflected an increasingly absolutist approach within a paradigm of toleration, the opinions of Justice Black and Justice Douglas in obscenity cases suggested a different framing: the government simply had no business trying to change the way that people think. Whether such efforts were socially beneficial was beside the point. Instead, the First Amendment denied governmental power to restrict speech in order to mold minds. Black and Douglas, in other words, were beginning to articulate a neutrality paradigm along the lines that Richard Price had proposed nearly two centuries before.[381]

This shift away from toleration was likely reinforced by the types of cases the Justices confronted throughout the 1950s. As Harry Kalven Jr. observed in 1960, "the problems of the day have moved law from the classic issue of direct government prohibition of speech by criminal sanction to the perplexities of the oblique sanctions found in loyalty oaths, administrative loyalty programs, and congressional investigations."[382] But rather than joining their colleagues in evaluating

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376. *Id.* at 498.

377. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 707 (1959) (Harlan, J., concurring in the result); *see also* Sweezy v. New Hampshire, 354 U.S. 234, 267 (1957) (Frankfurter, J., concurring in the result) ("[I]n the end, judgment cannot be escaped—the judgment of this Court.").

378. *Roth*, 354 U.S. at 509 (Douglas, J., dissenting).

379. Times Film Corp. v. City of Chicago, 365 U.S. 43, 80 (1961) (Douglas, J., dissenting); *see also Roth*, 354 U.S. at 512 (Douglas, J., dissenting) (referring to "civic groups and church groups"). For mid-twentieth-century links between censorship and Catholic activism, see Samantha Barbas, *The Esquire Case: A Lost Free Speech Landmark*, 27 WM. & MARY BILL RTS. J. 287, 289-90 (2018).

380. *Roth*, 354 U.S. at 513 (Douglas, J., dissenting).

381. *See supra* notes 84-87 and accompanying text.

382. Harry Kalven, Jr., *Mr. Alexander Meiklejohn and the* Barenblatt *Opinion*, 27 U. CHI. L. REV. 315, 315-16 (1960).

whether legal restraints were punitive,[383] Justice Black and Justice Douglas began to argue that the government simply had no jurisdiction over matters of belief, including the expression of those beliefs.[384]

Justice Black and Justice Douglas were not merely defending neutrality in the procedural sense articulated by Wechsler. Rather, they were embracing a *substantive* notion of neutrality. The First Amendment's "underlying premise," Douglas observed in 1959, was "that a complete hands-off policy on the part of government is at times the only course."[385] And although the case at hand had nothing to do with religion, he then cited a case interpreting the Establishment Clause,[386] which required neutrality with respect to religion.[387] Douglas was thus beginning to embrace a notion of neutrality in speech doctrine that was interwoven with a broader shift toward a more values-neutral form of liberalism.[388]

Around the same time, Justice Black and Justice Douglas also began to employ content-neutrality analysis. Laws regulating acts that only "indirectly affect speech," Black admitted in 1959, "can be upheld if the effect on speech is minor in relation to the need for control of the conduct."[389] Thus, "laws governing conduct . . . must be tested, though only by a balancing process, if they indirectly

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383. *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 518 (1958) (holding that withholding otherwise available privileges from speakers was "in effect to penalize them," because the "deterrent effect is the same as if the State were to fine them"). For a survey of Justice Black's willingness to find effective punishment through noncriminal means, see Reich, *supra* note 322, at 703-10.

384. *See, e.g.*, *Speiser*, 357 U.S. at 535-36 (1958) (Douglas, J., concurring); *see also* Adler v. Bd. of Educ. of N.Y., 342 U.S. 485, 497 (1952) (Black, J., dissenting) ("[G]overnment should leave the mind and spirit of man absolutely free.").

385. Cammarano v. United States, 358 U.S. 498, 515 (1959) (Douglas, J., concurring).

386. *Id.* (citing Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948)).

387. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) ("[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers.").

388. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965); Engel v. Vitale, 370 U.S. 421, 437 (1962) (Douglas, J., concurring); *see also Engel*, 370 U.S. at 435-36. *See generally* Stephen A. Gardbaum, *Why the Liberal State Can Promote Morals After All*, 104 HARV. L. REV. 1350, 1351 (1991) ("The central organizing idea in the contemporary characterization of liberalism, by both liberals and their critics, has been the neutrality of the state toward moral ideals, or, to use the more current phrase, conceptions of the good life."). A deeper intellectual history would be required to assess causal factors, or even to situate these developments more fully in their social, intellectual, and geopolitical histories. My aim here is more genealogical, showing that a subtle but important shift was occurring in the opinions of Justice Black and Justice Douglas.

389. Barenblatt v. United States, 360 U.S. 109, 141 (1959) (Black, J., dissenting).

affect ideas."[390] But, he continued, "a law directly aimed at curtailing speech and political persuasion" was always unconstitutional.[391] By the late 1950s, then, Black and Douglas were beginning to embrace both content and viewpoint neutrality.

Doctrine had come a long way. What began in the 1940s largely as a functionalist reinterpretation of common-law rules had shifted in the 1950s into a balancing test.[392] In this respect, doctrine in the 1950s generally reflected the public-good requirement derived from the natural-rights tradition, rather than the more rule-like common-law limits on governmental power. Speech rights thus were generally defeasible in face of genuine public needs. And as a consequence, the earlier boundaries on privileged speech became less important.

But as the Court moved this analysis to the First Amendment—and away from a broader rubric of natural rights—the Justices narrowed the scope of judicial review. Meaningful judicial scrutiny was only required, the Court explained, when the government had regulated speech based on its content. The 1950s thus served as a bridge to modern doctrine, even though it featured less robust constitutional protections for expression.

C. The Emergence of Modern Doctrine

In the early 1960s, the Justices switched course once again, moving to the modern tiers-of-scrutiny framework.[393] As we will see, the Court eventually adopted a variant of Justice Black's newfound view that content neutrality was a constitutional requirement—not a threshold condition for applying deferential balancing. And by the end of the decade, the Justices categorically rejected viewpoint-based rationales for restricting expression. Promoting morality "may be a

390. *Id.* at 142; *see also* William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 9-11 (1965) (describing the acceptance of the balancing test for evaluating content-neutral restrictions).

391. *Barenblatt*, 360 U.S. at 142 (Black, J., dissenting); *see also* Konigsberg v. State Bar, 366 U.S. 36, 70 (1961) (Black, J., dissenting) (criticizing the use of balancing for evaluating "governmental action that is aimed at speech and depends for its application upon the content of speech").

392. *See, e.g.*, Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 410 (1950); *see also* Siegel, *supra* note 294, at 217 ("[T]he Court turned what had been a speech-protective ['clear and present danger'] test into a formula for ad hoc balancing ripe for deferential application.").

393. *See* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 356-57 (2006). As Siegel notes, the adoption of strict scrutiny was not *ex nihilo*, but it did not fully emerge until the 1960s. *Id.* at 357.

noble purpose," they noted in 1969, "but it is wholly inconsistent with the philosophy of the First Amendment."[394] Neutrality had emerged as the central principle in speech and press doctrine.

The doctrinal shift began once Justice Frankfurter left the bench in 1962.[395] In a range of cases—many of which involved suppression of civil-rights activities—the Justices became far more protective of speech rights. In part, this included an effort to revive older common-law privileges. In *New York Times Co. v. Sullivan*, for example, the Court recognized extra protection for speech on matters of public concern.[396] But the Court substantially reformulated the privilege in light of functional arguments.[397] The privilege had previously required that the defendant had to have acted with public-regarding motives.[398] But the Court in *Sullivan* defined "actual malice" as knowingly or recklessly making false statements.[399] This test, Robert Post explains, "was designed . . . specifically to prevent defamation law from being used to implement local cultural mores."[400] It also provided breathing space for speakers who might otherwise have had to face the whims of biased juries.[401]

As a general matter, however, the Justices continued to use a balancing test to address most speech-related problems. They did not adopt absolutism. But

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394. Stanley v. Georgia, 394 U.S. 557, 566 (1969).

395. *See* Siegel, *supra* note 393, at 375-80. As Siegel points out, developments in the late 1950s reflected a slightly broader view of expressive freedom. *Id.* at 363. But the shift was far more dramatic after Frankfurter's departure. *Id.* at 375.

396. 376 U.S. 254, 279-80 (1964).

397. *See* Post, *supra* note 118, at 552 (noting "*New York Times*'s functionalist perspective" and concluding that "what ultimately distinguished *New York Times* from preceding cases was the influence of American instrumentalism").

398. *See, e.g.*, Phila., Wilmington & Balt. R.R. Co. v. Quigley, 62 U.S. 202, 214 (1858) (defining malice as "conceived in the spirit of mischief, or of criminal indifference to civil obligations"); *id.* at 220 (Daniel, J., concurring) (defining malice as "a wicked or malevolent motive"). For further evidence, see *supra* notes 116-118.

399. *Sullivan*, 376 U.S. at 280. This standard did not allow finding "actual malice" from mere criminal intent. *See* Henry v. Collins, 380 U.S. 356, 357 (1965) (per curiam); Garrison v. Louisiana, 379 U.S. 64, 73 (1964).

400. Post, *supra* note 118, at 554; *cf.* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 734 (1986) (describing the Court's decision in *Cohen v. California*, 403 U.S. 15 (1971), as "a repudiation of the maintenance of community cohesion and identity as a legitimate justification for the regulation of speech"). As Post explains, the *New York Times* standard does not make intent irrelevant, but it avoids using "the criterion of intent to enforce a civility rule." Post, *supra* note 94, at 649. By contrast, intent requirements that aim to enforce civility are, according to current doctrine, "inconsistent with the neutrality necessary for public discourse." *Id.* at 648.

401. Time, Inc. v. Hill, 385 U.S. 374, 406 (1967) (Harlan, J., concurring in part and dissenting in part).

now the government bore a much heavier burden under "strict scrutiny."[402] In justifying this approach, the Court emphasized a variety of functional concerns, including the need for "breathing space" so that speech was not stifled—or "chilled"—by fears of liability.[403]

Initially, the triggering condition for strict scrutiny was unclear. In the free-exercise context, the Court held that incidental burdens sufficed.[404] And in *Cox v. Louisiana*, the Justices also did not focus on whether the law singled out particular messages, relying instead on a distinction between "pure speech" and expressive conduct.[405] Writing separately in *Cox*, however, Justice Black focused on neutrality.[406] "Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets," he wrote. "This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments."[407] Only in cases involving neutral statutes, Black insisted, was it appropriate for judges to "weigh the circumstances."[408]

Eventually, the Justices settled on a middle course. Strict scrutiny applied to restrictions based on the content of speech. Content-neutral restrictions, by contrast, triggered a less rigorous balancing test known as "intermediate scrutiny." When the law did not single out certain messages, Chief Justice Warren explained in *United States v. O'Brien*,[409] the government still needed to demonstrate that any restriction of expressive freedom "furthers an important or substantial governmental interest . . . unrelated to the suppression of free expression."[410]

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402. *See* Siegel, *supra* note 393, at 377-78.

403. *See* NAACP v. Button, 371 U.S. 415, 433 (1963).

404. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963).

405. 379 U.S. 536, 555 (1965); *see also* Cox v. Louisiana, 379 U.S. 559, 564 (1965) ("We deal in this case not with free speech alone, but with expression mixed with particular conduct."); Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 12, 22 (discussing the majority's distinction between pure speech and "speech plus").

406. *Cox*, 379 U.S. at 581 (Black, J., concurring).

407. *Id.*

408. *Id.* at 578.

409. 391 U.S. 367 (1968).

410. *Id.* at 377. With content neutrality no longer used as a screening mechanism to determine the "coverage" of the First Amendment, the range of cases potentially subject to heightened judicial scrutiny broadened. As we have seen, the Court had already expanded the idea of "matters of public concern" in cases such as *Thomas v. Collins*, 323 U.S. 516 (1945), and it had generally abandoned any reliance on "matters of public concern" as a threshold limit on who could bring speech claims in *Winters v. New York*, 333 U.S. 507 (1948). In theory, at least, the notion that the First Amendment only protected speech on "matters of public concern" survived *Winters*, but that label lost relevance in the 1950s as the Court used balancing. For practical purposes, then, regulations of things like "commercial speech" were constitutionally unproblematic in

At least in theory, strict scrutiny did not exclude particular types of governmental interests. The test required only that they be "compelling."[411] But the Court quickly suggested that one interest was illegitimate. "The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views," the Court observed in *Edwards v. South Carolina*.[412] In a certain sense, that principle would have elicited no dissent from Justice Frankfurter or Justice Jackson. But by quoting at length from Justice Douglas's decision in *Terminiello*, Justice Stewart signaled an unwillingness to credit interests that were tied to communicative harms.[413]

The Court then embraced that suggestion more fully in *Stanley v. Georgia*.[414] Robert Eli Stanley had been prosecuted for possessing obscene films in his home. The Court reversed the conviction. The interest in restricting obscenity, Justice Marshall wrote for the Court, was confined to "commercial distribution of obscene material," not including "mere private possession of such material."[415] The latter, he insisted, implicated the fundamental right of privacy:

> Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or

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that period. But the increase in judicial scrutiny of content-based regulations in the 1960s then made those types of regulations far more problematic. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976). To be sure, *O'Brien* observed that the First Amendment did not apply to "an apparently limitless variety of conduct [that] can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 391 U.S. at 376. But the Court was now extending First Amendment coverage to conduct that was "sufficiently imbued with elements of communication." Spence v. Washington, 418 U.S. 405, 409 (1974). Justice Black sought to draw a formalist distinction between "speech" and "conduct." *See, e.g.*, Street v. New York, 394 U.S. 576, 609 (1969) (Black, J., dissenting); *see also* Blocher, *supra* note 24, at 384 n.23 (citing relevant sources). However, this distinction was devastatingly critiqued. *See, e.g.*, Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 78-80 (1968); Kalven, *supra* note 405, at 23.

411. *O'Brien*, 391 U.S. at 376.

412. 372 U.S. 229, 237 (1963); *see also* Cox v. Louisiana, 379 U.S. 536, 551-52 (1965) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment." (quoting Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949))).

413. *Edwards*, 372 U.S at 238.

414. 394 U.S. 557 (1969).

415. *Id.* at 563-64.

> what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[416]

Justice Marshall then addressed potential governmental interests. The first was "to protect the individual's mind from the effects of obscenity."[417] But he had no trouble rejecting this justification out of hand. "We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts," Marshall declared.[418] "To some, this may be a noble purpose," he continued, "but it is wholly inconsistent with the philosophy of the First Amendment."[419]

Although Justice Marshall relied on the longstanding idea that individuals have a right to espouse their views, he also was drawing a new lesson: the governmental *interest* could not rest on a moral judgment. "Whatever the power of the state to control public dissemination of ideas inimical to the public morality," he stated, "it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."[420] And even if Georgia could show that pornography led to deviant behavior, Marshall continued, the proper antidote was to suppress the behavior itself, not the "private consumption of ideas and information."[421] Georgia "may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct," he wrote, "than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits."[422]

The Court reinforced this approach just two weeks later in *Street v. New York*. The defendant had violated a state law making it a crime "publicly [to] mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act [any flag of the United States]."[423] Street had, in fact, burned an American flag, but the Court—over vigorous dissents—limited its analysis to whether a

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416. *Id.* at 565.

417. *Id.*

418. *Id.*

419. *Id.* at 565-66. *Stanley* was a privacy case, but the opinion explicitly assessed the governmental interests in First Amendment terms. In a footnote, Justice Marshall quoted Louis Henkin, *id.* at 565 n.8 (quoting Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 395 (1963)), in a piece that disputed state power to regulate morality, even though that power was unquestioned "earlier in the history of the Constitution." Henkin, *supra*, at 392.

420. *Stanley*, 394 U.S. at 566.

421. *Id.* at 566.

422. *Id.* at 567.

423. Street v. New York, 394 U.S. 576, 578 (1969) (quoting N.Y. GEN. BUS. LAW § 136(d) (McKinney 1967)).

state could punish someone for verbally deriding the flag.[424] Writing for the majority, Justice Harlan explained that any "shock" experienced by others would turn on "the content of the ideas expressed," and it was "firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[425] Nor could the state assert an interest in safeguarding "respect for our national symbol."[426] In support, Harlan quoted at length from *Barnette*.[427]

With the general embrace of content neutrality and rejection of viewpoint-based interests, neutrality had emerged as the constitutional lodestar in First Amendment cases. "[A]bove all else," the Court declared in 1972 in *Police Department of Chicago v. Mosley*, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[428] Justice Marshall then tied that understanding to tradition. "[O]ur people are guaranteed the right to express any thought, free from government censorship," he insisted. And "[t]he essence of this forbidden censorship is content control."[429] In sum, Marshall concluded, "[t]here is an 'equality of status in the field of ideas . . . .'"[430]

And how could it be otherwise? Justice Marshall's reasoning seems unassailable: censorship is antithetical to free expression, and "content control" is the essence of censorship; therefore, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[431] Q.E.D.

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424. The Court explained that it was not clear whether the finder of fact relied on *verbal* or *nonverbal* acts, and therefore the possibility of an unconstitutional verdict premised on the former was sufficient to warrant reversal of the conviction. *Id.* at 589-90, 594. *But see id.* at 596, 595 (Warren, C.J., dissenting) (concluding that there was "no doubt that appellant was convicted solely for burning the American flag," and criticizing the Court for "declin[ing] to meet and resolve the basic question presented in the case"); *id.* at 609-10 (Black, J., dissenting) (same); *id.* at 611 (White, J., dissenting) (same).

425. *Id.* at 592. Harlan reiterated this principle two years later in *Cohen v. California*, stating that efforts to maintain "a suitable level of discourse within the body politic" were contrary to the "powerful medicine" of the First Amendment, which "is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us." Cohen v. California, 403 U.S. 15, 23-24 (1971). He also reasoned that a lack of "principled distinctions in this area" accounted "largely" for why "the Constitution leaves matters of taste and style so largely to the individual." *Cohen*, 403 U.S. at 25.

426. *Street*, 394 U.S. at 593.

427. *Id.* The appellant's brief emphasized the same passages. *See* Brief for Appellant at 25, *Street*, 394 U.S. 576 (No. 5).

428. 408 U.S. 92, 95 (1972).

429. *Id.* at 96.

430. *Id.* (quoting MEIKLEJOHN, *supra* note 341, at 27).

431. *Id.* at 95.

Yet *Mosley*'s "anticensorial" approach reinforces just how far views of expressive freedom had come. Even the rhetoric was transformative. Prior to the 1960s, "censorship" did not mean any and all content regulation. Rather, it referred specifically to *administrative* control over expression, especially with respect to prior restraints.[432]

With the embrace of neutrality, however, the rule against prior restraints left scholars puzzled. "[I]t is not altogether clear just what a prior restraint is or just what is the matter with it," Harry Kalven remarked in 1971.[433] The doctrine, John Jeffries observed a decade later, had become "fundamentally unintelligible."[434] It is not hard to see why. The original premise of the rule—that legislators and jurors had to police the boundaries of expressive freedom—was now antithetical to the Court's neutrality-based conception of the First Amendment.[435]

And the Court never looked back. In the 1970s, debates shifted to how neutrality principles should be defined and potentially extended.[436] Liberal-leaning Justices wanted to exclude moral justifications for restricting other forms of liberty, particularly in cases involving reproductive and sexual freedom.[437] Meanwhile, conservative-leaning Justices used neutrality to squelch efforts to equalize speaking power.[438] To be sure, some Justices defended content-based suppression in limited domains, like obscenity doctrine.[439] But these were the exceptions that proved the rule. Neutrality had become the central organizing principle of First Amendment law.[440]

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432. *See* sources cited *supra* note 269.

433. Harry Kalven, Jr., *Foreword: Even When a Nation Is at War*, 85 HARV. L. REV. 3, 32 (1971).

434. John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 419 (1983).

435. Along similar lines, the absence of neutrality in earlier conceptions of free speech can shed light on other First Amendment paradoxes, like the absence of a neutrality principle when the government "speaks," *see generally* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695 (2011) (discussing governmental-speech doctrine), and the sometimes-unprotected treatment of speech integral to criminal conduct, *see generally* Volokh, *supra* note 342, at 1326-46 (discussing this category of speech doctrine).

436. For a discussion of the shift toward a more formalist approach to neutrality, rather than one more sensitive to speech-restrictive effects, see Lakier, *supra* note 34.

437. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 110-11 (1973) (Brennan, J., dissenting); Roe v. Wade, 410 U.S. 113, 116-17 (1973); Bowers v. Hardwick, 478 U.S. 186, 199, 210-12 (1986) (Blackmun, J., dissenting).

438. *See* Buckley v. Valeo, 424 U.S. 1, 18, 48-49 (1976); Austin v. Mich. Chamber of Com., 494 U.S. 652, 679-80 (1990) (Scalia, J., dissenting). These cases involved what are sometimes called *speaker*-based restrictions. *See* Citizens United v. FEC, 558 U.S. 310, 340 (2010) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content.").

439. *See, e.g.*, Miller v. California, 413 U.S. 15, 35-36 (1973).

440. *See supra* notes 1-10 and accompanying text.

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Content and viewpoint neutrality did not emerge at the end of a linear or predetermined path. Rather, the doctrines that the Justices embraced in the 1960s reflected an amalgam of different ideas drawn from earlier decisions. Some dimensions of neutrality were evident from the beginning—including a doctrinal emphasis on curtailing administrative discretion and preventing the arbitrary suppression of certain messages. But it would be inaccurate to view the accretive nature of doctrinal shifts as indicating that neutrality was somehow "inherent" in the First Amendment all along.[441] Earlier notions of neutrality were confined, and they did not suggest that agnosticism with respect to values was constitutionally required. Even decades into the twentieth-century rebirth of the First Amendment, the dominant paradigm was still one of socially bounded toleration. Neutrality only emerged as the bedrock principle of the First Amendment after a long and episodic process of constitutional change.

IV. IMPLICATIONS

What can this jurisprudential history teach us today? In a time when angst about expressive freedom is growing,[442] and when federal-rights jurisprudence more broadly is coming under immense strain,[443] it is worth stepping back to consider where we have been. History, it seems to me, cannot offer straightforward solutions, particularly given how deeply entrenched many speech doctrines have become. But it can at least help open our field of vision—illuminating the source of current jurisprudential problems and suggesting, if only tentatively, different ways of thinking about fundamental rights.

The history recounted in this Article poses a substantial difficulty for modern originalism. Many originalists describe their project in terms of recovering the original meaning of constitutional text. Viewing the Constitution this way, they argue, is a way of disciplining judicial analysis so that it can be more neutral and less dependent on contestable and fluctuating assessments of value.[444] In this respect, originalism, textualism, and formalism often merge, reflecting a particular conception of what constitutional law should be. At the same time, however,

441. *Contra* Karst, *supra* note 151, at 26. Karst's conclusion may better reflect what Harry Kalven described prior to his death in 1974 as "a deeply held consensus" favoring neutrality. HARRY KALVEN JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 17 (1988).

442. *See supra* note 35.

443. *See, e.g.*, JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 16-21 (2018); ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY?: THE UNNECESSARY CONFLICT 66 (2020).

444. The classic statements of this view are Bork, *supra* note 362, and Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

modern originalists are deeply committed to viewing constitutional rights as judicially enforceable trumps.[445] The very premise of modern rights, after all, is that some things cannot be left to the give-and-take of ordinary politics.[446]

These ideas work in tandem in speech doctrine. The neutrality principle is broadly applicable—supplying a way of resolving nearly any speech-related problem. And it forecloses the sorts of values-based assessments that might plague other approaches. Indeed, when the Solicitor General recently asserted that gratuitous depictions of animal cruelty were beyond the ambit of the First Amendment, the Court chastised the government for its "startling and dangerous" argument.[447] "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits," Chief Justice Roberts wrote in *United States v. Stevens*.[448] The Justices, he insisted, were helpless to revise the "judgment by the American people" about the scope of the First Amendment.[449] That original judgment, of course, was assumed to be a requirement of neutrality.

The irony here is that the neutrality principle was a product of the mid-twentieth-century constitutional revolution that originalism was designed to counter. If originalists want to begin to dismantle functionalist innovations in First Amendment law, as Justice Thomas has recently suggested,[450] they will quickly find that little remains. The entire edifice of modern doctrine is built on a foundation that only emerged within the past century.[451]

Perhaps neutrality is just too ensconced and that is the end of the matter. Many originalists, after all, defend stare decisis.[452] But if neutrality is here to stay, should it continue to operate as a metaprinciple—justifying a nearly constant expansion of the First Amendment in ways that pull doctrine further and further

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445. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 634-35 (2008).

446. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 676-78 (2015).

447. United States v. Stevens, 559 U.S. 460, 470 (2010).

448. *Id.*

449. *Id.*; *see also* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 879 (1960) ("[T]he Framers themselves did this balancing . . . .").

450. McKee v. Cosby, 139 S. Ct. 675, 677 (2019) (Thomas, J., concurring) (denying certiorari).

451. Even the facial analysis that the Court applied in *Stevens* was grounded on Justice Murphy's innovative opinion in *Thornhill*, calling on judges to "weigh the circumstances" in speech cases. Thornhill v. Alabama, 310 U.S. 88, 95-96 (1940) (quoting Schneider v. New Jersey, 308 U.S. 147, 161 (1939)).

452. *See, e.g.*, William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 36 (2019); Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1767 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 861-64 (2015).

from original meaning?[453] Should historical evidence matter in speech cases only when it is consistent with neutrality?[454] In a time when originalism and First Amendment expansionism both seem to be on the ascent, these issues deserve serious attention by scholars and judges.

More fundamentally, this Article highlights a transformation in thinking about rights jurisprudence. Until the mid-twentieth century, fundamental rights were bimodal. First, courts employed an ostensibly deferential ends-means test to ensure that any legislation restricting natural rights was within the police powers—that is, that the legislature was aiming to promote the public good. These "rights" were not antiregulatory at all, and they did not exclude particular *reasons* for restricting rights, so long as those reasons were public regarding. Second, courts applied a set of more determinate limits on legislative power that included fundamental common-law rules. In this latter sense, rights were "trumps."[455] Natural rights and common-law rights were thus the twin pillars of American rights jurisprudence.

The modern notion of constitutional rights, by contrast, reflects a transmogrified synthesis of these earlier ideas. In terms of scope, modern rights privilege certain realms of freedom, like communicative activity,[456] rather than specific, historically defined limits on governmental power or general protection for liberty. Nor do modern rights carry the same implications for governmental authority. "Personal rights," Suzanna Sherry explains, "are about preventing political majorities from imposing their values on individuals who may not share

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453. *See* Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1200 (2015) ("[T]he First Amendment's territory [has] pushe[d] outward to encompass ever more areas of law.").

454. *Cf.* Citizens United v. FEC, 558 U.S. 310, 391 (2010) (Scalia, J., concurring) ("[T]he dissent cites a law-review article arguing that 'corruption' was originally understood to include 'moral decay' and even actions taken by citizens in pursuit of private rather than public ends. . . . [I]f speech can be prohibited . . . [on that basis] then there is no limit to the Government's censorship power." (quoting Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 373, 378 (2009))).

455. For the term "rights as trumps," see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 184-205 (1977). For a related discussion of Dworkin's views, see Richard H. Pildes, *Dworkin's Two Conceptions of Rights*, 29 J. LEGAL STUD. 309, 312-15 (2000); and Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301, 302-07 (2000).

456. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995); Spence v. Washington, 418 U.S. 405, 409 (1974) (per curiam). *But see* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004) (arguing that First Amendment coverage does not, in fact, extend to all communicative activities).

those values."[457] The very idea of rights, then, limits the *reasons* why the government can restrict them.[458] The neutrality principle is a perfect illustration. Although the government is allowed to restrict speech in pursuit of any "compelling interest," it cannot assert an interest grounded on changing the way that people think.[459] To do so would violate the core of what rights are: individual entitlements to make judgments about the moral limits of one's own freedom.

History cannot tell us whether this view of rights is a good idea.[460] But tracing the rise of neutrality can at least raise awareness that substantive-rights jurisprudence is deeply unoriginal. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them," Justice Scalia declared in *Heller*, emphasizing that "[t]he First Amendment contains the freedom-of-speech guarantee that the people ratified."[461] Perhaps that is true in some theoretical or aspirational sense.[462] But in practice, not even close. And not because of a few nonoriginalist turns along the way. The entire jurisprudential project is new. What began as a functional reinterpretation of inherited rules has morphed into something else entirely. And the core principle of social-contract theory—the priority of the public good—is now mostly gone.

CONCLUSION

American law has always been protective of different views, but not through content and viewpoint neutrality. For well over a century, only well-intentioned

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457. Sherry, *supra* note 23, at 570.

458. *See* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 729 (1998); Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 2-8 (1998); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 711-12 (1994).

459. *See supra* notes 9-10 and accompanying text. This principle does much of the "heavy lifting in free speech cases," notwithstanding the common view that the level of scrutiny is determinative. Volokh, *supra* note 9, at 2447.

460. A vast literature expresses concern about rights discourse. *See, e.g.*, RICHARD THOMPSON FORD, RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY 9-14 (2011); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 14 (1991); Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 34-38 (2018); JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 8 (2021).

461. District of Columbia v. Heller, 554 U.S. 570, 634-35 (2008).

462. As a jurisprudential claim about the "true" meaning of the Constitution, one might assert—notwithstanding current case law—that the Constitution means today what it meant at the Founding. *See* Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2254 (2014).

speech on matters of public concern enjoyed any determinate protection against ex post punishments, otherwise leaving the government with plenty of room to suppress harmful speech. With the decline of classical legal thought and the embrace of a more functional view of constitutional law, however, older doctrinal categories began to shift and merge. And at the end of a long and bumpy road, the Justices eventually embraced a paradigm of neutrality.

Tracing these developments cannot alone tell us whether it is time to change course. But history can at least help open our minds to the radical notions that rights are not necessarily trumps and that a system of expressive freedom need not be agnostic about the value of ideas.