
HARPEROONING, GROEING AND BROWNING THE FIRST AMENDMENT

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Many scholars on the political left complain about the “Lochnerization of the First Amendment.”¹ Free speech has been “Lochnerized” in their view, partly because the First Amendment is presently interpreted as guaranteeing far more protection for the speech of the politically powerful than for the speech of unpopular dissenters. Recent Supreme Court decisions provide billionaires and corporations with far more valuable expression rights² than ordinary citizens who are finding their capacity to reach audiences substantially curbed.³ Free speech has also been “Lochnerized” because contemporary free speech law resembles *Lochner v. New York*⁴ in crucial dimensions. Just as Justice Rufus Peckham in *Lochner* insisted that the Supreme Court had no business leveling the contractual playing field, and should remain neutral between employers and employees during the bargaining process,⁵ the contemporary judicial majority maintains that federal justices have no business leveling the political playing field and should remain neutral between the rich and poor, as well as between corporations and human beings, during the electoral process.⁶ Mark Tushnet observes, “[t]he First Amendment (has) become this generation’s vision of economic substan-

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1. Morton J. Horwitz, *Forward, The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 109 (1993). See David Kairys, *Freedom of Speech*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 190, 211 (David Kairys ed., 3rd ed. 1998) (“The First Amendment as interpreted by today’s conservatives constitutes a constitutional barrier to political reform much like the constitutional barrier to economic reform erected by conservative justices in the *Lochner* era of the early 1900s.”).

2. See generally *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Citizens United v. FEC*, 558 U.S. 310 (2010).

3. See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2011); *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

4. 198 U.S. 45 (1905).

5. *Id.* at 64.

6. See *Citizens United*, 558 U.S. at 350 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (“[R]eject[ing] the premise that Government has an interest ‘in equalizing the relative ability of individuals and groups to influence the outcome of elections.’”)).

tive due process, a constitutional right restricting the ability of legislatures to regulate business.”⁷

Constitutional activists on the political left, who in the past sought to *Harper* on the First Amendment, are presently attempting to “gRoe” and *Brown* the First Amendment. Progressive writings assert that the main beneficiaries of free speech law ought to be the main beneficiaries of such Supreme Court decisions as *Harper v. Virginia State Board of Elections*,⁸ *Roe v. Wade*,⁹ or *Brown v. Board of Education*,¹⁰ and that constitutional protections for free speech should be derived from the same constitutional principles that justify the right to vote, the right to choose to have an abortion and make other intimate decisions, or the rights associated with an anti-subordination interpretation of the Equal Protection Clause of the Fourteenth Amendment.¹¹ Professor Alexander Tsesis’s *Free Speech Constitutionalism*¹² is an especially welcomed addition to this literature on the broader foundations of expression rights. Tsesis is unusually self-conscious in his effort to link free speech theory to fundamental constitutional principles. In sharp contrast to such scholars as John Hart Ely, David A.J. Richards, or Catharine McKinnon, who attempt to *Harper* on gRoe or *Brown* the First Amendment,¹³ Tsesis offers the political left a way to integrate *Harper*, *Roe*, and *Brown* into a constitutional whole.

Free Speech Constitutionalism maintains that constitutional protections for free speech are part of a basic regime project that predates the Constitution. Tsesis writes, “[t]he values for which the First Amendment stands should . . . be understood in the context of a wider ideal of liberty and equality that is derived from the nation’s core principles as they are set out in the Declaration of Independence and Preamble to the Constitution.”¹⁴ He recognizes the historical connections between the First Amendment and significant progressive constitutional achievements. “Freedom of speech was essential,” Tsesis declares, for “the advancement of civil rights, gender equality, and most recently, the gay rights movement.”¹⁵ As important, Tsesis details the jurisprudential and doctrinal connections between free speech rights and the other central commitments of contemporary constitutional progressivism. He insists

7. Mark Tushnet, *Introduction: Reflections on the First Amendment and the Information Economy*, 127 HARV. L. REV. 2234, 2248 (2014).

8. 383 U.S. 663 (1966).

9. 410 U.S. 113 (1973).

10. 347 U.S. 483 (1954).

11. See notes 23–33, *infra*. For the anti-subordination interpretation of *Brown*, see Jack M. Balkin and Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003).

12. Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. (forthcoming 2015).

13. See notes 23–33 and accompanying text, *infra*.

14. Tsesis, *supra* note 12, at 104.

15. *Id.* at 106.

that free speech rights can be derived from the same principles that justify the right to vote, the right to choose an abortion or make other intimate decisions, and the right to not be the victim of racialized, genderized, or other forms of subordination. These constitutional commitments, articulated by both the Declaration and Preamble,

recognize that humans have equal innate entitlements to pursue happiness and that representative government is created to enact institutions, laws and regulations effective in protecting those rights. Such a regimen is not only good for persons atomistically but for the national community because it recognizes that each of us has the right to explore his or her unique life plan, including expressive aims, without undue restraints.¹⁶

In short, Tthesis would *Harperoon*, *gRoe* and *Brown* the First Amendment.

Professor Tthesis's project of integrating the First Amendment into broader constitutional theory is both necessary and problematic. Those who *Lochnerize*, *Harperoon* *gRoe*, *Brown* or, for that matter, *Hellerize* the First Amendment correctly recognize that no constitutional provision is an island. Americans from the founding to the present have considered free speech rights to be vital aspects of a more general constitutional project, even as Americans had disputed the nature of that project, the precise protections for free speech necessary for that project, the other rights entailed by that project, and even whether that project requires constitutional protections for free speech be explicitly enumerated. The First Amendment nevertheless has always been somewhat insulated from broader constitutional projects. Constitutional protections for free speech have a partly autonomous doctrinal history and a partly distinctive mission that is partly subversive of all broader constitutional visions. Constitutional free speech rights create a space in which citizens can choose between the constitutional projects articulated in *Lochner*, *Harper*, *Roe*, *Brown*, or *Heller*.¹⁷ Tthesis is right to acknowledge that the reigning interpretation of free speech rights can never be entirely neutral between competing constitutional projects, but nor should the First Amendment be entirely subsumed by any particular constitutional project.

I. ACCESSORIZING THE FIRST AMENDMENT

Americans have historically made functional and doctrinal connections between free speech and other constitutional rights. Many com-

16. *Id.* at 105.

17. Or, as I show later, some mix of each.

mentators believe broad free exercise rights are practical preconditions to Americans enjoying any other constitutional right. Justice Benjamin Cardozo in *Palko v. Connecticut* declared the “freedom of thought and speech” was “the matrix, the indispensable condition, of nearly every other form of freedom.”¹⁸ As often, commentators claim that free speech rights are one aspect of a more general constitutional commitment, a commitment that, depending on the commentator may generate such rights as the freedom of contract, the right to vote, reproductive freedom, racial equality, and even the right to bear arms.

The conservative libertarians of the nineteenth century *Lochnerized* the First Amendment. They believed the Supreme Court should protect the freedom of speech for the same reason that the Justices protected the freedom of contract in *Lochner v. New York*. Both freedoms were aspects of the more general right to “be free in the enjoyment of all of [one’s] faculties.”¹⁹ Justice James McReynolds in *Meyer v. Nebraska* offered the classic expression of the connections between property rights and speech rights when upholding the right to teach German. The liberty protected by the due process clause, he declared

denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.²⁰

Herbert Spencer insisted “[t]he law of supply and demand extends from the material sphere to the mental sphere.” In his view, “as interference with the supply and demand of commodities is mischievous, so is interference with the supply and demand of cultured faculty.”²¹

New Deal and Great Society liberals *Harperooned* the First Amendment. They believed the Supreme Court should protect the freedom for speech for the same reason that the Justices protected the right to vote in *Harper v. Virginia Board of Elections*. Both are aspects of the more general constitutional commitment to democratic majoritarianism. The famous *Carolene Products* footnote is the classic expression of the constitutional connections between voting rights and speech rights. Chief Justice Stone suggested that “more exacting judicial scrutiny” might be appropriate in the case of “legislation which restricts those political pro-

18. *Palko v. Connecticut*, 302 U.S. 319, 326–27 (1937).

19. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

20. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

21. HERBERT SPENCER, *FACTS AND COMMENTS* 83 (1902).

cesses which can ordinarily be expected to bring about the repeal of undesirable legislation,” citing as examples judicial decisions in cases concerning “restrictions upon the right to vote” and “restraints upon the dissemination of information.”²² John Hart Ely claimed that Warren Court decisions protecting expression and voting rights were both derived from a judicial “desire to ensure that the political process . . . was open to those of all viewpoints on something approaching an equal basis.”²³

Radical civil libertarians g*Roe* the First Amendment.²⁴ They believe the Supreme Court should protect the freedom of speech for the same reasons that the Justices protected the right to an abortion in *Roe v. Wade*. Both rights are aspects of the more general constitutional commitment to individual self-development and the freedom to make certain intimate choices. Justice William O. Douglas in his concurrence in *Doe v. Bolton* offered the classical expression of the constitutional connection between speech and reproductive choice. His opinion interpreted the due process clause of the Fourteenth Amendment as protecting “autonomous control over the development and expression of one’s intellect, interests, tastes, and personality”²⁵ and from that commitment derived both the right to political dissent and the right to terminate a pregnancy.²⁶ David A. J. Richards declares that government must show “respect for the independent moral judgment of each person, who must stand as ultimate arbiter of conscience and of the legitimacy of the claims of state and community,” a principle from which he deduces rights to “sexual imagination and its expression.”²⁷

Proponents of critical race and gender studies prefer to *Brown* the First Amendment.²⁸ They believe the Supreme Court should protect the freedom of speech for the same reason that the Justices protected racial equality in *Brown v. Board of Education*. Both rights are aspects of a more general constitutional commitment to anti-subordination or “the universal right to self-respect and self-realization.”²⁹ Mari Matsuda champions the constitutional principle that “each person . . . is entitled to basic dignity, to nondiscrimination, and to the freedom to participate ful-

22. *United States v. Carolene Products*, 304 U.S. 144, 154 n.4 (1938).

23. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 74 (1980).

24. For a brief discussion of radical civil libertarianism, see Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 *VAND. L. REV.* 349, 356–59 (1995).

25. *Doe v. Bolton*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring). See *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”).

26. *Doe*, 410 U.S. at 211.

27. DAVID A. J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 207–08 (1986).

28. This paragraph borrows from the lengthier discussion in Graber, *supra* note 24, at 359–66.

29. Mary Ellen Gale, *Reimagining the First Amendment: Racist Speech and Equal Liberty*, 65 *ST. JOHN'S L. REV.* 119, 126 (1991).

ly in society.”³⁰ Those who would *Brown* the First Amendment differ from those who would *Lochnerize*, *Harperoon*, and *gRoe* the First Amendment, in their greater willingness to invoke their master principles for restricting expression rights. From the claim that *Brown* held that “racism is a form of subordination that achieves its purposes through group defamation,” Charles Lawrence concludes that a *Browned* First Amendment “commits us to some regulation of racist speech.”³¹ “When equality is recognized as a constitutional value and mandate,” Catharine MacKinnon agrees, “social inferiority cannot be imposed through any means, including expressive ones.”³²

A growing strain in American constitutional thought *Hellerizes* the First Amendment. Champions of an individual right to bear arms believe the Supreme Court should protect the freedom of speech for the same reason the Justices protected the right to bear arms in *District of Columbia v. Heller*.³³ Both rights are aspects of the more general constitutional commitment to providing citizens with the means to resist tyranny. Sanford Levinson suggests the connections between speech and gun rights when he notes, “just as ordinary citizens should participate actively in governmental decision-making through offering their own deliberative insights, rather than be confined to casting ballots once every two or four years for those very few individuals who will actually make decisions, so should ordinary citizens participate in the process of law enforcement and defense of liberty rather than rely on professionalized peacekeepers, whether we call them standing armies or police.”³⁴ Glenn H. Reynolds and Brannon P. Denning, more committed advocates of a broad interpretation of the right to bear arms, point out that “the First and Second Amendments share a common liberty-protecting heritage, so that borrowing from the former to implement the latter naturally follows.”³⁵

II. THE TESIS INTEGRATION

Professor Tesis proposes to *Harperoon*, *gRoe*, and *Brown* the First Amendment, but not *Lochnerize* or *Hellerize* free speech. He complains

30. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 48 (1993).

31. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 75, 58 (1993).

32. CATHARINE A. MACKINNON, ONLY WORDS 108 (1993).

33. 554 U.S. 570 (2008).

34. Sanford V. Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 650–51 (1989). For similar themes, see L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WILLIAM AND MARY L. REV. 1311 (1997).

35. Glenn H. Reynolds and Brannon P. Denning, *How to Stop Worrying and Learn to Love the Second Amendment: A Reply to Professor Magarian*, 91 TEX. L. REV. See also 89, 90 (2013).

that progressives who tie free speech closely to only one set of progressive constitutional commitments merely create larger constitutional islands. Too often, Tsesis maintains, while free speech scholars “accurately portray some of the purposes protecting and advancing free speech,” they “think of them as independent values rather than part of a greater scheme.”³⁶ If free speech is to be integrated with other liberal commitments, then free speech should be integrated with all liberal commitments. Hence, deriving free speech rights from the same underlying principle that justifies the right to vote, the right to an abortion, and the right to desegregated schools or anti-subordination makes more sense than closely connecting free speech with only one of these other rights, leaving the others to fend for themselves.

A progressive theory of free speech, Professor Tsesis insists, should be derived from the central principles of progressive constitutional thought and be connected to all progressive values. He *Harperoons* the First Amendment when declaring, “[f]ree speech is a necessary predicate for members of a representative democracy to voice their separate opinions and to compromise in the interest of community unity.”³⁷ He *gRoes* the First Amendment when emphasizing the value of “expressive self-definition”³⁸ and “the dignitary interest of each autonomous individual.”³⁹ He *Browns* the First Amendment when asserting that “[c]itizens participating in majoritarian voting lack the electoral power to prevent equal participation in public debate and self-expressions”⁴⁰ and that hate speech that “threatens the happiness of individuals and their allies, influences others to exclude identifiable groups, and disrupts multicultural tranquility” is not constitutionally protected.⁴¹ Tsesis makes clear that the *Harper*, *Roe*, and *Brown* dimensions of free speech stand together and do not reflect independent constitutional commitments. His entire project, “Free Speech Constitutionalism,” can be deduced from “the abstract principle that government must protect equal rights in order to benefit the common good.”⁴²

Free Speech Constitutionalism is sharply critical of progressive theories of free speech that exclude some progressive constitutional commitments. Those who would *Harperoon* the First Amendment by focusing on the role free speech plays in democratic majoritarianism overlook the crucial role free speech plays as a means of human development. “It is unfathomable to think,” Tsesis declares, “the government could regulate persons speaking to themselves in a bathroom, making mock gestures in

36. Tsesis, *supra* note 12, at 113.

37. *Id.* at 107.

38. *Id.* at 113.

39. *Id.* at 114.

40. *Id.* at 129.

41. *Id.* at 147.

42. *Id.* at 103.

a closet while getting dressed, reading the lines of a seditious play to a mirror, singing aloud in the woods, and yet none of them contribute to participatory democracy.”⁴³ Those who would g*Roe* the First Amendment by emphasizing the vital role of self-expression to the human personality undervalue the contribution free speech makes to democratic majoritarianism. Tsesis points out that the “self-fulfillment model does not satisfactorily explain why free speech doctrine treats public defamation differently than the private variety, since in both types of defamation the speaker might personally enjoy spreading untrue statements about the object of his anger.”⁴⁴

Professor Tsesis does not *Lochnerize* or *Hellerize* the First Amendment. *Free Speech Constitutionalism* does not discuss possible connections between free speech and either the freedom of contract or the right to bear arms, but Tsesis elsewhere makes clear that neither can be derived as fundamental constitutional principles. He declares “suspect . . . the Court’s attempt to link an individual’s right to bear arms with the Declaration of Independence.”⁴⁵ He thinks *Lochner* analogous to *Dred Scott v. Sandford*⁴⁶ as “obvious examples of judicial manipulation of the Constitution to suit the justices’ political and economic worldviews.”⁴⁷ For these reasons, progressive theories of free speech need not integrate the freedom of contract or the right to bear arms into a broader constitutional vision.

Nevertheless, Tsesis has provided persons who do not share his progressive constitutional vision with a road map for constructing a First Amendment more true to their constitutional faith. Integrating the freedom of contract and the right to bear arms into a broader free speech theory is not difficult. Those who would *Lochnerize* and those who would g*Roe* the First Amendment differ for the most part only over the rights they believe are necessary for human development. Justice McReynolds thought such rights included the freedom of contract and the freedom of speech. Justice Douglas thought such rights included the right to intimate relationships and the freedom of speech. A libertarian might think such rights include the freedom of contract, the right to intimate relationships, and the freedom of speech.⁴⁸ Those who would *Hellerize* and those who would *Harperoon* the First Amendment differ primarily over what rights they believe are necessary for a participatory

43. *Id.* at 124.

44. *Id.* at 131.

45. Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693, 701 n.24 (2012).

46. 60 U.S. 393 (1856).

47. Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609, 1667 (2013).

48. For one version of this argument, see generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (revised ed. 2013).

democracy to flourish. Pro-gun advocates believe the right to bear arms furthers participatory democracy.⁴⁹ Anti-gun advocates do not.⁵⁰

More generally, Professor Tsesis has provided a major challenge to the dominant mode of constructing a constitutional theory of free speech. Such classical free speech theorists as Alexander Meiklejohn and Thomas Emerson began by exploring values free speech served and then constructed free speech doctrine to serve those values.⁵¹ *Free Speech Constitutionalism* begins from a better place. Professor Tsesis asks what values the broader constitutional order serves and then constructs free speech doctrine to serve those values. Progressives and non-progressives who do not share Tsesis's interpretation of the Declaration of Independence may nevertheless rely heavily on his method when developing theories of free speech that better integrated what they believe are the most fundamental constitutional rights and norms.

III. THE FIRST AMENDMENT AS A PARTLY AUTONOMOUS CONSTITUTIONAL NORM

Free speech is not a constitutional island, but neither are constitutional visions undifferentiated land masses in which all provisions fit seamlessly with each other. Constitutions are disharmonic, containing provisions and strands that clash as often as they complement.⁵² Speech rights in disharmonic constitutions simultaneously promote and obstruct various regime purposes. Sometimes, speech clauses contribute to a particular constitutional vision. At other times, free speech is the means by which alternative constitutional visions are kept open. Even if at the present time we choose to *Harperize*, *gRoe*, and *Brown* the First Amendment, the constitutional protections for free speech keep open the possibility that at a later date we may *Lochnerize* and *Hellerize* the First Amendment.

Americans have consistently integrated free speech rights into the broader constitutional themes of the day.⁵³ Conservative libertarians during the late nineteenth century integrated the freedom of speech and the freedom of contract. New Deal and Great Society liberals integrated the freedom of speech and the right to vote. Post-Great Society liberals maintain that free speech rights are an aspect of the broader constitutional principles that justified constitutional rights to abortion and an an-

49. See Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 NOTRE DAME L. REV. 131, 172-73 (2008).

50. See Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49 (2012).

51. See THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1966); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

52. See GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* 4-5 (2010).

53. See notes 18-35 and accompanying text, *infra*.

ti-subordination interpretation of *Brown*. Many contemporary opponents of gun control laws derive their broad interpretation of the Second Amendment from the same principles they believe support free speech rights.

Proponents of broad free speech rights before the late nineteenth century similarly tied free speech rights to broader constitutional themes. In defending John Peter Zenger, Alexander Hamilton emphasized the close connection between free speech and jury trials.⁵⁴ The Virginia and Kentucky Resolutions weaved together free speech rights and the compact theory of the constitution.⁵⁵ James Madison's "Report on the Virginia Resolutions" noted how the American commitment to popular sovereignty entailed a different understanding of free speech than the English commitment to Parliamentary sovereignty.⁵⁶ Abolitionists closely tied free speech rights to their anti-slavery commitments.⁵⁷ The motto of the Free Soil party was "Free Soil, Free Speech, Free Labor, Free Men."⁵⁸ Michael Kent Curtis details how these connections between speech rights and anti-slavery structured the post-Civil War Amendments.⁵⁹

Other strands of free speech thinking and doctrine are largely independent of broader constitutional themes. From Tunis Workman to Thomas Emerson, scholars have produced major tomes devoted exclusively to free speech problems.⁶⁰ Emerson's *The System of Freedom of Expression* is devoted entirely to role free speech plays in a constitutional democracy, and not to any broader constitutional vision.⁶¹ Although he played an active role in the fight to constitutionalize a right to birth control,⁶² Emerson's writings on free speech do not connect *Griswold v. Connecticut*⁶³ and the First Amendment.⁶⁴ First Amendment rights in the

54. See JOHN PETER ZENGER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (London 1738) (Paul Finkleman ed. 2010).

55. See Henry Steele Commager, *The Kentucky and Virginia Resolutions of 1798*, in DOCUMENTS OF AMERICAN HISTORY 178-83 (Henry Steele Commager ed., 7th ed. 1962).

56. James Madison, *Mr. Madison's Report on the Virginia Resolutions*, 2 THE EXAMINER AND J. POL. ECON. 65 (Condy Raguet ed. 1835).

57. MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE:" STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 216-99 (2010).

58. THEODORE CLARKE SMITH, THE LIBERTY AND FREE SOIL PARTIES IN THE NORTHWEST 149 (1897).

59. Curtis, *supra* note 57, at 357-83.

60. See TUNIS WORKMAN, A TREATISE CONCERNING POLITICAL ENQUIRY AND THE LIBERTY OF THE PRESS (1800); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

61. Emerson discussed the role other constitutional provisions played in maintaining speech rights, but not the ways in which speech rights maintained values advanced by other constitutional provisions. See, e.g., EMERSON, *supra* note 60, at 3-20.

62. See DAVID J. GARROW, LIBERTY & SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 231-38 (1994).

63. 381 U.S. 479 (1965).

United States have a different development trajectory than other constitutional rights: during major wars for example, Americans have typically become more committed to racial equality⁶⁵ and less committed to free speech.⁶⁶ First Amendment doctrines developed in one era are routinely applied in different eras despite changing constitutional commitments: civil libertarians who came of age defending the free speech rights of progressives typically opposed hate speech codes that restricted racist and sexist speech.⁶⁷

*New York Times Co. v. Sullivan*⁶⁸ highlights the partial autonomy of the First Amendment. The judicial decision in that case cannot be understood independently from the struggle for racial equality. As Michael Klarman notes, “[d]uring the 1950s and 1960s, free speech became intertwined in popular and legal consciousness with another substantive cause that was beginning to prosper—that of the civil rights movement.”⁶⁹ A fair case can be made that the Supreme Court would have looked more sympathetically on Martin Luther King’s defamation suit against an Alabama newspaper than the justices actually did when deciding *L.B. Sullivan*’s defamation suit against the *New York Times*. Nevertheless, when resolving *Sullivan*, the Justices did not rely on strict scrutiny, the standard being developed for cases explicitly concerned with racial equality. Instead, the justices turned to the “actual malice” standard that the distinguished judge and constitutional treatise author Thomas Cooley had developed for libel cases during the late nineteenth century.⁷⁰ By treating *Sullivan* as a free speech case that raised no racial issues, the judicial majority set in motion a series of legal developments that saw *Sullivan* have a substantial impact on the constitutional law of defamation while having no impact of other efforts to hinder the civil rights movement. Thus, when courts in the twenty-first century determine the constitutional status of racist speech, they similarly turn to a set of standards developed in a series of free speech cases having nothing to do with race than a set of standards developed in race cases having nothing to do with free speech. Put differently, while we cannot tell the history of either ra-

64. The twelve-page table of cases in THE SYSTEM OF FREEDOM OF EXPRESSION does not mention *Griswold*. The index neither mentions birth control nor contraception. See EMERSON, *supra* note 60, at 829–54.

65. See PHILIP A. KLINKER & ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA (1999).

66. See GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2005).

67. See, e.g., Nadine Stroessen, *Regulating Racist Speech on Campus: A Modest Proposal?* 1990 DUKE L.J. 484 (1990); C. Edwin Baker, *Of Course, More than Words*, 61 U. CHI. L. REV. 1181 (1994).

68. 376 U.S. 967 (1964).

69. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VIRGINIA L. REV. 1, 42 (1996).

70. See THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 540–41 (4th ed. 1878); see also *Atkinson v. Detroit Free Press*, 9 N.W. 501, 508–25 (Mich. 1881) (Cooley, J., dissenting).

cial equality or free speech without mention of the other, both racial equality and free speech have distinctive and partly autonomous developmental paths.⁷¹

The partial autonomy of the First Amendment reflects the distinctive role free speech plays in American constitutionalism. The constitutional visions underlying *Lochner*, *Brown*, *Roe*, *Harper*, *Heller* and other constitutional decisions are not as etched in constitutional stone as is a single-executive or, better yet, state equality in the Senate. The latter are part of “the constitutional of settlement”⁷² that cannot be changed without a constitutional amendment (if even that) in the case of state equality in the Senate. The former are part of “the constitution of conversation,”⁷³ interpretive choices that Americans are free to revise in light of changed and perhaps better constitutional commitments. These conversations about the fundamental constitutional norms that should guide the proper interpretation of the First Amendment do not take place in an entirely neutral marketplace of constitutional ideas. A constitutional regime that is committed to the freedom of contract and the right to an abortion, but not an anti-subordination understanding of equality or the right to bear arms will *Lochnerize* and *gRoe* the First Amendment, but not *Harperize*, *Hellerize*, or *Brown* free speech. The resulting constitutional choices will privilege practices that reinforce existing constitutional commitments while placing new obstacles to achieving alternative constitutional visions. Given that all ideological schemes are “mobilizations of bias,”⁷⁴ such privileging is inevitable. Nevertheless, free speech also stands for the principle that government may not entrench a particular constitutional vision, that the First Amendment must always be interpreted as providing dissenters from the dominant regime commitments with a fair, if imperfect, opportunity to persuade others to adopt an alternative constitutional vision. Even if we prefer to adopt Tsesis’s theory of free speech that privileges commitments to democratic majoritarianism, personal development and antisubordination, the First Amendment reminds us that we must nevertheless permit some speech that risks anti-democratic outcomes, hinders personal development, and silences some speakers. If, after all, progressives are committed to free speech, that commitment entails a confidence that on a not totally slanted marketplace of ideas, the progressive vision that *Harperize*s, *gRoe*s, and *Brown*s the constitution and First Amendment will be more persuasive

71. One might note that war has been especially good for racial equality, but not so good for free speech.

72. Sanford V. Levinson, *What are We to Do About Dysfunction? Reflections on Structural Constitutional Change and the Irrelevance of Clever Lawyering*, 94 BOSTON U.L. REV. 1127, 1136 (2014).

73. *Id.*

74. See E.E. SCHATTSCHEIDER, *THE SEMI-SOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 69 (1960).

than a conservative vision that *Lochnerizes* and *Hellerizes* the constitution and First Amendment.⁷⁵

75. See Graber, *supra* note 24, at 383–89.