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THE FIRST AMENDMENT COMES OF AGE: THE EMERGENCE OF FREE SPEECH IN TWENTIETH-CENTURY AMERICA

G. Edward White*

INTRODUCTION

As the number of issues perceived as having First Amendment implications continues to grow, and the coterie of potential beneficiaries of First Amendment protection continues to widen — including not only the traditional oppressed mavericks and despised dissenters but some rich and powerful members from the circles of political and economic orthodoxy — alarms have been sounded. Another period of stocktaking for free speech theory appears to be dawning, and some recent commentators have proposed a retrenchment from the long twentieth-century progression of increasingly speech-protective interpretations of the First Amendment. At the heart of the retrenchment literature lies the belief that some forms of expression are incompatible with the aspirations of contemporary Americans for a civic-minded, decent, compassionate, and responsible society.¹

One might attribute to the contributions of retrenchment advocates an implicit questioning of the special constitutional and cultural status of free speech in America. Such a reading invites parallels between the perspective of retrenchment commentators and a much older view of the status of speech. That view was embodied in an often anthologized attack on Justice Holmes's dissent in *Abrams v. United States*² made by John Wigmore in 1920. In his attack Wigmore distinguished between "Freedom of Speech" and "Freedom of Thuggery," and maintained

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1. See *infra* text accompanying notes 270-92 (discussing relevant sources).

2. 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

that a civilized society such as the United States, whose members enjoyed ample freedoms, had the capacity to distinguish those utterances that enhanced the body politic from those that corroded it. Wigmore suggested that American citizens had a moral, as well as a legal, right to repress speech that passed the boundaries of civilized interchange and accordingly threatened the fabric of the community.³

I am not primarily interested here in exploring the parallels between Wigmore's perspective on free speech and that exhibited by current retrenchment advocates. Nor is my central concern with the saliency of various arguments advanced in retrenchment commentary. The recent proposed retrenchment of libertarian free speech theory has stimulated me to consider a broader issue: How did free speech, and the First Amendment, come to be treated as special, both constitutionally and culturally, in America?

It is remarkable, given the significant attention to First Amendment issues in legal commentary, that no detailed explanation for the special status of free speech in twentieth-century America hitherto has been advanced. It is conventional wisdom in current constitutional jurisprudence that the First Amendment, and the idea of protection for free speech, have been regarded for several decades as being at the very center of the American constitutional enterprise, whereas before World War I both the First Amendment and the idea of freedom of speech occupied a far more marginal status. Moreover, because of the increasing anthologization of some important work on the role of free speech in the late nineteenth century, scholars and students have a clearer understanding of the "prehistory" of modern First Amendment jurisprudence.⁴

But as yet no comprehensive inquiry has been undertaken into the question of why the First Amendment and freedom of speech "came of age," that is, came to occupy the status of constitutional and cultural

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3. See John H. Wigmore, *Abrams v. United States: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time*, 14 ILL. L. REV. 539, 552-54 (1920).

4. The most significant contributors have been David Rabban and Mark Graber. See MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* (1991); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983) [hereinafter Rabban, *Emergence*]; David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981) [hereinafter Rabban, *Forgotten Years*]; David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. REV. 47 (1992); David M. Rabban, *The IWW Free Speech Fights and Popular Conceptions of Free Expression Before World War I*, 80 VA. L. REV. 1055 (1994); David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985) (reviewing LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (1985)).

lodestars, in twentieth-century America.⁵ This article attempts such an inquiry, and in the process seeks to revise some conventional wisdom on a related subject: the origins and evolution of the bifurcated review project, in which constitutional challenges to legislative infringements on property rights or economic activity received a lower level of judicial scrutiny than constitutional challenges to legislative infringements on noneconomic "rights" or "liberties."

Specifically, I argue in this article that the most complete and satisfactory account of the twentieth-century jurisprudential and cultural emergence of the First Amendment and the idea of freedom of speech is one that associates the elevation of speech to special status with the emergence, in the early years of the twentieth century, of a "modernist" consciousness. This modernist consciousness bore a distinctive relationship to democracy and capitalism, the two prominent political and economic models of what I call "modernity."⁶

In addition, I argue that the bifurcated review project, conventionally identified as beginning with Chief Justice Stone's celebrated "footnote four" in the 1938 case of *United States v. Carolene Products Co.*,⁷

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5. Michael Klarman's article, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996), demonstrates an awareness of the absence of historical inquiries into the emergence of free speech as a particularly important constitutional and cultural concept in twentieth-century America, and offers a preliminary hypothesis for making sense of that emergence. See *id.* at 34, 39-41. Klarman's hypothesis attaches significance both to particularistic political and economic coalitions within American culture in the period between World War I and World War II and to the effect of those coalitions on constitutional litigation and the process of judicial appointment.

This explanation, insofar as it stresses the role of World War I as a cause of altered attitudes toward speech, tracks an argument made by Rabban. See Rabban, *Emergence*, *supra* note 4, at 1213-16, 1313-15. The importance of World War I also is emphasized in the work of the leading historian of free speech in twentieth-century America, Paul Murphy. See, e.g., PAUL L. MURPHY, *THE MEANING OF FREEDOM OF SPEECH: FIRST AMENDMENT FREEDOMS FROM WILSON TO FDR* 4, 21-22 (1972). That hypothesis is not inconsistent with the explanatory framework set forth in this article, but I believe it is incomplete. The question is not only why, after many years, Congress sought to restrict speech in statutes passed against the backdrop of World War I, but also why those statutes were challenged on constitutional grounds, and why a new, more speech-protective approach to the First Amendment emerged as a result of the challenges. The wartime context of the cases, which accentuated the negative consequences of allegedly "subversive" speech, might have suggested otherwise.

In short, previous commentators have tended to suggest that free speech emerged to a position of constitutional and cultural stature because of factors external to the altered intellectual meaning of the concepts of "freedom" and "speech" themselves. This article suggests that a full explanation of the rise of the First Amendment to constitutional and cultural prominence also must explore the nature of that altered intellectual meaning.

6. For definitions of modernist consciousness and modernity, see *infra* text accompanying notes 8-17.

7. 304 U.S. 144, 152 n.4 (1938).

began several years earlier and was centered on speech cases. I also argue that although the expanded governmental regulatory apparatus that emerged in the early twentieth century was a necessary condition for bifurcated review, it was not a sufficient condition: on a theoretical level, that regulatory apparatus could have been accommodated through judicial deference to legislative regulation of all types of constitutionally based liberties. Bifurcated review emerged with the perception that speech was a special sort of liberty and deserved particular judicial solicitude in a modern democratic society.

Finally, I argue that as the progression of twentieth-century free speech jurisprudence has played itself out from the early twentieth century until the present, the original, self-reinforcing modernist premises that elevated speech to special status in America have fragmented and become self-opposing. This development potentially threatens not only the enhanced role of speech but the intelligibility of the bifurcated review project itself.

My argument is presented in the form of an intellectual history of free speech theory in twentieth-century America, with particular attention to the contributions of prominent commentators advancing successive rationales for giving special protection to speech. The primary purpose of that history, however, is not to describe the views of those commentators, whose contributions are familiar to students of First Amendment issues. It is rather to trace the emergence, and subsequent refinement and fragmentation, of the central intellectual premises driving twentieth-century free speech jurisprudence, and thus to establish the existence of a paradox that current First Amendment theorists must now confront: When everyone can speak, and everything can be said, speech has ceased to be special.

I. A DEFINITIONAL AND ANALYTICAL FRAMEWORK

In this Part I set forth the framework for the intellectual history of First Amendment jurisprudence that follows, including definitions of some recurrent terms. I make no effort at this point to detail the connections between what I call modernist consciousness and the successive rationales for the protection of free speech that are discussed in this article. As a consequence, the framework may appear somewhat abstract. It seems useful, however, to prefigure the orientation of my argument in advance, and to suggest where its emphasis will differ from those of conventional accounts.

A. *The Premises of Modernist Jurists*

"Modernist" and "modernism" are ubiquitous and multifaceted terms that have been associated with the emotive as well as the cognitive realms of consciousness, and with developments in the arts, the humanities, and the sciences. This article focuses generally on the connections between modernism and unfolding doctrinal and theoretical developments in twentieth-century First Amendment jurisprudence. Given the professional orientation of the leading participants in that history — all writers about law — I both follow and depart from the helpful recent characterizations made by Dorothy Ross,⁸ and hence I employ the term modernist in a particularistic fashion in this article.

I use the term "modernist" to identify a perspectival orientation, or consciousness, characterized by a distinctive set of culturally and temporally bounded starting intellectual premises. Ross associates modernist consciousness with "the turn-of the-[nineteenth-] century recognition of the subjectivity of perception and cognition."⁹ David Hollinger expands upon Ross's definition by equating modernist consciousness with an "enthusiasm" for "the cognitive capability of human beings," around which "[a] distinctive culture uniquely appropriate for modern society" could be "organize[d]."¹⁰ I accept Ross's and Hollinger's general formulation, but it requires some particularization as applied to the legal writers I survey in this article. Whereas Ross and Hollinger note that some modernists in the arts and humanities treated the discovery of innate subjectivity as a source of alienation and skepticism, a basis for recoiling from modernity, the modernist writers on law whom I discuss assumed that the cognitive capabilities of humans would be a source of enlightened, human-fashioned policymaking, provided that policies were grounded in rationality and empirically based truth.

Thus the orientation of the modernist legal writers I consider closely resembles that ascribed to certain American political scientists by Raymond Seidelman, who identified adherents of a "philosophy of modernism" in the discipline of political science between 1884 and

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8. Dorothy Ross's introduction to her edition of a series of interpretive essays on modernism represents in my judgment the clearest and most cogent effort to define and locate modernist consciousness that has yet appeared. See Dorothy Ross, *Modernism Reconsidered*, in *MODERNIST IMPULSES IN THE HUMAN SCIENCES 1870-1930*, at 1 (Dorothy Ross ed., 1994). Another helpful collection of essays is *MODERNIST CULTURE IN AMERICA* (Daniel Joseph Singal ed., 1991).

9. Ross, *supra* note 8, at 8.

10. David A. Hollinger, *The Knower and the Artificer with Postscript 1993*, in *MODERNIST IMPULSES IN THE HUMAN SCIENCES*, *supra* note 8, at 26, 32 (emphasis omitted).

1984. Modernist philosophy, Seidelman suggested, rested on the assumption that once scientific knowledge had been acquired, "conflicts thought to be endemic to modern society could be rationally controlled, mediated and contained justly, equitably, and democratically."¹¹ The elements of modernist consciousness central to my subjects are identified in Seidelman's characterization: the value of scientific knowledge, the importance of rationality, and the significance of the democratic process in furthering individual freedom of thought. I am calling these elements cognitive freedom, rationalism, and empiricism.¹²

The modernist writers surveyed in this article took humans to be "free" in the deepest sense: free to master and to control their own destinies. In holding this "freedom premise" they were rejecting a heritage of causative explanations for the universe that emphasized the power of external, nonhuman forces, ranging from God to nature to inexorable laws of political economy or social organization to determinist theories of historical change. For them a recognition of the subjectivity of perception and cognition meant much more than the belief that individual humans were capable of giving individual meaning to their life experiences. It meant that humans had the potential — the freedom — to alter those experiences.

But in this group of modernist judges and commentators the freedom premise was subjected to two distinctive constraints. The constraints trace back to the fact that the group inhabited the professional sphere of practical policymaking. The recognition of cognitive human subjectivity was more than a stunning epistemological insight for them; it had potentially ominous governance consequences. Radical subjectivity, coupled with the brute fact of power, appeared to revive two of the endemic problems of governance in past societies — tyranny and arbi-

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11. RAYMOND SEIDELMAN, *DISENCHANTED REALISTS: POLITICAL SCIENCE AND THE AMERICAN CRISIS, 1884-1984*, at 9-10 (1985).

12. I use the term "cognitive freedom" to distinguish those dimensions of human subjectivity directed toward the processes of "knowing" or "thinking" from those directed toward "emoting" or "feeling." See Hollinger, *supra* note 10, at 28-29. The version of subjective freedom exemplified in "aesthetic modernism," which Ross and Hollinger identify primarily with responses in literature and the arts, see Ross, *supra* note 8, at 8; Hollinger, *supra* note 10, at 28, was not a central element in the consciousness of most of the writers I am describing.

Nonetheless the "freedom" associated with human subjectivity by modernist writers was taken to include emotive as well as cognitive dimensions, so that the premises of modernist consciousness implicitly conferred legitimacy on individualized aesthetic responses to experience. Over time the emotive dimensions of modernist "freedom" were to become incorporated in rationales for the protection of speech in American First Amendment jurisprudence. See *infra* text accompanying notes 225-45. To signal the emergence of that stage, I will replace the term "cognitive freedom" with the term "freedom."

trariness. Those features of premodern societies, when they existed, had been justified by appeal to externally based theories of causal attribution ("the King can do no wrong," "God's will"), but such theories hitherto were rejected. How was the modern world, largely created by humans themselves — a world in which democracy had replaced oligarchy, capitalism had supplanted feudalism, science increasingly overshadowed religion, and an essentially frozen status system had been made increasingly mobile — to restrain the power of human will?

To deal with the potential connection between the freedom premise and the prospect of tyrannical or arbitrary governance, modernist jurists incorporated two constraints on the creative power of humans to function as causal agents into their consciousness — rationalism and empiricism.¹³ Both ultimately helped cement the symbiotic relationship between modernism and an elevated status for the First Amendment.

The constraint of rationalism posed a central distinction between laws, rules, and policies that were arbitrary and those that were rational. A rational decision, for modernist American jurists, was one that was defensible and justifiable by appeal to something other than the power and creative force of those making it.¹⁴ "Rationality" could be located in the "common sense" of the people, as reflected in legislative judgments, or, increasingly in the twentieth century, in the "expertise" of administrators, but it could not be located merely in the fact of powerholding itself.

The freedom of humans to fashion rules or policies guiding their own conduct also was constrained, for modernist jurists, by a requirement that legal decisions be grounded in an appropriately empirical understanding of the subjects affected by the decisions. The methodology of empiricism had come into prominence with the emergence of science as an important key to understanding the external world. It was based

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13. Hollinger identifies rationalism and empiricism with the cognitive dimensions of human subjectivity, encapsulating those premises in the figure of the scientist, a "modern, intersubjective, empirical, professional Knower" who "eschew[s] imaginary certainties and comforting illusions in order to face relentlessly the truth, developing . . . capacities for skepticism, disinterestedness, and rigorous analysis." Hollinger, *supra* note 10, at 37. Early twentieth-century American jurists often defined law as a science and viewed an important task of their profession as responding to the uncertainty and complexity of modern life by making the law more scientific. For a detailed account of the infatuation of early twentieth-century legal academics with empirical social science, see JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

14. For discussions of the relationship of rationalism to modernist consciousness, see RICHARD TARNAS, *THE PASSION OF THE WESTERN MIND* 275-90 (1991); Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 263-64 (1992).

on an assumption that through appropriately learned techniques of observation and deduction, finite, objective truths about the universe could be ascertained. As such, empiricism was a check on the radical subjectivity of perception, but the insights of empiricist methodology were not available to all: they required specialized training in the techniques that elicited "truth." Thus alongside a commitment to the constraint of empiricism went a faith that the truths unearthed by experts presumptively were worth more than those of the lay public.¹⁵

B. *Modernist Consciousness and Rationales for the Protection of Speech*

Much of the remainder of this article will demonstrate how each of the starting premises of modernist consciousness influenced the development of free speech jurisprudence in America. Before taking up the details of that process, however, it is worth pointing out two additional analytical themes that frame the twentieth-century intellectual history of free speech.

The first of those themes focuses on the connections between the premises of modernist consciousness and the major philosophical rationales for the protection of free speech in American society that surfaced over the course of the twentieth century.

I have suggested that the freedom premise of modernist consciousness emphasized the capacity of humans to master their experience and in effect to create their own destiny: it was a powerful affirmation of the capacity and potential of the individual. The philosophical rationale for protecting speech most intimately associated with the freedom premise would appear to be one emphasizing speech as a particularly fundamental component in the affirmation of human freedom. That rationale eventually surfaced in free speech jurisprudence under the heading of individual autonomy or self-fulfillment. However, for historical rea-

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15. In a recent history of the idea of democracy in America from the 1820s to the 1990s, Robert Wiebe argues that the decade between 1914 and 1924 was one in which two developments occurred in the realm of ideas about democratic theory: a loss of confidence in "the people" as a repository of wisdom, with a corresponding rise in the status of experts as enlightened policymakers; and a shift in the normative thrust of democracy from an emphasis on majority rule to an emphasis on expanded opportunities for individuals. See ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 175-84 (1995). I will argue that a reformulation of the cultural meaning of democracy in America bore a close relationship both to the emergence of modernism and to the expanded significance of free speech. Although I did not have the benefit of Wiebe's observations in the process of developing that argument, and although his emphasis differs slightly from mine, his findings parallel and support my own.

sons, the self-fulfillment rationale was comparatively late to surface in First Amendment doctrine and commentary.

The rationalism premise of modernist consciousness sought to channel the freedom of human creativity along paths compatible with effective and orderly governance. Rationalism, as a constraint on freedom, suggested that not all versions of human mastery in the universe were conducive to effective social organization; tyrannical and arbitrary policies were, in fact, destructive of that goal. Analogically, not all examples of the power and creativity of humans in the form of free expression were useful; those retarding the formation of rational policies of governance were inefficacious. Thus one can grasp an affinity between the premise of rationalism and a second philosophical rationale for the protection of speech, one that emphasized the channeling of self-expression toward the processes of rational policymaking. This rationale was to appear in free speech jurisprudence under the rubric of "self-governance."

Finally, the empiricism premise of modernist consciousness sought to impose upon the process by which humans extract meaning from their experience a requirement that the meaning be "true" as distinguished from "false," lest the potentially radical dimensions of cognitive subjectivity precipitate anarchic or excessively willful interpretations of the external world. Empiricist techniques for observing and generalizing about the universe were to be one of the chief sources of true meanings. It followed from this commitment to empiricism as a check on unlimited interpretive freedom that the principal value in freedom of expression was as part of a process designed to distinguish true ideas from false ones, what might be called a collective process of gathering information and distinguishing the true from the false meanings of that information. The philosophical rationale for the protection of free speech most akin to the empiricist dimensions of modernist consciousness was a rationale that emphasized freedom of expression as part of a "search for truth" in the "marketplace of ideas."¹⁶

Chronologically, the three principal rationales for protection for freedom of speech did not surface simultaneously in twentieth-century First Amendment jurisprudence. The search for truth rationale came first, to be followed by the self-governance and self-fulfillment rationales. When one asks questions not only about the connections between

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16. The "marketplace of ideas" was itself a testament to the cognitive capabilities of human beings. Ideas were propounded by human actors and tested and found wanting by human actors. No externally based truths overwhelmed those discerned by the actors participating in the marketplace. Of course, as we shall see, the modernist jurists being surveyed concluded that some human-discerned truths were better than others.

the rationales and modernist consciousness, but about possible explanations for the chronology of the rationales' appearance, one must consider not only the intellectual premises that engendered the rationales but their historical setting. One must explore not only modernist consciousness but the "actual world" of modernity itself.

C. *The Emergence of Free Speech and the Bifurcated Review Project*

The First Amendment came of age in America at a particular point in time. That period was characterized not only by the emergence of a modernist consciousness, but by the presence of external features in American culture that bore a generative relationship to that consciousness. According to Ross, modernity can be exemplified, in important part, by a democratic model of politics and a capitalist model of economics.¹⁷ However, the status of those models, at the time free speech was first taken seriously as a constitutional and cultural value in America, was not identical.

As First Amendment jurisprudence became progressively speech-protective — beginning around World War I and stretching at least to the 1980s — the democratic model of politics expanded in influence. At the same time the capitalist model of economics, in its idealized late nineteenth-century version of a laissez-faire economic marketplace characterized by the absence of governmental regulation, receded in influence. As the meaning and normative significance of democracy expanded, the model of capitalism as unregulated economic activity separated from democratic theory. Freedom in the political sphere became embodied by democratic theory and practices,¹⁸ but freedom in the economic sphere was pictured increasingly as producing inequitable distributions of power and wealth. Indeed, regulation of the economic marketplace became associated with democratic theory.¹⁹

The increasing influence of the democratic model of politics relative to the capitalist model of economics was reflected in a fundamental development in American constitutional jurisprudence. The emergence of free speech as constitutionally and culturally special was intimately

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17. See Ross, *supra* note 8, at 8.

18. This transition was affected, as Wiebe suggests, by practices that emphasized the opportunities of the individual citizen as a participant in collective governance. See WIEBE, *supra* note 15, at 137.

19. Identification of the themes of an expanding conception of political democracy and a contracting conception of economic freedom as defining elements of the political economy of early and mid-twentieth century America can be found in nearly any standard history of that period. See, e.g., WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 344-47 (1963); WILLIAM E. LEUCHTENBURG, THE PERILS OF PROSPERITY, 1914-1932, at 8-9 (2d ed. 1993).

tied to that development. I am calling that development the bifurcated review project — an effort to fashion a double standard of constitutional review in which judges would defer to legislative regulation of the economy but scrutinize legislative regulation of noneconomic rights, including the right to free speech. The basis for that heightened scrutiny was the close connection between the freedom personified in noneconomic liberties and democratic theory. The basis for judicial deference to legislative regulation of economic rights was similar. Such deference not only alleviated fears of an undemocratic substitution, under the guise of constitutional interpretation, of judicial for legislative theories of the economy, it left in place legislative regulations designed to alleviate the undemocratic consequences of the unregulated economic marketplace.

The bifurcated review project represented an effort to give concrete effect to modernist premises. By fostering judicial deference in the area of economic regulation, the project embraced the perceived truth that unregulated economic activity actually infringed on the freedom of a significant number of actors in the economic marketplace and reinforced rational regulatory policies that were based on that truth. By fostering judicial scrutiny of legislative restrictions on speech and other noneconomic liberties, the project underscored the centrality of the modernist freedom premise when that premise could be associated with the goals of democratic theory.

The evolution of free speech jurisprudence in twentieth-century America thus can be seen as a series of episodes in which the major premises of modernism, as interpreted by courts and commentators, successively contributed to elevate the constitutional and cultural status of free speech. At the same time, as those episodes produced alternative rationales for the protection of speech, those rationales began to conflict with, as well as to reinforce, one another, and eventually came to threaten, as well as to implement, the juristic goals of the bifurcated review project. The sharp separation between the juristic realms of noneconomic and economic freedom had been the essence of the bifurcated review project and arguably the essence of an enlightened modernist approach to modernity. But as protection for speech began to disengage itself from democratic political theory and to invade the realm of economic regulation, this sharp separation began to blur. The result has been to stimulate a reconsideration of the significance of speech in America.

My narrative of the First Amendment's coming of age divides the twentieth-century intellectual history of free speech into five discrete periods, in each of which an analysis of commentary and cases reveals

the existence of distinct, but overlapping, jurisprudential rationales for the protection of speech. In the first four periods, that progression exhibits an increasingly libertarian, speech-protective First Amendment jurisprudence, and an increasingly aggressive role for courts in constitutional review of free speech claims. In the last period, which includes the present, the libertarian progression has continued, but the association of a speech-protective approach to First Amendment issues with democratic theory and with an implicit deference to economic regulation has become much less easy to discern. The tendencies of recent free speech jurisprudence have fostered calls for a reconsideration of its libertarian emphasis, and, arguably, for a less elevated constitutional and cultural role for speech. The article concludes by suggesting that this movement signals the deeply paradoxical and problematic status of modernist-driven free speech jurisprudence.²⁰

II. COGNITIVE FREEDOM AND "THE SEARCH FOR TRUTH": ZECHARIAH CHAFEE AND THE EMERGENCE OF A SPEECH- PROTECTIVE THEORY OF THE FIRST AMENDMENT

A. *The Setting: Early Twentieth-Century Doctrinal and Theoretical Orthodoxy*

As late as 1915 the Supreme Court of the United States continued to treat free speech cases as undeserving of special judicial solicitude. Two venerable doctrinal formulations continued to control First Amendment jurisprudence. One was the position, represented in the 1897 case of *Robertson v. Baldwin*,²¹ that the Amendment did not institute "any novel principles of government," but simply codified "certain guaranties and immunities which we had inherited from our English ancestors, and which from time immemorial had been subject to certain well-

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20. It remains, in this introductory section, to locate this article within recent literature on the twentieth-century history of the First Amendment. Although I believe that the explanation offered here for the emergence of free speech in twentieth-century America is novel, it builds not only on the aforementioned work of intellectual historians on modernist consciousness and modernity, but on other recent work at the interfaces of "new institutionalist" political science, philosophy, and constitutional history, samples of which are cited in subsequent notes. I want to single out here the contributions of two of my colleagues, Michael Klarman and Barry Cushman, whose interest in twentieth-century constitutional and intellectual history has stimulated me to reexamine my approach to those fields. See, e.g., Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994); Klarman, *supra* note 5; Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from Swift to Jones & Laughlin*, 61 FORDHAM L. REV. 105, 154 (1992); Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994).

21. 165 U.S. 275 (1897).

recognized exceptions." This meant that speech that was regarded as libelous, blasphemous, obscene, indecent, or "injurious to public morals or private reputation" could be suppressed.²²

The other formulation confined constitutional protection for free speech to freedom from governmentally imposed "prior restraints," such as the censorship of publications before they were issued. This position dated back at least to William Blackstone's *Commentaries*, in which Blackstone had defined "the liberty of the press" as protection only from "laying no *previous* restraints upon publications," as distinguished from "freedom from censure for criminal manner when published."²³ In a 1907 case in which a Colorado newspaper editor had been convicted of contempt of court for publishing articles and a cartoon impugning the motives of judges of the Supreme Court of Colorado, the Court upheld the conviction. The author of the Court's opinion was Justice Oliver Wendell Holmes, who repeated Blackstone's prior restraints dictum and held that even factually accurate (true) criticism of judicial officials that tended to interfere with the administration of justice could be criminally punished.²⁴

The Supreme Court cases up through *Patterson* made free speech challenges to state or federal restrictions simple "police power" cases. The test for whether the police power of the state could be invoked to punish expression was whether the expression in question had a "bad tendency" — that is, a tendency to injure public morals or private reputation or lead to other socially injurious acts. Under this conception, most free speech cases, which involved restrictions formulated by states, were not First Amendment cases at all, but Fourteenth Amendment due process cases, testing the boundary between a liberty claim and state police powers. Since the First Amendment had not been incorporated into the Fourteenth Amendment's Due Process Clause, the liberty at stake was simply one of the ancient "rights" of English-speaking citizens.²⁵

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22. 165 U.S. at 281.

23. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *151.

24. See *Patterson v. Colorado ex rel. Attorney Gen.*, 205 U.S. 454, 456, 462-63 (1907).

25. Recent scholarship has revealed the existence of a tradition of libertarian commentary on issues implicating freedom of expression that can be traced back to the years before the Civil War. In particular, groups such as the Free Speech League and the International Workers of the World had initiated, by the early years of the twentieth century, the practice of scrutinizing and challenging restrictions on speech in the press and in public debate; by the early twentieth century libertarian theories of free speech had begun to appear in "mainstream" academic writing. See sources cited *supra* note 4.

Late nineteenth-century libertarian free speech theory, however, cannot be seen as fully reflective of a modernist consciousness. That commentary saw freedom of speech

As a police power liberty, absolutist formulations of speech seemed as potentially distasteful as "liberty of contract" when that doctrine came under attack from early twentieth-century Progressive legal theorists. The first instinct of many Progressive commentators, in fact, was to continue to sweep free speech issues within the rubric of police power analysis, and to emphasize the social interest in restricting dissident speech to promote progress and civic harmony.²⁶

The premodernist dimensions of libertarian free speech theory became significant when Congress, in the shadow of World War I, passed two statutes that criminalized speech tending to encourage resistance to the war effort or to undermine respect for the government and its operations.²⁷ Indictments under those statutes raised the question, dormant for so many years, of what the First Amendment's imprecation that "Congress shall make no law . . . abridging speech" meant in a wartime setting.

The Supreme Court's 1919 decisions in a series of Espionage Act and Sedition Act cases, beginning with *Schenck v. United States*²⁸ and extending through *Abrams v. United States*,²⁹ are among the most an-

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as a liberty akin to that of the due process liberty: a private right, such as property, that in some contexts had an important public function such as disseminating information or opinions on public issues. It was conceived of as an innate, prepolitical liberty, one of the essential conditions of humanity but not in itself an illustration of the cognitive capabilities of humans.

Recent scholarship also has shown increased attention to the theoretical dimensions of late nineteenth-century constitutional jurisprudence, and particularly to the fascination of that body of work with bright-line doctrinal categories designed to maintain a fundamental distinction between the public and private spheres of social activity. See, e.g., HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 10-15 (1992) [hereinafter HORWITZ, *TRANSFORMATION OF AMERICAN LAW*]; Morton J. Horwitz, *The Supreme Court, 1992 Term — Forward: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 101-03 (1993); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 8, 23-24 (1991). Nonetheless very little attention has been devoted to grounding the categorical orientation of nineteenth- and twentieth-century constitutional theory in premodernist assumptions about the cognitive capabilities of humans as causative agents in the realm of political economy. For a preliminary effort, attempting to cabin James Bradley Thayer's deferential theory of judicial review in time, see G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48 (1993).

26. See GRABER, *supra* note 4, at 78-86; David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEXAS L. REV. 951, 958-59 (1996).

27. See Espionage Act of 1917, ch. 30, 40 Stat. 217 (codified as amended in scattered sections of 18, 22, 50 U.S.C.); Sedition Act of 1918, ch. 75, 40 Stat. 553 (repealed 1921).

28. 249 U.S. 47 (1919).

29. 250 U.S. 616 (1919).

thologized cases in American constitutional law. In *Schenck* Holmes announced for the Court that "[t]he question in every [subversive advocacy] case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."³⁰ Holmes restated this test in *Abrams*, in dissent.³¹

I am concerned here with how Espionage Act and Sedition Act cases provided a forum for a reconsideration of nineteenth-century free speech jurisprudential orthodoxy. That reconsideration, prompted largely by the writing of Zechariah Chafee — particularly his glosses on the Espionage Act opinions of Holmes — served to integrate and to give new meaning to the diverse strands of free speech commentary that were in existence by World War I. It also served to supply First Amendment jurisprudence with its first modern set of theoretical apologetics, which associated protection for speech with a search for truth in a democratic society.³²

30. *Schenk*, 249 U.S. at 52.

31. "[T]he United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent." *Abrams*, 250 U.S. at 627 (Holmes, J., dissenting). The restatement was not insignificant, and a good deal of commentary has been devoted to the development of Holmes's perspective on free speech issues in the short interval between *Schenck* and *Abrams*. I review that commentary and discuss the internal history of Holmes's altered perspective in G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 414-36 (1993).

32. This article's emphasis on the role of Chafee and other legal commentators in formulating rationales for the protection of speech, and in illustrating one or another of the starting premises I have identified with a modernist juristic consciousness, raises two questions about the place of such commentators in an intellectual history of constitutional concepts such as freedom of speech. The first question is what weight, if any, can be attached to the views of commentators, given that they are not judges and thus have no power to interpret the Constitution. The second is why the starting intellectual premises of any particular commentator should be singled out as "representative" of a larger body of opinion, so that, for example, the theoretical dilemmas illustrated in the work of a given commentator can be seen as emblematic of dilemmas contained within twentieth-century American juristic modernism itself.

I assume that the work of certain legal commentators does exert influence on constitutional interpretation, and I have attempted to chronicle that influence in this article. In the cases of Zechariah Chafee and Alexander Meiklejohn such influence is readily documented, and by doing so I intend to suggest that the writings of Chafee and Meiklejohn had considerable influence on the theoretical grounding of Supreme Court First Amendment cases even though both Chafee and Meiklejohn spent their careers as academics.

My selection of the other two commentators, Thomas Emerson and Cass Sunstein, is designed more to emphasize their role as "representative" intellectual and cultural figures than as formative influences on judicial interpretations of the First Amendment. I single out Emerson and Sunstein because I think that their respective approaches to

The Espionage Act decisions of 1919 were handed down during an important transition period in the intellectual history of twentieth-century American jurisprudence. The first distinctly modernist political movement in America, Progressivism, had become established, and sociological jurisprudence, the legal ideology of early twentieth-century Progressives, had captured the attention of some sectors of the legal academy.³³ A notable dimension of sociological jurisprudence was its critique of what Roscoe Pound called "mechanical jurisprudence": the late nineteenth-century juristic emphasis on bright-line legal categories and concepts.³⁴ The sociological jurists' critique of the Court's majority opinion in *Lochner v. New York*,³⁵ which they viewed as paradigmatically mechanical, was itself paradigmatically modernist. *Lochner* was attacked for being insufficiently attentive to the "realities" of the industrial marketplace, and thus irrational; and at the same time for perpetuating outmoded assumptions about the coexistence of economic "freedom" and democratic theory in a society where industrial capitalism was the dominant model of enterprise.³⁶

One feature of the *Lochner* decision that made it notorious for Progressive critics was its embrace of the doctrine of "liberty of contract," which signified to them either a fiction or a nineteenth-century confusion of economic power with economic liberty. Having assumed that liberty of contract was neither conceptually nor practically defensible, modernist critics concluded that it functioned simply as a tool that judges could employ to invalidate statutes that they felt threatened the idealized domain of unregulated economic activity. This conclusion, of course, also posited a modernist view of the judicial function as creative.³⁷ As Holmes had pointed out in his dissent in *Lochner*, liberty of

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free speech issues clearly reveal their intellectual starting premises, and that those premises can be shown to be illustrative of stages not only in the progression of twentieth-century First Amendment jurisprudence but in the progression of twentieth-century modernism.

33. See G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1004 (1972).

34. See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); see also HORWITZ, *TRANSFORMATION OF AMERICAN LAW*, *supra* note 25, at 10-19 (describing the category-based tendency of nineteenth-century legal thought); David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 MO. L. REV. 93 (1990); Stephen A. Siegel, *Historicism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431.

35. 198 U.S. 45 (1905).

36. See Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 464, 479-81 (1909).

37. The modernist recognition of human cognitive capabilities can be seen as significantly contributing to the collapse of the established jurisprudential assumption that

contract was itself a judicial gloss on the Due Process Clauses.³⁸

The modernist critique of liberty of contract suggested that a reading of the Due Process Clauses to develop a libertarian position toward speech rights might be comparably susceptible to judicial abuse, and might take on some of the baggage of an interpretive approach that was being attacked as outmoded.³⁹ But the instinctive attraction of some Progressive scholars toward the idea of freedom of speech stimulated them to try to reconcile a theory of curtailed constitutional protection for economic liberties, embodied in the critique of *Lochner*, with a theory of expanded protection for freedom of expression in a democracy.⁴⁰ That attempted reconciliation eventually blossomed into the project of bifurcated constitutional review.

With the approach of World War I, some Progressive commentators increasingly became concerned with the implications of dissident speech for political and cultural solidarity.⁴¹ Certain other Progressive theorists, however, had begun to associate protection for free speech with the value of enhanced citizen participation in an industrializing, democratizing society. One of the political goals of the Progressive movement was to broaden the base of popular involvement in government and to encourage larger numbers of citizens to participate in public discourse, even though many Progressives held a selective view of who those citizens should be.⁴² The modernist premise of freedom was a thread linking many policies endorsed by Progressives, ranging from enhanced bargaining power for workers in the industrial marketplace to opposition to machine politics to enthusiasm for new scientific techniques that would relieve the drudgery of workplace and household rou-

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judges merely "found" or "declared" law. That assumption can be identified with a theory of causal attribution in the universe that located omnipotent causal agents, such as disembodied principles of law, in entities and forces external to human will. For an earlier effort to characterize the theory of judicial law declaration, described as an "oracular theory of judging," and to trace its demise in the first three decades of the twentieth century, see G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 145-77 (expanded ed. 1988).

38. See *Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting).

39. One of the nineteenth-century commentators that had articulated a relatively libertarian perspective on free speech issues was Thomas Cooley, one of the visible proponents of the "liberty of contract" doctrine. See GRABER, *supra* note 4, at 8, 241 n.39. On Cooley's general jurisprudential orientation see GILLMAN, *supra* note 25, at 55-59.

40. See GRABER, *supra* note 4, at 87-95; Rabban, *supra* note 26, at 957-62.

41. See GRABER, *supra* note 4, at 77-86.

42. See ELDON J. EISENACH, *THE LOST PROMISE OF PROGRESSIVISM* 193-95 (1994); WIEBE, *supra* note 15, at 162-65.

tines.⁴³ Freedom of speech, from this perspective, signified freedom of political participation and freedom of inquiry.

B. *Chafee and the Reformulation of First Amendment Orthodoxy*

As Progressive legal scholars sought to square their enhanced interpretation of freedom in a democracy with their increasing alienation from what they saw as an excessively libertarian constitutional heritage, Zechariah Chafee began his own reformulation of free speech jurisprudence. In his 1920 treatise, *Freedom of Speech*,⁴⁴ which was prompted by the Espionage Act cases, Chafee employed three strategies as part of his reformulation effort. First, he discarded the legacy of earlier libertarian speech theorists by treating their work as largely invisible, thereby helping to cement the image of pre-World War I First Amendment jurisprudence as a period in which free speech issues were not given any serious attention.⁴⁵ Second, he attempted a sharp separation of First Amendment free speech jurisprudence, which he sought to invigorate, from the legacy of police power liberty due process cases, which he sought to discard. Finally, Chafee restated the philosophical rationale for protecting free speech in America — resting protection for speech on a “social interest” in enhanced public participation and informed public debate in a democracy rather than on an individual interest in self-expression. His reformulation supplied First Amendment jurisprudence with the first of its twentieth-century bases for a speech-protective perspective: that protection for speech facilitated a search for truth in the marketplace of ideas.

Chafee took pains to disassociate the liberty of speech and the press from liberty of contract, and did so in a fashion that revealed his modernist sensibility. He announced that his goal was to disengage the “true meaning of free speech” from “talk about rights.”⁴⁶ In cases such as the Espionage Act cases, he argued, “[t]he agitator asserts his constitutional right to speak [and] the government asserts its constitutional right to wage war”: the “result is a deadlock.”⁴⁷ Breaking this deadlock required discarding the jurisprudence in which “free speech has been regarded as merely an individual interest” and adopting an analysis em-

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43. For examples of the policies see generally ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920* (1967).

44. ZECHARIAH CHAFFEE, JR., *FREEDOM OF SPEECH* (1920).

45. The legacy discarded by Chafee was reclaimed by those scholars who recently have documented the existence of late nineteenth-century libertarian free speech commentary. See sources cited *supra* note 4.

46. CHAFFEE, *supra* note 44, at 34-35.

47. *Id.* at 34.

phasizing "the balancing against each other of two very important social interests," that of "public safety" and that of what Chafee called "a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way."⁴⁸

In another place in *Freedom of Speech* Chafee was to equate the social interest in protecting free speech with "the need of continuous contact with the facts and with sound conclusions."⁴⁹ Freedom of speech led to truth, he believed, because the outpouring of ideas stimulated other ideas to be proposed as counters or correctives, and the resulting dialogue led its participants closer to the true facts of life.⁵⁰

The normative bite of Chafee's proposed reformulation of free speech jurisprudence was captured in a sentence reading, "[T]he great interest in free speech should be sacrificed only when the interest in public safety is really imperiled, and not, as most men believe, when it is barely conceivable that it may be slightly affected."⁵¹ Chafee suggested that even in wartime, speech should be protected "unless it is clearly liable to cause direct and dangerous interference with the conduct of the war."⁵² One might notice how this formulation asserts a great social interest in free speech, a comparable social interest in public safety, and then looks to empirical analysis (when is the safety of the public really imperiled?) on which to ground a rational process of balancing. By comparison the "bad tendency" test ("when it is barely conceivable that [public safety] may be slightly affected") appears unduly vague, subjective, and irrationally underprotective of speech in wartime.

In the short run, Chafee's reformulation had far greater impact on theory than doctrine. His proposed test for determining whether speech

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48. *Id.* at 36-38. In placing emphasis on social interests Chafee benefited from his close contact with Progressives like Roscoe Pound. In his early twentieth-century scholarship Pound had suggested that to the extent that legal "interests" were "balanced" in a judicial decision, they needed to be balanced on the same plane, so that "social interests" were balanced against "social interests." See Roscoe Pound, *Interests of Personality* (pt. 1), 28 HARV. L. REV. 343, 344, 349 (1915). By giving "individual interests" the same potential weight as social interests, Pound felt, judges were being insufficiently sensitive to the contemporary social and economic consequences of their decisions. It invited the kind of "mechanical" analysis embodied by the majority opinion in *Lochner*. See Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pt. 3), 25 HARV. L. REV. 489, 492-95 (1912). On Chafee's connections with Progressive thinkers, see DONALD L. SMITH, ZEPHARIAH CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW 81-84 (1986).

49. CHAFEE, *supra* note 44, at 179.

50. *See id.* at 36.

51. *Id.* at 38.

52. *Id.*

should be protected, which was influenced by Learned Hand's holding in *Masses Publishing Co. v. Patten*,⁵³ was not adopted by the Supreme Court in the Espionage Act cases. Even though Chafee roundly criticized the bad tendency test in free speech cases,⁵⁴ Holmes employed it for the Court in all the Espionage Act cases except *Abrams*, where the majority employed it.⁵⁵ At least until *Abrams*, Holmes did not appear to treat his celebrated "clear and present danger" dictum in *Schenck*⁵⁶ as incompatible with the bad tendency test.⁵⁷

Chafee, however, intimated that the Court adopted his reformulation as early as the Espionage Act cases. He repeated in *Freedom of Speech* a conclusion he had advanced earlier in an article, *Freedom of Speech in Wartime*, in the *Harvard Law Review*.⁵⁸ There Chafee wrote that in *Schenck* and the companion Espionage Act cases, in order to give force to the First Amendment, "Justice Holmes draws the boundary line very close to the test of incitement at common law and clearly makes the punishment of words for their bad tendency impossible."⁵⁹ This was what Chafee took Holmes to mean by "clear and present danger."

Chafee took pains to suggest that Holmes's reformulation in *Abrams* was "only an elaboration" of his dictum in *Schenck*. Chafee was eager to bring *Abrams* within the "clear and present danger" line of cases so that the doctrine would be linked with "Justice Holmes's magnificent exposition of the philosophic basis" of the First Amendment.⁶⁰ Holmes wrote in his *Abrams* dissent:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good 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

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53. 244 F. 535 (S.D.N.Y. 1917), *revd.*, 246 F. 24 (2d Cir. 1917). Hand held in that case that only speech that constituted a "direct incitement to violent resistance" is illegal. 244 F. at 540. Chafee dedicated the 1920 edition of *Freedom of Speech* to Hand.

54. See CHAFEE, *supra* note 44, at 25-32.

55. See *Abrams v. United States*, 250 U.S. 616 (1919).

56. *Schenck v. United States*, 249 U.S. 47 (1919).

57. See WHITE, *supra* note 31, at 418-20 (discussing Holmes's use of "bad tendency" language and analysis in two Espionage Act cases following *Schenck*).

58. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919). Chafee had published an earlier version of this article. See Zechariah Chafee, Jr., *Freedom of Speech*, NEW REPUBLIC, Nov. 16, 1918, at 66.

59. Chafee, *Freedom of Speech in War Time*, *supra* note 58, at 967. In his book *Freedom of Speech*, Chafee made a nearly identical statement. See CHAFEE, *supra* note 44, at 89.

60. CHAFEE, *supra* note 44, at 155.

that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.⁶¹

Chafee was enthusiastic about this passage because Holmes clearly had elevated the social interest in the search for truth as a foundation for civic policymaking over any individual interest in expression. The "ultimate good," Holmes suggested, was "free trade in ideas" rather than the "foundations" of individual conduct. Individual "faiths" were ephemeral, but the search for truth in the marketplace of ideas was permanent, since truth was "the only ground" upon which policy could "safely" be made.

Holmes's articulation in *Abrams* of the search for truth rationale for protection of speech has regularly been celebrated as a defining moment in the modern history of the First Amendment. Chafee himself played a part in encouraging Holmes to rethink his view of free speech, and scholars recently have come to realize the significant role Chafee played in Holmes's adoption of a more speech-protective approach.⁶² But there has been little discussion of the extent to which the concept of a search for truth in the marketplace of ideas can be connected to modernist starting premises.

Two controlling assumptions appear to guide the famous words from Holmes's *Abrams* dissent: that truth is the only basis on which effective policy can be made, and that the "truth" of ideas is determined simply by their survival in the marketplace. If ideas are essentially impermanent and contextual, why would not the collective meaning of truth also be? And if the truth of ideas were determined by their survival in the current marketplace, why would that process produce anything other than the temporary elevation of majoritarian beliefs as to what was true? In short, how could Holmes and Chafee imply that truth

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61. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

62. Between the decisions in *Schenck* and *Abrams*, Harold Laski and Felix Frankfurter, two Progressive acolytes of Holmes who had come to believe in the enhanced importance of protection for free speech, had made Holmes aware of criticism of his opinion for the Court in *Debs v. United States*, 249 U.S. 211 (1919), where he had upheld Eugene Debs's conviction under the Espionage Act for a speech in which he stated, "I abhor war. I would oppose the war if I stood alone." 249 U.S. at 214. That decision was difficult to square with Holmes's "clear and present danger" language in *Schenck*, and Ernst Freund had published an article that was highly critical of Holmes's opinion. See Ernst Freund, *The Debs Case and Freedom of Speech*, NEW REPUBLIC, May 3, 1919, at 13. Stimulated by conversations and correspondence over the summer of 1919, with Frankfurter, Laski, and Learned Hand, Holmes began reading literature on free speech, and in July met Chafee at a tea arranged by Laski. For the details of Holmes's engagement with Chafee's writings and others on the subject of free speech in the spring and summer of 1919, see WHITE, *supra* note 31, at 420-30 and sources cited therein.

had any meaning independent of the collective prejudices of the market?

It is possible to read Holmes's *Abrams* dissent as a forthright expression of majoritarian fatalism, a reading some of his own comments tend to support.⁶³ This reading, however, is oversimple. To a limited extent Holmes, and to a greater extent Chafee, sought to distinguish what they meant by "truth" from mere majoritarian prejudices. Part of Holmes's rationale for allowing expressions such as those suppressed in *Abrams* into the marketplace was based on an assumption that patently foolish expressions — "silly leaflet[s]," "poor and puny anonymities"⁶⁴ — would by their very foolishness reveal their "falsity" and permit more sensible alternatives to emerge. At least at this stage in his free speech jurisprudence,⁶⁵ Holmes seems to have included, within his search for truth metaphor, both a commitment to the free exchange of ideas and information in a democracy and an elitist reading of that exchange process, in which the surfacing of truth would be accompanied by a discarding of foolish ideas for rational ones. It was, after all, Holmes himself, not Congress, who had labeled the leaflets in *Abrams* silly.

If Holmes and Chafee held this alternatively elitist and egalitarian conception of speech at the moment that the search for truth rationale for protection of speech first appeared,⁶⁶ one could see how that con-

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63. Take, for example, his definition of "truth" as "the prevailing can't help of the majority," Letter from Oliver Wendell Holmes to Harold J. Laski (Jan. 11, 1929), in 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, at 1124 (Mark DeWolfe Howe ed., 1953), quoted in WHITE, *supra* note 31, at 435, or "the majority vote of that nation that can lick all others." Letter from Oliver Wendell Holmes to Learned Hand (June 24, 1918), quoted in WHITE, *supra* note 31, at 435.

64. See *Abrams*, 250 U.S. at 628-29.

65. For an argument that Holmes held no consistent theory of free speech throughout his judicial career, but rather issued a series of rhetorical formulations, not necessarily consistent with one another, that demonstrated an increasingly speech-protective emphasis in his jurisprudence, see WHITE, *supra* note 31, at 412-54.

66. Such a view is harder to square with a statement made by Holmes in a later free speech opinion that if "the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). It is not clear by this sentence whether Holmes meant to embrace only the process of exchanging ideas in the marketplace or all results that the marketplace produced. If the latter, he would appear to be content with repression of speech by the "dominant forces of the community" in those instances in which those forces accepted the "beliefs expressed in proletarian dictatorship" and such beliefs favored repression.

Attributing the above view to Holmes makes one of his subsequent definitions of free speech, as "freedom for the thought that we hate," hard to understand. United

ception would square with the starting premises of modernist consciousness, in which the creative freedom accorded humans as a consequence of their cognitive capabilities was constrained by the obligations of rationality and empiricism. Some ideas would necessarily be superior to other ideas because they were predicated on a scientifically accurate understanding of the defining social and economic facts of a civilization at a point in its history. Being empirically grounded, they took on the character of truth. Being true, they lent a dimension of rationality to the public policies they produced, making the wishes of policymakers capable of being carried out safely.

Despite Chafee's and Holmes's efforts, the marketplace theory of free speech and the "clear and present danger" formula for speech cases only slowly became orthodoxy. Chafee's and Holmes's formulation faced two interrelated problems. The first was a practical one: despite Holmes's claim in *Abrams* that "clear and present danger" was the Court's test for determining whether speech in a given case had been subversive, a majority of the Court continued to equate clear and present danger with the established bad tendency test.⁶⁷ At the time of

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States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting), *overruled by* *Girouard v. United States*, 328 U.S. 61 (1946). Moreover, in discussing the pacifist sentiments that had caused Rosika Schwimmer to be threatened with deportation, Holmes noted to Harold Laski that "[a]ll 'isms [including pacifism] seem to me silly — but this hyperaethereal respect for human life seems perhaps the silliest of all." Letter from Oliver Wendell Holmes to Harold J. Laski (Apr. 13, 1929), 2 HOLMES-LASKI LETTERS, *supra* note 63, at 1146, *quoted in* WHITE, *supra* note 31, at 583 n.292. So I am inclined to believe that implicit in Holmes's marketplace of ideas rationale for protecting speech was an elitist view of that market: silly ideas simply would not prevail. Such a view, of course, equates freedom of speech not only with empirically based truth but with an assumption that the process of exchanging ideas eventually produces rational outcomes.

As for Chafee, his statement that he could not sit down for half an hour's conversation with the great majority of persons who had spoken out against the war "without losing [his] temper," but that he wished to see them treated consistently with the principle of freedom of speech, could be read as combining similar elitist and egalitarian interpretations of the marketplace of ideas. See CHAFEE, *supra* note 44, at 2.

67. See *Fiske v. Kansas*, 274 U.S. 380 (1927); *Whitney v. California*, 274 U.S. 357 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919). *Fiske*, in which the Court unanimously invalidated a conviction under the Kansas Criminal Syndicalism Act for soliciting members of a local branch of the International Workers of the World, used the same bad tendency test and adopted the same police power balancing analysis as had *Gitlow* and *Whitney*. It presumably reached a different outcome from the majority opinions in those cases because the only evidence offered by the state was a copy of the preamble to the IWW's constitution, which stopped short of advocating unlawful activity.

Holmes's retirement from the Court in 1932, only Justice Louis Brandeis had joined him in repudiating the bad tendency formula.⁶⁸

The second problem was methodological. Chafee had insisted on abandoning police power methodology in speech cases for a balancing of the social interests in public safety and the search for truth in a democratic society. At the same time he had claimed that Holmes had designed the clear and present danger test to draw a boundary line between protected and unprotected speech claims. The methodological ambiguities in Chafee's formulation crept into the clear and present danger test itself.

It was not obvious, for example, that shifting to social interest balancing in speech cases would have normative effects consistent with greater protection for speech. It might, in fact, have the opposite effect. Cases such as *Gitlow v. New York*, which reviewed a New York statute providing criminal penalties for those who advocated "that organized government should be overthrown by force, violence or any unlawful means,"⁶⁹ appeared to pose particular problems for Chafee's social interest balancing methodology in speech cases. In such cases legislative majorities had "balanced" in advance and had deemed the espousal of a particular ideological position "subversive" to democratic institutions and thus not contributing to the search for truth in a democracy. When judges came to consider such legislation in light of the First Amendment, their characterizing the interest in freedom of expression as a social interest might suggest, when a legislative enactment was overturned, that they were in a better position than legislatures to make decisions about social questions. This was the very suggestion that Progressives had deplored in decisions such as *Lochner*.

Nor did the clear and present danger formula, in its marketplace version, seem to help in cases such as *Gitlow*. When the legislature had engaged in social interest balancing in the process of enacting a statute restricting speech, clear and present danger appeared to be serving simply as another category-based judicial formula, akin to such nineteenth-

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68. See *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting & Brandeis, J., concurring in dissent), *overruled by* *Giroud v. United States*, 328 U.S. 61 (1946); *Gitlow*, 268 U.S. at 672-73 (Holmes, J., dissenting); *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 426 (1921) (Brandeis, J., dissenting). In *Schwimmer*, Holmes's dissent, joined by Brandeis, converted a routine deportation case into a free speech case. See WHITE, *supra* note 31, at 445-46.

69. N.Y. PENAL LAW § 161.2 (Matthew Bender 1909) (current version at N.Y. PENAL LAW § 240.15 (McKinney 1989)).

century rubrics as "affected with a public interest."⁷⁰ Such formulas had served to place economic activity on one side or another of a constitutional boundary line; the clear and present danger formula seemed to be doing the same for speech. If courts should be reluctant to upset legislative determinations of whether a business was "affected with a public interest," why should they not be equally reluctant to upset legislative determinations as to whether certain speech posed a clear and present danger to the body politic?

Speech-protective theory, on confronting cases such as *Gitlow*, appeared to be forced in one of two directions. One direction involved reframing the rationale of protecting speech to make clear that the marketplace of ideas was not confined to collective majoritarian preferences. In this reformulation the social interest in protecting speech was more than simply an interest in allowing majorities freedom to decide what speech they wanted to protect; it was also an interest in giving individual citizens in a democracy the freedom to express their views.

An alternative direction was to reframe the rationale for protecting speech so as to link speech more closely to the democratic model of politics itself, and at the same time to suggest that that model was not embodied exclusively in the outcomes produced by legislative majorities. In this formulation the significance of speech in a democracy was seen more as creating an opportunity for citizens to participate in the democratic process than as creating opportunities to speak freely as part of a search for collective truth. Both directions were explored in free speech commentary after *Gitlow*.⁷¹

C. *Beyond the "Search for Truth" Rationale: Brandeis and the Emergence of "Self-Governance"*

In the 1927 case of *Whitney v. California*,⁷² Justice Brandeis wrote a passage in a concurring opinion, joined by Holmes, that also has been one of the most anthologized passages in twentieth-century American constitutional law. The *Whitney* case raised the constitutionality of Anita Whitney's conviction under a California criminal syndicalist statute for attending a convention held in Oakland to create a California

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70. On that formula and other categorist nineteenth-century formulas, see HORWITZ, *TRANSFORMATION OF AMERICAN LAW*, *supra* note 25, at 17-19.

71. Both directions are also consistent with Wiebe's observations about the increasingly elitist and individualistic thrust of ideas about American democracy in the decade after World War I. See WIEBE, *supra* note 15, at 185-87.

72. 274 U.S. 357 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

chapter of the Communist Labor Party.⁷³ In upholding Whitney's conviction, the majority adopted a conventional police power analysis and concluded that the state of California had a strong interest in suppressing the advocacy of doctrines designed to foment revolution. Although concurring in the result, Brandeis and Holmes declared that Whitney had a constitutional right to associate with a political party that advocated "the desirability of a proletarian revolution by mass action at some date necessarily far in the future."⁷⁴

In his concurrence Brandeis, after acting as if clear and present danger rather than bad tendency was the Court's test for evaluating speech claims, wrote the following:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.⁷⁵

Brandeis's paragraph achieved a fusion of two sets of arguments justifying protection for free speech. One set rehearsed the now familiar search for truth position. The other identified freedom as both "an end"

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73. The California statute prohibited any person from organizing or knowingly becoming a member of any organization advocating "the commission of crime, sabotage . . . or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change." See 274 U.S. at 359-60 (internal quotation marks omitted) (quoting Criminal Syndicalism Act, ch. 188, § 1, 1919 Cal. Stat. 281, 281). On its face the platform of the Communist Labor Party, which advocated industrial revolts and strikes, clearly came within the statute. For general background on the *Whitney* case, see Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988).

74. *Whitney*, 274 U.S. at 379 (Brandeis, J., concurring). Brandeis and Holmes concurred in affirming Whitney's conviction because she had not adequately raised the free speech issue at her trial and because, even if one assumed that she had and adopted the clear and present danger test for evaluating her claim, "there was evidence on which the court or jury might have found that such danger existed." 274 U.S. at 379 (Brandeis & Holmes, JJ., concurring). Their decision seems quite time-bound, given the statute's exceptionally vague and overbroad language. *Whitney* was only to survive as a precedent for about a decade.

75. 274 U.S. at 375-76 (footnote omitted).

and "a means" and associated "freedom to think as you will and to speak as you think" with "public discussion." Notable in the passage were referents to the discourse of modernism: a distinction between deliberation and arbitrariness; an association of public discussion with the power of reason; and the allusions to tyranny and to coerced silence. The referents, however, were not contained simply in arguments on behalf of speech as furthering the social interest in the search for truth. They also were contained in arguments on behalf of speech as part of the process by which American citizens learned how to govern themselves.

Much has been written on Brandeis's concurrence in *Whitney* as marking the first impressive appearance of the self-governance rationale in First Amendment theory.⁷⁶ I am interested here in how Brandeis's intuitions about First Amendment jurisprudence provided an embryonic response to the principal problems encountered by Chafee's and Holmes's search for truth rationale as a basis for enhanced protection for speech.

Brandeis made three assertions about the value of speech in America in *Whitney*: that it signified a commitment to a broader ideal of human freedom itself; that it furthered the discovery and spread of truth; and that it fostered public discussion. But in the celebrated passage from his concurrence the assertions were not treated as separable. Freedom to think as you will and to speak as you think was linked to *political* truth; and political truth, as well as the duty of citizens to participate in government, were linked to *public* discussion. Thus, the *Whitney* concurrence can be read fairly, on a theoretical level, as subsuming the search for truth rationale in a rationale that identified the principal function of speech as promoting self-governance in a democratic society. In addition, a fair reading of the *Whitney* concurrence is that it enlisted all of the central premises of modernism — embodied in the asserted value of freedom, the discovery and spread of truth, and the power of reason — on behalf of the principle of public discussion.

If one considers these dimensions of the Brandeis concurrence in light of the difficulties cases such as *Gitlow* posed for Chafee's formulation, one can see how with one stroke Brandeis was attempting to supply a rationale for the protection of speech devoid of any lingering overtones of late nineteenth-century libertarian orthodoxy. The rationale for protecting speech was its extraordinary value in promoting free and

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76. See, e.g., Blasi, *supra* note 73; HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 156-66 (Jamie Kalven ed., 1988).

rational public discussion; speech as an embodiment of other liberties was implicitly less central.

One can also see that Brandeis was attempting to modify Chafee's analytical methodology in free speech cases. Although he retained clear and present danger as an evaluative standard for speech claims, his *Whitney* concurrence did not mention balancing. Brandeis spoke of courts "fix[ing] the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly."⁷⁷ He announced that "[o]nly an emergency can justify repression" of speech, and that "[s]uch must be the rule if authority is to be reconciled with freedom."⁷⁸

In short, Brandeis's methodology contained two sorts of categorical inquiries. At the level of doctrine, judges were to employ a fixed standard for interpreting the clear and present danger formula, and categorize cases as involving or not involving emergencies. More significantly, at the level of normative theory, judges were to categorize speech claims as related, or unrelated, to public discussion. To make the implications of the latter characterization clear, Brandeis said in *Whitney* that "[t]he power of the courts to strike down an offending law" was "no less" in cases implicating "the fundamental personal rights of free speech and assembly" than in cases "where the denial of liberty involved was that of engaging in a particular business."⁷⁹ As we shall come to see, by "no less," in fact, he meant "greater."

The categorist dimensions of Brandeis's methodology in *Whitney* suggest that he intended to turn late nineteenth-century orthodox jurisprudence on its head. Instead of subsuming protection for personal liberties in a line of arguments associated with police power property rights cases, he attempted to subsume protection for personal liberties in arguments generated by the concept of political self-governance. Brandeis, in short, used First Amendment cases to launch the project of bifurcated constitutional review. Speech rights were to be given *greater* protection against legislative infringement than property rights because

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77. *Whitney*, 274 U.S. at 374 (Brandeis, J., concurring). Later in his *Whitney* concurrence Brandeis suggested that the standard should be a very speech-protective reading of the phrase "clear and present danger," permitting legislative repressions of speech only when the speech posed "imminent danger" creating "the probability of serious injury to the state." 274 U.S. at 378 (Brandeis, J., concurring).

78. 274 U.S. at 377 (Brandeis, J., concurring).

79. 274 U.S. at 374 (Brandeis, J., concurring).

speech was more closely connected than economic activity to the process of self-governance in a democracy.

III. THE "PREFERRED POSITION" INTERLUDE

A. *Free Speech Cases and the Bifurcated Review Project*

Commentators on twentieth-century constitutional history have acknowledged the existence of the bifurcated review project but have tended to locate its origins in the political and economic transformations that eventually ushered in a much greater regulatory presence for the federal government after the 1932 election.⁸⁰ This article has maintained that the project originated earlier, first with Chafee's effort to disassociate protection for speech from the late nineteenth-century legacy of arguments on behalf of economic liberties, and then with Brandeis's reformulation of Chafee's rationale for the protection of speech in *Whitney*. Most commentary, however, identifies the origins of bifurcated review with two developments in constitutional jurisprudence in the late 1930s.

One development was the appearance of First Amendment opinions suggesting that the freedoms of speech, assembly, and religion occupied a "preferred position" in constitutional jurisprudence and in American culture. Despite the frequent allusions to preferred position cases in commentary, the cases themselves have received relatively little attention.⁸¹ The other development was then-Justice Stone's aforementioned *Carolene Products* footnote, in which he suggested that there might be more searching judicial review of legislative activity when a statute affected rights explicitly mentioned in the text of the Constitution or when it was directed at "discrete and insular minorities" whose status adversely affected their influence in the legislative forum.⁸²

The major impact of the *Carolene Products* footnote has been in equal protection jurisprudence, but it should be understood that the first paragraph of the footnote, with its attention to textually protected rights, provides a justification for a higher level of judicial scrutiny for First Amendment claims than for legislative infringements on *Lochner*-type

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80. See, e.g., PAUL L. MURPHY, *THE CONSTITUTION IN CRISIS TIMES 1918-1969*, at 172-75 (1972).

81. The preferred position cases have received slightly more attention from political scientists and constitutional historians. A recent treatment is Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623 (1994).

82. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

rights.⁸³ Modern commentators have tended not to concentrate on this paragraph.⁸⁴

It has been simple enough for commentators to conclude that the expansion of government in the 1930s precipitated a recognition of the potential of government to infringe upon noneconomic rights. The emergence around the time of the New Deal of preferred position cases,⁸⁵ and of the two-tiered theory of judicial review suggested in *Carolene Products*, has been seen as a natural consequence of reflections on the intrusive potential of an expanded governmental apparatus.⁸⁶

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83. The paragraph reads: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." 304 U.S. at 152 n.4. First Amendment cases were clearly the model for this paragraph. It was followed by a citation to *Stromberg v. California*, 283 U.S. 359, 369-70 (1931), and to *Lovell v. Griffin*, 303 U.S. 444, 452 (1938), in each of which the Court unanimously invalidated a municipal ordinance prohibiting the distribution of circulars or any other literature without a permit from the city manager. Moreover, correspondence between Chief Justice Charles Evans Hughes and Stone over an earlier draft of the *Carolene Products* footnote centered on ways to distinguish First Amendment cases from other "liberty" cases. See Letter from Charles Evans Hughes to Harlan Fiske Stone (Apr. 18, 1933), quoted in WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 487 (1986); Letter from Harlan Fiske Stone to Charles Evans Hughes (Apr. 19, 1938), quoted in MURPHY ET AL., *supra*, at 488.

84. The following statement, from a constitutional casebook jointly authored by two political scientists and a law professor, represents the conventional view of the relationship of the *Carolene Products* footnote to the bifurcated review project:

The timing of the footnote is important. For much of the previous fifty years, a majority of the justices . . . had read their economic views into and out of the Constitution so as to thwart both state and federal efforts to cope with the problems of industrial and finance capitalism. The Great Depression that enveloped the country in 1929 and the Court's war against Roosevelt's New Deal had left laissez faire — and the nation — in shambles. By 1938, the Court had retreated, saying it would presume economic regulation to be constitutional. This withdrawal . . . raised fundamental questions about the future of constitutional interpretations by judges. If they were to presume economic regulation constitutional, why not all regulation? On what principles could they draw lines?

MURPHY ET AL., *supra* note 83, at 473. Professor Fleming, currently on the faculty of Fordham Law School, was in private practice at the time the casebook was issued.

85. The term "preferred position case" refers simply to any case in which an opinion of the Court used language either openly declaring that First Amendment rights occupied a preferred position or stating that such rights should receive greater judicial solicitude because of the fundamental nature of speech rights or the "indispensable connection" between speech rights and democratic theory. As will become evident, the precise constitutional meaning of preferred position was never fully clarified in the decisions.

86. See, e.g., Gillman, *supra* note 81, at 645-46.

The difficulty with seeing the preferred position interlude in First Amendment jurisprudence as part of a natural response to the emergence of expanded government in the twentieth century is that such an explanation supplies no intellectual basis for why a group of judges and jurists should have responded to expanded government by bifurcating constitutional review. The logic of the *Lochner* critique, we have seen, led in the direction of less judicial activism on behalf of legislatively regulated liberties, whatever their content. Moreover, the civil rights movement, with its enhanced consciousness of the oppressed status of minorities in America, was hardly a mainstream phenomenon in the late 1930s.⁸⁷ Thus there does not appear to be any obvious explanation for why Justices, such as Brandeis and those who can be identified with the brief development of preferred position free speech jurisprudence, should have concluded that although governmental restrictions on *Lochner*-type rights were now presumptively rational, governmental restrictions on noneconomic rights needed to be scrutinized carefully.

There is, however, an explanation for the emergence of bifurcated review that can be grounded in the language of the preferred position cases themselves. That explanation begins with an understanding that from Brandeis's 1927 concurrence in *Whitney* until 1942, the very time interval in which the *Lochner* majority's approach to due process cases was rejected⁸⁸ and the Court increasingly sanctioned an expansion of congressional and state power to regulate the economy,⁸⁹ every Supreme Court case exhibiting an increased level of scrutiny of a legislative regulation was a First Amendment case.⁹⁰ Moreover, many of those cases openly suggested that First Amendment rights should receive greater judicial solicitude than other rights: that was what "preferred position" meant.

Finally, the cases that did assign First Amendment rights to a preferred position posited an explanation for their being singled out. The explanation was not fully developed: it often consisted, in fact, of a single rhetorical assertion. But that assertion was nonetheless of real significance in the twentieth-century history of free speech. It proclaimed an "indispensable connection" between free speech and the meaning of

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87. See Klarman, *supra* note 5, at 26-27.

88. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391-92 (1937).

89. See *United States v. Darby*, 312 U.S. 100 (1941); *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934).

90. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), marks the first instance of a majority of the Court adopting heightened scrutiny in a non-First Amendment case. It involved a compulsory sterilization law that the Court invalidated on a combination of due process and equal protection grounds.

democracy in America. The preferred position cases decided by the Supreme Court, beginning in 1937, reveal intuitions by several Justices, with Brandeis, that First Amendment rights were in a different category from other constitutional liberties and deserved greater constitutional protection than police power analysis afforded them. Those Justices intuitively concluded that the reason for this enhanced protection for First Amendment rights lay not only in the close connections between free speech and democratic theory, but in the enhanced significance of democratic theory itself as a defining aspirational feature of American civilization.

B. *The Preferred Position Cases: Intuitions About Cognitive Freedom and Democracy*

By the late 1930s the Court's First Amendment decisions showed signs of abandoning the legacy of police power liberty analysis, which the Court also had begun to modify significantly in economic liberty cases,⁹¹ and of reaching more speech-protective results.⁹² The question remained, however, as to why the now enlightened posture of judicial deference to reasonable legislative restrictions on economic activity should not also apply to restrictions on speech. If bifurcated review was to take place, on what basis could it be justified?

The preferred position interlude in the twentieth-century intellectual history of free speech in America consisted of efforts by several Justices to offer versions of the idea that First Amendment rights occupied a special constitutional and cultural place in America because of their intimate connection to the idea of democracy. As a doctrinal development, the preferred position interlude was cryptic and abortive. Between 1937 and the early 1950s various Justices on the Court declared openly or implied that First Amendment rights occupied a preferred position. Their scattered remarks, although invoked by majority opinions in subsequent cases, neither clarified the precise doctrinal

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91. Compare *West Coast Hotel*, 300 U.S. 379 with *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), overruled by *West Coast Hotel*, 300 U.S. at 400.

92. In a series of cases between *Whitney* in 1927 and *Herndon v. Lowry*, 301 U.S. 242 (1937), the Court began to reach more speech-protective results and to supplant its bad tendency test in subversive advocacy contexts with a clear and present danger test. *Fiske v. Kansas*, 274 U.S. 380 (1927), continued to employ police power analysis and the bad tendency formula. But *De Jonge v. Oregon*, 299 U.S. 353 (1937), and *Herndon* invalidated convictions under criminal-syndicalist statutes under circumstances where a bad tendency analysis would have sustained them. Meanwhile *Stromberg v. California*, 283 U.S. 359 (1931), and *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), represented the first two instances in which the Court had openly invalidated a state statute on First Amendment grounds.

meaning of "preferred position" nor provided any extended justification for why freedom of speech, religion, and assembly should be given preferred status. Eventually the Court implicitly abandoned the phrase "preferred position" altogether and explored other interpretive techniques for carving out a high degree of protection for speech.

But the episode, coming at the time it did, aptly illustrated the search for a bifurcated standard of constitutional review that lay at the heart of the Court's jurisprudential enterprise by the late 1930s. The preferred position sequence of cases represented an attempt by the Court to enshrine the modernist premise of cognitive freedom and to associate that premise with a powerfully evocative theme that surfaced for Americans in the third and fourth decades of the twentieth century — the theme of America as a democratic society. Beginning in the 1930s and stretching through the years of the Second World War, the idea of America as a democracy dramatically expanded its cultural meaning, signifying not only a society based on freedom, but a society opposed to tyranny and arbitrariness; an antitotalitarian society that represented the world's last best hope for rationality and truth.⁹³

Free speech, in the preferred position episode, became democratic speech. It became closely associated with the intertwined ideas of creative self-fulfillment (freedom to express oneself) and equality (freedom from discrimination or oppression.) Those ideas were taken to be at the foundation of America as a democratic society. Free democratic speech in modernist parlance signified the power of the human actor, liberated from the dominance of external forces, free to determine his or her individual destiny, required only to respect the freedoms of others.

Modernist conceptions of freedom suggested that free democratic speech was unlike the other liberties in orthodox nineteenth-century ju-

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93. Wiebe argues that in this period "the state," personified by the decisions of expert policymakers, decisively replaced "the People" as "democracy's last resort." See WIEBE, *supra* note 15, at 202. He also suggests that the elitist and individualistic emphasis of democratic theory continued in this period. These developments, taken together, facilitated the role of institutions of the national government, including the Supreme Court, in fashioning "democratic rights" for individual citizens. See *id.* at 220, 225-26.

I agree that the period from the early 1930s through the Second World War was one in which the Justices on the Court increasingly came to regard themselves as guardians, and arguably creators, of free speech rights. Assumptions that democratic theory was implemented best by elites, and realized most effectively through the expansion of individual rather than collective rights, might have contributed to that development. But I think a more obvious motivation for Justices to forge an explicit link between free speech and democracy in the 1930s and 1940s rested in their awareness that in many other nations the expansion of state power was being associated with totalitarian regimes that repressed speech. American "democracy" for them had powerfully antitotalitarian overtones.

risprudence. Such liberties had come to be associated with the undemocratic economic excesses that had rewarded the rich at the expense of the poor and caused the Depression. The free speech ideal did not protect rights associated with material possessions but instead shielded rights embodied in the ideal of democracy.

The sequence of preferred position cases started in a decision in which the phrase itself was not employed, but in which the theme of democratic speech surfaced. In *Palko v. Connecticut*,⁹⁴ decided a year before the *Carolene Products* footnote, Justice Cardozo, for the Court, defined free speech as "the matrix, the indispensable condition, of nearly every other form of freedom." "Liberty" in America, he concluded, "has been enlarged . . . to include liberty of the mind as well as liberty of action."⁹⁵ It is not clear by those remarks whether Cardozo meant to suggest that free speech rights, by being a "matrix" of other rights, were preferred over all other constitutional guarantees. But *Palko* was a case in which he searched for Bill of Rights freedoms that were "of the very essence of a scheme of ordered liberty," so that "neither liberty nor justice would exist if they were sacrificed."⁹⁶ "[F]reedom of thought[] and speech" was first on his list.⁹⁷

Between *Palko* and the close of the Second World War the Court's free speech cases regularly involved challenges to state and municipal regulations by members of the Jehovah's Witnesses sect. Many Witness sects believed that the Old Testament's First Commandment, forbidding the worshipping of any graven image, prevented them from participating in flag-salute ceremonies. They were thus the petitioners in one of the Court's most celebrated sequence of decisions, *Minersville School District v. Gobitis*⁹⁸ and *West Virginia State Board of Education v. Barnette*,⁹⁹ in which the Justices reversed themselves on the constitutionality of compulsory flag-salute laws, and overruled an opinion that had been rendered only three years previously and had engendered only one dissent. The flag-salute cases also can be shown to have been the basis for an eventual critique of the preferred position rationale by Justice Felix Frankfurter, who initially had identified himself with that rationale.

94. 302 U.S. 319 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969).

95. *Palko*, 302 U.S. at 327 (citing Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926)). The Court unanimously and without elaboration decided to incorporate the First Amendment against the states in *Gitlow v. New York*, 268 U.S. 652 (1925).

96. *Palko*, 302 U.S. at 325-26.

97. 302 U.S. at 326.

98. 310 U.S. 586 (1940), *overruled by* *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

99. 319 U.S. 624 (1943).

As early as 1939 Jehovah's Witnesses cases began to invoke judicial declarations that speech rights should be given special solicitude. In *Schneider v. Irvington* Justice Roberts, for each member of the Court save McReynolds, conceptualized an antilittering ordinance directed against the distribution of Witness literature as pitting the "duty" of municipalities "to keep their communities' streets open and available for movement of people and property" against "the guarantee of freedom of speech or of the press."¹⁰⁰ In such cases the judicial task was "to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."¹⁰¹ Roberts made it clear what would weigh most heavily in the balancing:

This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. . . .

. . . [L]egislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the existence of rights so vital to the maintenance of democratic institutions.¹⁰²

Not only were First Amendment freedoms indispensable and fundamental, they had been linked explicitly to the ideal of democracy.

A year after *Schneider* the first of the flag-salute cases was handed down, and the idea of democratic speech greatly expanded in cultural significance and revealed itself as containing some internal ambiguities. Both Frankfurter's majority opinion, sustaining the constitutionality of a Pennsylvania school district's practice of opening each day in its public schools with a mandatory ceremony paying homage to the American flag, and Stone's dissent, finding the practice a violation of the religious freedom of Jehovah's Witnesses families who objected to the practice, attempted to justify their positions through invocations of the indispensable connection between freedom and democracy. Frankfurter asserted that "personal freedom is best maintained — so long as the remedial channels of the democratic process remain open and unobstructed — when it is . . . not enforced against popular policy by the coercion of adjudicated law."¹⁰³ Stone countered that:

The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be

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100. *Schneider v. Irvington*, 308 U.S. 147, 160 (1939).

101. 308 U.S. at 161.

102. 308 U.S. at 161.

103. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 599 (footnote omitted).

preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist.¹⁰⁴

The Frankfurter-Stone exchange suggested that the ideal of democracy could be translated into support for majoritarian, popular policies restricting speech as well as support for an individual's speech rights as the embodiment of freedom. As the Court developed those alternative conceptions of speech and democracy, it continued to review Jehovah's Witnesses cases, many involving municipal regulations on the distribution of leaflets.¹⁰⁵ But the stakes involved in carving out special judicial protection for speech, at least within the Court, had been elevated.

In the 1942 case of *Jones v. Opelika*, a 5-4 majority of the Court upheld municipal license fees directed against Witness pamphlets by characterizing the distributions as commercial transactions, and thus not implicating speech rights, and the fees as reasonable restraints on economic activity. In his dissent Stone was not content simply to challenge the majority's characterizations of the municipal regulations. He announced that:

The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position. Their commands are not restricted to cases where the protected privilege is sought out for attack. They extend . . . to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it.¹⁰⁶

Stone's dissent in *Opelika* made it clear that the "speech dimensions" of the leaflets were what conveyed special protection on those who distributed them. By "preferred position" he meant that "every form of taxation" and other economic regulation that could be seen as infringing First Amendment rights would receive heightened judicial scrutiny. When one combines this categorization of preferred position rights with the original rationale for giving those rights special attention — their indispensable connection to the maintenance of democratic principles — it became clear that Stone was suggesting that speech

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104. 310 U.S. at 606-07 (Stone, J., dissenting).

105. Between 1938 and 1946 the Court considered six such cases. See *Marsh v. Alabama*, 326 U.S. 501 (1946); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1942); *Jones v. Opelika*, 316 U.S. 584 (1942) (deciding a conglomerate of several comparable cases); *Schneider v. Irvington*, 308 U.S. 147 (1939); and *Lovell v. Griffin*, 303 U.S. 444 (1938). Of these cases all but *Lovell* produced rhetoric identifying First Amendment rights as occupying a "preferred position." See *infra* text accompanying notes 106-12.

106. *Opelika*, 316 U.S. at 608 (Stone, C.J., dissenting).

rights reinforced democracy in a way that economic rights did not. This suggestion expanded the cultural significance of democracy in America during a period of totalitarian challenges and made speech rights the exemplar for bifurcated review in a post-*Lochner* constitutional universe.

This reading of Stone's dissent in *Opelika* is supported by an unusual memorandum issued in the case by Justices Murphy, Black, and Douglas, all of whom had joined Stone's dissent. In that memorandum the three Justices stated that "[t]he opinion of the Court sanctions a device which in our opinion suppresses or tends to suppress the free exercise of a religion practiced by a minority group."¹⁰⁷ They then announced that they had changed their mind about the Court's decision in *Gobitis*, which they had each joined (this despite the fact that *Opelika* had nothing to do with compulsory flag salutes). The reason they gave for changing their minds about the constitutional status of religious-based challenges to compulsory flag salute laws was that "our democratic form of government, functioning under the historic Bill of Rights, has a high responsibility to accommodate itself to the religious views of minorities, however unpopular and unorthodox those views be."¹⁰⁸

A personnel change on the Court provided additional momentum to the theory that free speech rights should occupy a preferred position in a democracy. *Murdock v. Pennsylvania*,¹⁰⁹ another Jehovah's Witnesses license case handed down a little over a year later, vacated *Opelika* and invalidated all municipally imposed "flat taxes" on the distribution of religious literature.¹¹⁰ Douglas, for the majority in *Murdock*, declared that "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position."¹¹¹ The context of his statement made it clear that he meant "preferred" to refer to a distinction between speech and commercial activity. "A license tax," he argued, "certainly does not acquire constitutional validity because it classifies the privileges

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107. 316 U.S. at 623 (Stone, C.J., dissenting).

108. 316 U.S. at 624 (Stone, C.J., dissenting). This allegedly left Roberts, Reed, Byrnes, and Jackson as continuing to adhere to Frankfurter's *Gobitis* opinion, but Byrnes and Jackson had not been on the Court for *Gobitis*, so Frankfurter hardly could regard them as firm adherents.

109. 319 U.S. 105 (1942). Frankfurter protested against the Court's grant of certiorari in *Murdock*, which was virtually on all fours with *Jones v. Opelika*. See H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 166 (1981).

110. The majority in *Murdock* consisted of the four dissenters in *Opelika* plus newly appointed Justice Wiley Rutledge, who had replaced James Byrnes in the 1942 Term. The remaining members of the majority in *Opelika*, Frankfurter, Roberts, Reed, and Jackson, three of whom had joined the majority opinion in *Gobitis*, dissented.

111. *Murdock*, 319 U.S. at 115.

protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike."¹¹²

Thus by 1943 Jehovah's Witnesses cases had given the Court an opportunity to formulate a distinction reminiscent of that made by Chafee: religious speech was specially protected, but commercial activity, including speech proposing a commercial transaction, was not.¹¹³ The Court now returned to the issue of compulsory flag salutes, as the national counsel for the Witnesses challenged a policy imposed by the West Virginia Board of Education on all state public schools.¹¹⁴ After conference Stone knew that he had a clear majority to overrule *Gobitis*¹¹⁵ and assigned the opinion to Jackson. Frankfurter was comparably aware that his position, which once had commanded the votes of eight Justices, now, three years later, commanded the votes of only three. As the opinions in the second flag salute case unfolded, it was apparent that two themes were on the Justices' minds: the "indispensable" connection between free speech and democratic theory and the jurisprudential implications of conferring a preferred position on speech rights.

Jackson's opinion for the Court, after noting that "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters," announced that "the First Amendment . . . was designed to avoid these ends by avoiding these beginnings. . . . We set up govern-

112. 319 U.S. at 115.

113. The Court specifically had excluded commercial speech from First Amendment protection in *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

One could even suggest that Jehovah's Witnesses cases had stimulated the Court to make even more fundamental distinctions about speech. In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), Justice Murphy, for a unanimous Court, attempted to define the content of constitutionally protected free speech rights. He excluded from First Amendment protection

certain well-defined and narrowly limited classes of speech . . . . These include the lewd and the obscene, the profane, the libelous, and the insulting or "fighting words" — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . [S]uch 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.

315 U.S. at 571-72 (footnote omitted). The petitioner in *Chaplinsky* was a Jehovah's Witness distributing sect literature on the streets of Rochester, New Hampshire when he was accused of calling a city marshal "a God damned racketeer" and a "damned Fascist." 315 U.S. at 569.

114. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

115. The *Gobitis* majority, in addition to Frankfurter, had consisted of Chief Justice Hughes and Justices McReynolds, Roberts, Black, Reed, Douglas, and Murphy. Black, Douglas, and Murphy had signaled their desertion in *Opelika*, Hughes's and McReynolds's seats were now occupied by Stone himself and Rutledge, and Robert Jackson had succeeded to Stone's seat.

ment by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent.”¹¹⁶ Having identified the First Amendment as embodying an antitotalitarian ethos, he then turned to the implications of treating the Constitution as withdrawing “certain subjects,” in which “fundamental rights” such as “free speech” and “freedom of worship” were implicated, “from the vicissitudes of political controversy.”¹¹⁷ He listed among “fundamental” rights “liberty” and “property.”¹¹⁸ Did this mean that bifurcated review was unintelligible, or that *Lochner* was revived?

Jackson made it clear that the preferred position experiment would continue:

[I]t is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. . . . Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all the restrictions which a legislature may have a “rational basis” for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully prevent.¹¹⁹

Jackson’s doctrinal conclusion was unmistakable: when First Amendment rights were involved, the rational basis standard for evaluating the constitutionality of legislation now would have to yield to a version of Holmes’ and Brandeis’ clear and present danger test.

Perhaps stung by the invocation of Holmes and Brandeis against his majority opinion in *Gobitis*, Frankfurter’s dissent immediately took up the question of whether a preferred position for speech rights was necessary once one concluded that free speech bore an “indispensable” connection to democratic theory. His answer was that placing speech rights in a preferred position was not only unnecessary, but dangerous:

The Constitution does not give us greater veto power when dealing with one phase of “liberty” than with another . . . . Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. . . . Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judi-

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116. *Barnette*, 319 U.S. at 641.

117. 319 U.S. at 638.

118. See 319 U.S. at 638.

119. 319 U.S. at 639.

cial power is concerned, the same constitutional dignity as . . . freedom of the press or freedom of speech or religious freedom.¹²⁰

Frankfurter's dissent in *Barnette* was part of an intense and ultimately painful flirtation he had undertaken in the 1930s and 1940s with the preferred position experiment and bifurcated review. In 1938, after reading Stone's *Carolene Products* footnote, Frankfurter wrote Stone that he had just finished a series of lectures on Holmes in which he "tried to reconcile [Holmes's] latitudinarian attitude toward constitutionality in cases other than civil liberties . . . with his attitude in civil liberties cases"; Frankfurter stated that he "was especially excited by [Stone's] note 4," which "is extremely suggestive and opens up new territory."¹²¹ In his lectures on Holmes, Frankfurter had concluded that "the liberty of man to search for truth was of a different order than some economic dogma," and "therefore, Mr. Justice Holmes attributed very different legal significance to those liberties of the individual which history has attested as the indispensable conditions of a free society from that which he attached to liberties which derived merely from shifting economic arrangements."¹²²

Two years later Frankfurter was on the Court writing the majority opinion in *Gobitis*, and he wrote Stone, after the latter had circulated a draft dissent, that "I am aware of the important distinction which you skillfully adumbrated in your footnote four . . . in the *Carolene Products Co.* case. I agree with that distinction; I regard it as basic."¹²³ And as late as 1941 he was prepared to declare, for the Court, that judges should approach efforts to restrict freedom of discussion in labor disputes "with a jealous eye," and to cite footnote four in *Carolene Products* for that proposition.¹²⁴

But Frankfurter had also told Stone, in his *Gobitis* letter, about his "anxiety that, while we lean in the direction of the libertarian aspect,

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120. 319 U.S. at 648 (Frankfurter, J., dissenting).

121. Letter from Felix Frankfurter to Harlan Fiske Stone (Apr. 27, 1938) (on file with the Harlan Fiske Stone Papers, Library of Congress), quoted in MURPHY ET AL., *supra* note 83, at 491. The letter provides additional evidence that the bifurcated review project, in inchoate form, had begun with the emergence of modernist free speech jurisprudence after World War I. Frankfurter's reference to Holmes's non-"latitudinarian" attitude in "civil liberties" cases could only have meant free speech cases, since Holmes was deferential to legislatures in all other cases. See WHITE, *supra* note 31, at 377-409.

122. FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 75-76 (2d ed. 1961).

123. Letter from Felix Frankfurter to Harlan Fiske Stone (May 27, 1940) (on file with the Harlan Fiske Stone Papers, Library of Congress), quoted in HIRSCH, *supra* note 109, at 151.

124. See *American Fedn. of Labor v. Swing*, 312 U.S. 321, 325 (1941).

we do not exercise our judicial power unduly . . . . In other words, I want to avoid the mistake comparable to that made by those whom we criticized when dealing with the control of property."¹²⁵ And after being humiliated in the flag salute sequence,¹²⁶ he signaled that any inclination he had had to endorse the preferred position experiment had been withdrawn. Eventually, after Stone died in 1946, Frankfurter decided to mount an open attack on the preferred position rubric itself.

The case was *Kovacs v. Cooper*,¹²⁷ a 1949 decision in which a plurality of the Court sustained a Trenton, New Jersey, ordinance prohibiting the use of sound trucks that issued "loud and raucous noises." In *Kovacs*, Justice Reed, for a plurality that included Justices Vinson and Burton, endorsed what he called "[t]he preferred position of freedom of speech in a society that cherishes liberty for all,"¹²⁸ but found that the state interest in protecting the privacy and tranquility of its citizens overrode the First Amendment claim.¹²⁹ Frankfurter and Jackson concurred in the result in *Kovacs*, with Black, Douglas, Rutledge, and Murphy dissenting.

In his concurring opinion Frankfurter launched an attack on the preferred position rubric. He called " 'preferred position' " a "mischievous phrase" that had "uncritically crept into some recent opinions of this Court."¹³⁰ He then set forth a history of preferred position, including not only cases in which the characterization was explicitly used, but cases in which he concluded that the Court was adhering to a bifurcated standard of review. The result of this historical exegesis, for Frankfurter, was that "the claim that any legislation is presumptively unconstitutional which touches the field of the First Amendment . . . has never commended itself to a majority of this Court."¹³¹ He then concluded with an extraordinary sentence:

[I]n considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.¹³²

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125. Felix Frankfurter to Harlan Fiske Stone, *supra* note 123, at 151.

126. For evidence that the flag salute cases were a pivotal episode in Frankfurter's tenure on the Supreme Court, see HIRSCH, *supra* note 109, at 176-77, 211.

127. 336 U.S. 77 (1949) (plurality opinion).

128. 336 U.S. at 88 (plurality opinion).

129. See 336 U.S. at 87 (plurality opinion).

130. 336 U.S. at 90 (Frankfurter, J., concurring).

131. 336 U.S. at 90 (Frankfurter, J., concurring).

132. 336 U.S. at 95 (Frankfurter, J., concurring).

This was, of course, an almost verbatim paragraph of the characterization of Holmes's jurisprudence that he had made in 1938, in the course of an argument that "the liberty of man to search for truth was of a different order than some economic dogma defined as a sacred right."¹³³

Frankfurter's tortured and ambivalent reaction to the preferred position rubric, and to the bifurcated review project itself, underscores once again the pivotal role of speech rights in launching that project. The passage quoted above from his *Kovacs* concurrence suggests that Frankfurter had internalized the central assumption of the preferred position cases, that speech rights could be distinguished from rights derived "merely from shifting economic arrangements" because of their indispensable connection to an open, democratic society.¹³⁴ In that passage Frankfurter signaled his tacit acceptance of the bifurcated review project while apparently protesting against it. Rutledge, dissenting in *Kovacs*, observed that Frankfurter's excursus had "demonstrate[d] the conclusion opposite to that which he draws, namely, that the First Amendment guaranties . . . occupy preferred position not only in the Bill of Rights but also in the repeated decisions of this Court."¹³⁵

There is no direct evidence about the reaction of any of Frankfurter's other colleagues to his attack on the preferred position concept in *Kovacs*, but the phrase "preferred position" virtually disappeared from the Court's free speech cases, showing up only once more in a throwaway line by Douglas in a 1953 case.¹³⁶ The short life of the preferred position rubric, however, concealed its significance as an important transition phase in the twentieth-century intellectual history of First Amendment jurisprudence.

Both Chafee and Brandeis had hinted, but not explicitly suggested, that the search for truth and self-governance rationales for the protection of speech were associated with the training of citizens to make informed and intelligent decisions about questions of public concern. Although their formulations can be read as seeking to channel the freedom to learn about and to discuss public issues along paths consistent with the constraints of rationalism and empiricism, they had not indicated that all of the central premises of modernist consciousness were reflected in democratic theory and a model of democratic politics. They had not, in other words, explicitly suggested that the speech being pro-

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133. FRANKFURTER, *supra* note 122, at 75.

134. See *Kovacs*, 336 U.S. at 95 (Frankfurter, J., concurring).

135. 336 U.S. at 106 (Rutledge, J., dissenting).

136. See *United States v. Rumely*, 345 U.S. 41, 56 (1953) (Douglas, J., concurring).

tected by the First Amendment was speech furthering the ideals of a democracy.

By openly identifying the basis of special constitutional protection for speech as the indispensable connection between free expression and democratic theory, and at the same time distinguishing between speech and liberties deriving from shifting economic arrangements, the preferred position cases sought both to link free speech with the idea of America as a democratic society and to disengage protection for economic liberties from that idea. "Preferred position" meant a preference for First Amendment freedom as having a particularly close association with the model of democratic politics that had surfaced in modern American society. It also meant, implicitly, that the freedoms associated with an economic model of unregulated capitalism were less democratic and hence less preferred. Liberties derived from "shifting economic arrangements" were taken to be less indispensable conditions of an "open" society.

There were, as the flag salute cases suggested, some difficulties with grounding a preferred position for speech rights in the expanded meaning of America as a democratic society. These lay in the tension between democratic theory as bolstering freedom of expression and democratic theory as being embodied in majoritarian policymaking. If a justification for legislative regulation of economic activity was that legislatures, being representative of the majority of citizens, were appropriate institutions to make policies affecting the distribution of benefits in the economic marketplace, why were they not equally appropriate institutions to determine the forms of expression that a majority wanted to restrict as well as protect? Yet the very cases announcing that First Amendment rights were to be placed in a preferred position because of the close connection between free speech and the ideal of democracy were cases in which legislatures, on behalf of their majoritarian constituency, had restricted speech.

Thus it appeared that a further particularization of what types of speech were indispensable to a democratic society, and which were not, might be required. This was especially true if one were inclined to grant Chafee's premise that humans tended to react rationally to economic issues but subjectively and irrationally to speech issues. Although a democratic model of politics suggested that policymaking should be majoritarian, Chafee's premise suggested that majorities were likely to suppress, perhaps even oversuppress, provocative speech. How did one determine which speech was presumptively immune from suppression? The rhetorical basis of the preferred position cases suggested an answer:

that speech which itself could be said to be indispensable to the functioning of democratic politics.¹³⁷

In a search for indispensable, democratic speech, neither the search for truth formulation nor its accompanying metaphor of a constantly expanding marketplace of ideas seemed to provide much guidance. Letting more speech into the market did not clarify which expressions a majority could and could not suppress consistent with the ideal of democracy. It was not particularly surprising, then, that the first significant contribution to twentieth-century free speech jurisprudence to appear after the preferred position interlude was one that attempted to disassociate protection for speech from the "marketplace of ideas" and at the same time to refine the meaning of "democratic," protected speech.

IV. THE MEIKLEJOHN INTERPRETATION, "PUBLIC SPEECH," AND THE PROGRESSION TO ABSOLUTISM

A. *The Doctrinal and Cultural Setting*

While the preferred position formulation was being experimented with in free speech cases from the late 1930s to the early 1950s, another doctrinal development took place in the area in which speech-protective theories of the First Amendment had initially surfaced — subversive advocacy. By the 1940s free speech cases were beginning to group themselves loosely in three distinct areas: nonsubversive cases with a labor setting, such as *Thomas v. Collins*,¹³⁸ cases involving efforts on the part of a religious minority to disseminate its views, such as the numerous cases in which Jehovah's Witnesses were plaintiffs; and a continuing line of subversive activity cases, such as *Herndon v. Lowry*¹³⁹ and *De Jonge v. Oregon*,¹⁴⁰ which after the early 1940s were reviewed using the clear and present danger test.

This last set of free speech cases came to be affected by the ideological confrontation between an expanded Soviet Union, with its associated bloc of communist-dominated regimes in eastern Europe, and the United States and nations in western Europe whose governments were modeled on democratic rather than totalitarian theories of political or-

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137. One could argue that at the very time that several justices on the Court were demonstrating an enthusiasm for the preferred position rubric, they also implicitly were exploring distinctions between "protected" and "unprotected" forms of speech in cases such as *Chaplinsky*, *Valentine v. Chrestensen*, and the Jehovah's Witnesses leafletting cases. In such cases an implicit hierarchy of "higher" and "lower value" expression appeared to be forming, although the Court did not characterize it as such.

138. 323 U.S. 516 (1945).

139. 301 U.S. 242 (1937).

140. 299 U.S. 353 (1937).

ganization. Communist states replaced the defeated fascist regimes as the principal form of world government rejecting a democratic model of politics.

Some of the aims of international communism, when identified with communists or communist sympathizers in America, arguably gave a potentially new meaning to "subversion" in subversive advocacy cases. Among the stated goals of international communism was the systematic delegitimation and destruction of "bourgeois" governments that oppressed the people. These goals, encapsulated in the phrase "overthrow the government of the United States," were taken, given the immediate past history of imperialist totalitarian regimes, as directly hostile to America, and efforts were made to deny legal status to the American Communist Party as a threat to national security. The perceived danger created by international communism also gave a revived meaning to provisions in the 1940 Smith Act, enacted by Congress after war had broken out in Europe,¹⁴¹ which made it unlawful for any person "to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States."¹⁴²

The constitutional culmination of these developments was the Supreme Court's interpretation of the clear and present danger standard for evaluating subversive advocacy in the 1951 case of *Dennis v. United States*.¹⁴³ In *Dennis*, Chief Justice Vinson restated the standard as "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger,"¹⁴⁴ and applied it to sustain a conviction under the Smith Act against eleven leaders of the Communist Party of the United States for conspiring to advocate the overthrow of the U.S. government. There was no evidence in *Dennis* that the defendants actually had participated in any

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141. The Smith Act's formal title was the Alien Registration Act, ch. 439, 54 Stat. 670 (1940) (repealed 1952). See generally MICHAEL R. BELKNAP, COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES (1977).

142. Alien Registration Act, ch. 439, § 2(a)(1), 54 Stat. 670, 671 (1940) (repealed 1952).

143. 341 U.S. 494 (1951).

144. 341 U.S. at 510 (plurality opinion) (internal quotation marks omitted). Vinson was quoting Learned Hand's rephrasing of the clear and present danger standard in *Dennis v. United States*, 183 F.2d 201, 212 (2d Cir. 1950). Gerald Gunther has argued that although Hand's rephrased test "diluted the most speech-protective interpretations" of clear and present danger, Hand did not do so out of a desire to reduce the level of protection for "subversive" speech but because he had long been frustrated with the vagueness of the test. See GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 599-600 (1994).

acts of subversive activity or had advocated such acts. The Court simply took judicial notice of their collective organization, the ideological tenets of international communism, and the political pressure being placed on non-communist regimes in Western Europe in the aftermath of the Second World War.¹⁴⁵

B. *The Meiklejohn Interpretation*

Three years before the *Dennis* decision Alexander Meiklejohn, then the President of Amherst College, had published a book, *Free Speech and Its Relation to Self-Government*.¹⁴⁶ In his preface Meiklejohn stated that the book was prompted by two concerns: his sense that the U.S. government was moving on a number of fronts to suppress "dangerous" speech,¹⁴⁷ and his conviction that the Supreme Court's clear and present danger test for evaluating such efforts at suppression was inadequate.¹⁴⁸

Meiklejohn's particularistic motivations for writing *Free Speech* were clear enough, but the strategy he employed in formulating his theoretical position suggested that he was reacting to a larger jurisprudential concern. The "most general thesis" of his argument, he announced in his first chapter, "is . . . that our civil liberties, in general, are not all of one kind. They are of two kinds which, though radically different in constitutional status, are easily confused. . . . One of these is open to restriction by the government. The other is not open to such restriction."¹⁴⁹ As examples Meiklejohn offered the liberty "of religious or irreligious belief," which "the government is unqualifiedly forbidden to restrict," and "the liberty of an individual to own, and to use the income from, his labor or his property," which was "a limited one," "open to restriction by the government."¹⁵⁰

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145. See GUNTHER, *supra* note 144, at 601-02.

146. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

147. Meiklejohn cited the FBI's gathering of the "opinions" of "hundreds of thousands of our people" in its files, the House Un-American Activities Committee's investigations, the Department of Justice's listing of allegedly "disloyal" organizations, an Executive Order directed at establishing tests for "loyalty," and an order issued by the Attorney General that would restrict the opportunities of certain classes of aliens "to engage in public discussion of public policy." See *id.* at x-xiii.

148. Meiklejohn began his discussion of the clear and present danger test by asserting that it "annuls the most significant purpose of the First Amendment" and "destroys the intellectual basis of our plan of self-government." *Id.* at 29.

149. *Id.* at 1-2.

150. *Id.*

Meiklejohn located the constitutional source of these two types of liberties in the juxtaposition of the First and Fifth Amendments. The First flatly prohibited the abridgement of freedom of speech. The Fifth prohibited the deprivation of liberty without due process of law. Liberty in the Fifth Amendment had been construed by the Court to include speech, but it still could be limited so long as due process was accorded. There were thus two classes of liberties in the Constitution, nonabridgable and abridgable liberties, and speech could be included in both. It was crucial to determine what sorts of speech belonged in each class.¹⁵¹

For Meiklejohn the answer was obvious. Speech as a due process, abridgable liberty was correlated to rights such as life and property, private rights. Speech in the First Amendment referred to public speech, the freedom of public discussion. Thus "[t]he constitutional status of a merchant advertising his wares, of a paid lobbyist fighting for the advantage of his client, is utterly different from that of a citizen who is planning for the general welfare."¹⁵² The question in every case was whether the speech was public or private, unabridgable or abridgable.¹⁵³

Meiklejohn's theory of free speech was closely connected not only to the bifurcated review project but to the search to identify those forms of speech that were sufficiently connected to the democratic model of politics to be presumptively immune from majoritarian restrictions. Although the point of departure for his theory was the perceived threat to speech he found in the Court's Cold War subversive advocacy cases, he had larger goals in mind.

It is instructive that in Meiklejohn's discussion of the clear and present danger test for speech, which occupied most of his attention in *Free Speech*, his primary emphasis was on the inadequacy of the "marketplace" metaphor offered by Holmes in his *Abrams* dissent. In one passage Meiklejohn spelled out his objections to that metaphor:

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151. See *id.* at 37-39.

152. *Id.* at 38-39.

153. Meiklejohn was not a lawyer, and commentators with legal training have regularly attacked his effort to distinguish First Amendment speech rights from Fifth Amendment speech rights as confused and even incoherent. Chafee reviewed *Free Speech and Its Relationship to Self-Government* in 1949 and suggested that Meiklejohn's attempt to do constitutional exegesis was analogous to his attempt to break up a fight among students when he was a professor of philosophy at Brown University before becoming President of Amherst. The only thing Meiklejohn's intervention in the fight had accomplished, Chafee suggested, was the denting of Meiklejohn's hat. See Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891, 891-92 (1949); see also LEE BOLLINGER, *THE TOLERANT SOCIETY* 149-51 (1986).

We Americans . . . have taken the "competition of the market" principle to mean that as separate thinkers, we have no obligation to test our thinking, to make sure that it is worthy of a citizen who is one of the "rulers of the nation." That testing is to be done, we believe, not by us, but by "the competition of the market." Each one of us, therefore, feels free to think as he pleases, to believe whatever will serve his own private interests. We think, not as members of the body politic . . . but as farmers, as trade-union workers, as employers, as investors. . . . And our aim, as we debate in those capacities, is not that of finding the truth. . . . Our aim is to "make a case," to win a fight, to make our plea plausible, to keep the pressure on. And the intellectual degradation which that interpretation of truth-testing has brought upon the minds of our people is almost unbelievable. Under its influence, there are no standards for determining the difference between the true and the false. The truth is what a man or an interest or a nation can get away with. That dependence on intellectual laissez-faire, more than any other single factor, has destroyed the foundations of our national education . . . .¹⁵⁴

This argument, of course, flatly denied any connection between the marketplace of ideas and a search for truth. That "marketplace" was like other markets, where the truth was "what a man or an interest or a nation can get away with." This equation of marketplaces with intellectual degradation was a general theme of *Free Speech*. Meiklejohn posited distinctions between self-government and mere economic preference, between civic responsibility and what one could "get away with," between a collective search for information about public issues and "intellectual laissez-faire."

It was as if Meiklejohn wanted to identify Holmes's marketplace metaphor with a whole catalog of bogeys associated with the collapse of an unregulated capitalist order. At one point Meiklejohn praised Brandeis's concurrence in *Whitney* as having "brought us far along the road toward . . . the absolute freedom of public discussion," and having "den[ied] at its very roots the [clear and present danger] principle which had been formulated by Mr. Holmes"¹⁵⁵ in the unfortunate marketplace metaphor. He neglected to mention that Holmes had joined Brandeis's *Whitney* opinion, or that Brandeis continued to insist that the clear and present danger test should govern subversive advocacy cases.

Only by understanding the intellectual context in which *Free Speech* appeared can one explain the subsequent influence of the "Meiklejohn Interpretation" of the First Amendment.¹⁵⁶ For those of

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154. MEIKLEJOHN, *supra* note 146, at 86-87.

155. *Id.* at 54-55.

156. See William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965) (acknowledging a connec-

Meiklejohn's contemporaries who were committed to the bifurcated review project, the clear and present danger test, despite its attractiveness as a device that gave judges maximum power and flexibility in speech cases, raised many of the problems of substantive judging associated with *Lochner*.¹⁵⁷ In addition, the preferred position characterization also appeared to be a comparably open invitation for unconstrained judicial lawmaking, since those employing that characterization had given very little guidance as to which kinds of speech rights were to be preferred.

The Meiklejohn interpretation, for all its analytic deficiencies, represented an ingenious bifurcated review "solution." One attractive feature has already been noted: by abandoning clear and present danger for a more "absolutist" approach to protecting speech, but confining the category of protected speech to public speech, Meiklejohn's approach ostensibly avoided the opportunities for substantive judging inherent in clear and present danger. This feature was particularly responsive to the context of subversive advocacy cases in the aftermath of World War II. Meiklejohn's approach, for example, would have characterized the *Dennis* defendants' activity as public speech and protected it, at least to the point where the leaders of the Communist Party had not yet created an emergency by advocating immediate revolution.¹⁵⁸

A second attractive feature of Meiklejohn's approach was that it preserved much of the doctrinal framework of First Amendment jurisprudence, including the intuitive attempts of the Court to create a hierarchy of protected expressions. It was well-settled at the time of the appearance of *Free Speech* that the First Amendment did not apply to a variety of expressions, including commercial speech,¹⁵⁹ libel and slander,¹⁶⁰ obscenity,¹⁶¹ and unauthorized disclosure of private informa-

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tion between Meiklejohn's theoretical rationale for the protection of free speech and certain Warren Court First Amendment decisions).

157. Meiklejohn noted this in *Free Speech*, suggesting that Chafee's "search for truth" justification presupposed a judicial "balancing" of "[t]he interest in the public safety and the interest in the search for truth." MEIKLEJOHN, *supra* note 146, at 64. In Meiklejohn's view balancing was appropriate only when a private need in individuals to speak was balanced against the public safety. Such a balancing was permissible under Fifth Amendment methodology, but that was reserved for private speech. The First Amendment, according to Meiklejohn, was "not saying that any man may talk whenever and wherever he chooses"; it was "not dealing with that private issue." It was saying that "as interests, the integrity of public discussion and the care for the public safety are identical." In public speech cases under the First Amendment, there was no need for judicial balancing. Public speech was fully protected. *See id.* at 65.

158. *See id.* at 54-55.

159. *See* *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

160. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

161. *See* 315 U.S. at 568.

tion.¹⁶² By describing each of these expressions as private speech, Meiklejohn avoided the intrusion of the First Amendment into a number of established common law doctrines. Moreover, an intuitive distinction between public and private expression already existed in free speech cases, as illustrated by the Court's treatment of commercial speech and its characterization of the solicitation efforts of Jehovah's Witnesses as noncommercial. Meiklejohn's tacit relegation of private expressions to a lower-value category of speech resonated with the views of those who were concerned with maintaining legislative control over economic or commercial activities in the post-*Lochner* era.

Meiklejohn's approach also promised to clarify the meaning of the democratic speech singled out for protection in the preferred position cases. He explicitly associated public speech with the processes of education and responsible citizenship in a democracy. The metaphoric construct that he employed to introduce his theory of free speech was not the marketplace of ideas but the New England town meeting: a public forum in which all citizens participated and spoke freely about civic affairs. As Meiklejohn described it:

In the town meeting the people of a community assemble to discuss and to act upon matters of public interest — roads, schools, poorhouses, health, external defense, and the like. Every man is free to come. They meet as political equals. Each has a right and duty to think his own thoughts, to express them, and to listen to the arguments of others. The basic principle is that the freedom of speech shall be unabridged. . . .

. . . .
. . . As the self-governing community seeks, by the method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens. If they fail, it fails. That is why freedom of discussion for those minds may not be abridged.¹⁶³

In Meiklejohn's characterization, the search for truth formulation was stripped of its marketplace dimensions. In his portrait of the town meeting no private or commercial issues corrupted the discussion: only public matters such as roads, schools, poorhouses, and public health were on the agenda. The speech that he sought to protect was that associated with the quintessentially public and democratic act of voting on non-commercial community issues.

Finally, Meiklejohn's interpretation offered a way out of the apparent dilemma between protection for speech rights and a commitment to the principle of majority rule in a democracy. One could argue that if the central purpose of speech was to foster individual citizen participa-

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162. See *Barber v. Time Inc.*, 159 S.W.2d 291 (Mo. 1942).

163. MEIKLEJOHN, *supra* note 146, at 22-25.

tion in a democracy, an equation of majoritarian policies with the collective will of the democratic citizenry was dependent on that unrestricted participation. Otherwise a majority was not truly representative and its decisions not truly democratic. Majoritarian decisions restricting speech rights were thus open to the charge that they sought to block the very channels of citizen participation that justified majority rule.

But for all the apparent ingenuity of Meiklejohn's approach, it appeared to contain a significant internal tension. If protection for free speech was so vital and necessary a task in American society, so indispensable a condition of America as a democracy, it would appear that free speech itself was an important cultural phenomenon, something to be cherished. Moreover, if the central importance of speech in facilitating the democratic political process meant that the political speech of individuals could not be restricted without threatening the integrity of that process, then in an important sense individual speech rights trumped majoritarian efforts to restrict them. Why, then, had Meiklejohn offered so limited a definition of protected speech? One might have surmised from his elevation of the significance of individual speech rights in a democracy, and of free speech itself, that democratic theory required a wide latitude for individuals to speak freely on all subjects. Yet Meiklejohn insisted that democratic theory only required a wide latitude for individuals to speak on public subjects.

Thus in making a powerful argument that individual public speech, in a democratic society, trumps majoritarian efforts to restrict it, Meiklejohn implicitly was raising the possibility that the self-education of individual citizens might not invariably be confined to public expressions. Speech that signified the desire of individual citizens to learn more about themselves and the world around them might have value in a democracy whether or not it appeared to be directed toward public issues. The capacity of humans to effectively govern themselves might be a product of qualities, such as self-confidence or integrity, that were not easily labeled public or private. The two components of the self-governance rationale, "self" and "governance," bore a problematic connection to Meiklejohn's insistence on maintaining the distinction between public and private speech.

C. *Launching the Progression Toward Absolutism: The Reception of Meiklejohn in the 1950s and 1960s*

The initial reviews of *Free Speech* criticized Meiklejohn's reading of clear and present danger, his constitutional exegesis, and the level of protection for public speech he advocated. But comparatively few re-

viewers even alluded to the linchpin of Meiklejohn's approach, his distinction between public and private speech.¹⁶⁴ Meiklejohn's metaphors and examples made it clear that he had a strong intuitive sense about which sorts of expressions were public and which private, and that he did not anticipate a particularly large category of expressions that were to be treated as unabridgable. Most early reviewers found that intuition unremarkable.

By the 1950s free speech cases had come to the Supreme Court in increased numbers, and several conceptual problems had surfaced. Although the problems took different forms in different doctrinal areas of First Amendment coverage, ranging from subversive advocacy¹⁶⁵ through a variety of areas now assembled under the category "low value" speech,¹⁶⁶ they can be treated as specific variants on a general puzzle raised by the Meiklejohn interpretation.

That general puzzle can be stated as follows: If, on the one hand, speech freedom was at the very core of cultural self-definition in America, and if, on the other, one granted Meiklejohn's premise that such freedom was only implicated in public speech, should First Amendment balancing remain part of the methodology of free speech jurisprudence? Or, alternatively, should an enhanced version of the categorist methodology suggested by Brandeis in *Whitney*, premised on a stark separation between "public" and "private" speech, replace the social interest balancing proposed by Chafee and operationalized in the

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164. A sampling of legal periodicals for the 1948-1949 academic year yielded nine reviews. See Edward L. Barrett, Jr., Book Review, 36 CAL. L. REV. 667 (1948); Chafee, *supra* note 153; Osmond K. Fraenkel, Book Review, 14 LAW & CONTEMP. PROBS. 167 (1949); John P. Frank, Book Review, 27 TEXAS L. REV. 405 (1949); Irving M. Gruber, Book Review, 8 LAW. GUILD REV. 508 (1948); Arthur Garfield Hays, Book Review, 97 U. PA. L. REV. 751 (1949); Charles B. Nutting, Book Review, 10 U. PITT. L. REV. 254 (1948); Eve Thomas, Book Review, 3 MIAMI L.Q. 66 (1948); Book Note, 47 MICH. L. REV. 734 (1949). Of those only Chafee, Thomas, and Frank mentioned Meiklejohn's distinction between public and private speech. See Chafee, *supra* note 153, at 899-900; Frank, *supra*, at 411; Thomas, *supra*, at 67. Chafee's criticism was the most extensive and telling. He called Meiklejohn's "supposed boundary between public speech and private speech" the "most serious weakness in [his] argument." Chafee, *supra* note 153, at 899. He wondered in what category would be included books or plays, scholarship, and the arts. "The truth is," Chafee suggested, "that there are public aspects to practically every subject." *Id.* at 900.

165. See, e.g., *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298 (1957), *overruled by* *Burks v. United States*, 437 U.S. 1 (1978); *Dennis v. United States*, 341 U.S. 494 (1951).

166. See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (concerning commercial speech); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (concerning fighting words); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (precipitating a breach of the peace).

clear and present danger test? And, if so, could such a methodology establish any legitimacy?

As the Warren Court began reconsidering speech cases in the 1950s and 1960s, a categorist methodology, loosely termed First Amendment "absolutism,"¹⁶⁷ surfaced as a respectable doctrinal perspective. The progression toward absolutism in free speech jurisprudence took two distinct stages. In the first stage, the Warren Court emerged as the most significant institutional champion of free speech to appear thus far in America. In subversive advocacy cases, the Court obliterated *Dennis* by fashioning a distinction between advocacy of unlawful action and advocacy of belief.¹⁶⁸ Only the former satisfied the clear and present danger test, so a mere showing that a defendant belonged to a political organization (the Communist Party) whose doctrines advocated the overthrow of the Government was insufficient to make out a conviction under the Smith Act. Eventually the Court made the clear and present danger test significantly more speech-protective by permitting convictions for subversive advocacy only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."¹⁶⁹

Meanwhile, as two Justices, Black and Douglas, declared themselves to be "absolutists," and several others, notably Brennan, Warren,

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167. "Absolutism" in First Amendment jurisprudence has, of course, never been the equivalent of unlimited protection for all speech, even all public speech. None of the free speech theorists surveyed in this article assumed that the First Amendment's categorical language prevents Congress from making any law that abridges speech in any conceivable fashion. The familiar example is a law making it a crime to advocate the immediate assassination of a public official. Absolutism in First Amendment jurisprudence refers to a jurisprudential perspective that ostensibly rejects balancing in free speech cases for an analysis that treats some, or even all, forms of expression as presumptively protected, capable of being abridged only by the showing of a very strong interest on the part of the government in maintaining its own survival or that of its bedrock principles.

168. See *Yates*, 354 U.S. at 324-27. In *Scales*, a 5-4 majority of the Court was satisfied that "the teaching of forceful overthrow, accompanied by directions as to the type of illegal action which must be taken when the time for revolution is reached," was sufficient for a Smith Act conviction, but that the teaching alone was not. *Scales*, 367 U.S. at 234.

169. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). In *Brandenburg* the most inflammatory comment made by the speaker, and eventually broadcast on television, went as follows:

The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.

We are marching on Congress July the Fourth, four hundred thousand strong.

395 U.S. at 446 (quotation marks omitted).

and Marshall, adopted highly speech-protective positions, the Court began whittling away at the types of speech that Meiklejohn would, at least in 1948, have swept into his private, unprotected category.¹⁷⁰ Notable among them were defamation¹⁷¹ and false light privacy,¹⁷² which came to be treated as presumptively unabridgable in some contexts. In some Warren Court decisions Meiklejohn was cited approvingly,¹⁷³ and his distinction between public and private speech was treated as a meaningful doctrinal rubric.¹⁷⁴ Meiklejohn endorsed some of the developments: he was reported as saying, of the *New York Times* decision, "It is an occasion for dancing in the streets."¹⁷⁵

But then the progression toward First Amendment absolutism entered a second stage, one in which the all-important distinction, for Meiklejohn, between public and private expressions began to break down. Eventually the Court would confer protection on a broad category of speech — commercial speech — that Meiklejohn had assumed to be entirely outside the range of the First Amendment's coverage. In order to understand how this development came to occur, it is necessary to shift attention from Meiklejohn to the next influential twentieth-century First Amendment theoretician, Thomas I. Emerson.

V. EMERSON AND THE FRAGMENTATION OF MODERNIST FIRST AMENDMENT JURISPRUDENCE

Emerson's treatise, *The System of Freedom of Expression*, appeared in its fullest version in 1970.¹⁷⁶ Emerson's work, although grounded in

170. In *Free Speech* Meiklejohn had listed "libellous assertions" and "slander" as "forms of speech" that "may be, and must be, forbidden and punished." MEIKLEJOHN, *supra* note 146, at 18.

171. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

172. See *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

173. See Brennan, *supra* note 156 (underscoring the role of Meiklejohn's approach in the majority opinion in *New York Times*); Harry Kalven Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 208-09 (noting the majority opinion's debt to Meiklejohn and suggesting that the core of First Amendment protection was for "speech without which democracy cannot function").

174. Notably in the area of defamation, where a progression of cases, stretching from *New York Times* to *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), the Supreme Court eventually tied a First Amendment privilege to the "public figure" status of the defendant or to the "public" or "private" nature of the communication.

175. See Kalven, *supra* note 173, at 221 n.125.

176. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970) [hereinafter EMERSON, SYSTEM]. That work represented an expansion and further refinement of Emerson's 1966 book, THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1966).

the contributions of both Chafee and Meiklejohn and sharing many of their theoretical premises, had the perhaps unintended effect of pointing free speech theory in quite different directions from what they had anticipated. Emerson's interpretive theory of the First Amendment represents a culmination of the logic of modernist premises as applied to free speech issues. At the same time it can be seen as exposing the potentially contradictory nature of those premises and as severing the assumed connection between protection for free speech and democratic theory that previously had animated twentieth-century First Amendment jurisprudence.

As speech-protective jurisprudence gained additional momentum in the 1950s and 1960s, its original modernist premises appeared to have been modified. Rationalism and empiricism were compatible with Meiklejohn's emphasis on protecting public speech,¹⁷⁷ but those premises had been subsumed in the "town meeting" metaphor, which primarily emphasized the connections between cognitive freedom and democratic theory. Speech-protective interpretations of the First Amendment increasingly emphasized two rationales: protection for speech furthered cognitive freedom and protection for speech underscored the democratic orientation of American society.

Another significant figure in the development of free speech jurisprudence in the 1960s and 1970s was Harry Kalven. See, e.g., Harry Kalven Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1; Harry Kalven Jr., *Mr. Alexander Meiklejohn and the Barenblatt Opinion*, 27 U. CHI. L. REV. 315 (1960); Kalven, *supra* note 173; Harry Kalven Jr., *The Reasonable Man and the First Amendment*: Hill, Butts, and Walker, 1967 SUP. CT. REV. 267. For Kalven's most synthetic treatment of free speech issues, which appeared after his death, see HARRY KALVEN JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (1988), edited with an introduction by his son Jamie Kalven.

Emerson's work has been singled out for treatment in this article because it represents a more extended synthesis of free speech issues than anything Kalven produced in the 1960s, and because Kalven's own synthesis, *A Worthy Tradition*, was incomplete at his death. The selection of Emerson is for heuristic purposes and should not be taken as a comparative comment on his and Kalven's stature.

177. Consider the following passage from *Free Speech*:

[I]n that method of political self-government [the town meeting], the point of ultimate interest is not the words of the speakers, but the minds of the hearers. The final aim of the meeting is the voting of wise decisions. . . . The welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about. And this, in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented at the meeting. . . .

The First Amendment, then, is not the guardian of unregulated talkativeness. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said.

MEIKLEJOHN, *supra* note 146, at 25.

The relationship between those rationales, which the preferred-position advocates and Meiklejohn had taken as necessarily self-reinforcing, became perceived as ambiguous. Democratic theory could be seen as channeling protected speech into a public category of expression, as Meiklejohn urged, or democratic theory could be seen as giving impetus to *self-expression itself*, as a symbol of the high value democracy placed on the diverse contributions of individual citizens. Libertarian free speech theory thus could potentially expand the concept of freedom in First Amendment jurisprudence by disengaging freedom from Meiklejohn's conception of self-governance. Emerson was to struggle with the implications of that potential development.

A. Emerson's Dilemmas

1. The "Self-Fulfillment" Rationale For Protecting Speech

The Meiklejohn interpretation became enlisted in the Warren Court's move toward First Amendment absolutism, but the very process of enlistment began to place pressure on Meiklejohn's self-governance formulation. Instead of fashioning numerous refinements of the boundary between public and private speech, activist judges, comfortable with the ideological correctness of progressively expanding First Amendment freedoms in modern America, devoted their energy to widening Meiklejohn's category of protected expressions. Some of the new candidates for protection represented the very sorts of expressions that Meiklejohn might well have relegated to the private sphere.¹⁷⁸ These developments not only unsettled the Meiklejohnian boundary between unabridgable and abridgable speech, they appeared to make less compelling Meiklejohn's insistence that protection for speech be coupled with self-governance in a democracy. Out of this swirl of activity came a new theoretical rationale for protecting speech, self-fulfillment, with which Emerson was prominently identified.

Emerson was no less enlisted in the premises of modernist jurisprudence than Chafee or Meiklejohn. In the first chapter of *The System*

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178. In *Free Speech* Meiklejohn, after insisting that "the First Amendment stands guard over the freedom of public speech but is indifferent to the rights of private speech," suggested that:

It would be a fascinating and important task to follow those implications as they bear upon the rights to freedom which are claimed, for example, by lobbyists for special interests, by advertisers in press or radio, by picketing labor unions . . . by the distributors of handbills on city streets . . . and many others. In all these cases the crucial task is that of separating public and private claims.

Id. at 99. First Amendment claims in each of these areas were considered by the Supreme Court in the 1960s and 1970s.

of *Freedom of Expression*, Emerson gave an overview of the “main premises” of a “system of freedom of expression in a democratic society” that amounted to a textbook summary of modernist epistemology.¹⁷⁹ First was the affirmation of human cognitive capabilities. “The proper end of man,” Emerson declared, “is the realization of his character and potentialities as a human being.” To cut off expression was “to elevate society and the state to a despotic command over him and to place him under the arbitrary control of others.”¹⁸⁰

The freedom premise was followed by the empiricist constraint, embodied in search for truth language. Emerson stressed the centrality of expression as “an essential process for advancing knowledge and discovering truth.”¹⁸¹ The methodology of “open discussion” was likened to the methodology of scientific experimentation: “[a]n individual who seeks knowledge and truth must hear all sides of the question, consider all alternatives, test his judgment by exposing it to opposition, and make full use of different minds.”¹⁸² The presentation of “unaccepted opinion[s] . . . compel[s] a rethinking and retesting of the accepted opinion.” Through open discussion “many of the most widely acknowledged truths” had been shown “to be erroneous.”¹⁸³

Next came an assertion of the indispensable connection between free speech and the idea of democracy. Freedom of expression was “essential to provide for participation in decision making by all members of society.”¹⁸⁴ Once one accepted the democratic philosophy “of the Declaration of Independence — that governments ‘derive their just powers from the consent of the governed’ ” — it followed that all the people “must, in order to exercise their right of consent, have full freedom of expression . . . in forming the common judgment.”¹⁸⁵

Last was the rationalist constraint. Suppression of open discussion made “a rational judgment impossible, substituting force for reason.”¹⁸⁶ The process of open discussion, in contrast, “promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision-making process.” Since the process produced truth, it provided a foundation for rational deci-

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179. See EMERSON, SYSTEM, *supra* note 176, at 6.

180. *Id.*

181. *Id.*

182. *Id.* at 6-7.

183. *Id.* at 7.

184. *Id.*

185. *Id.*

186. *Id.*

sionmaking, thus facilitating social progress without "destroying . . . the balance between stability and change."¹⁸⁷

The order in which Emerson listed his premises represented a subtle difference in emphasis from the formulations of Chafee and Meiklejohn. Chafee explicitly identified the social interest in the search for truth as a more important rationale than the individual interest in expression. His hierarchy of premises had been made more explicit by Meiklejohn, who reserved an absolute level of protection for that speech that was directly connected to "the voting of wise decisions" and suggested that such speech should not be seen as individual and private but as collective and public.¹⁸⁸

Emerson incorporated those rationales, but did not rank them first in his listing of the premises underlying protection for free speech. That place was reserved for the premise that "freedom of expression is essential as a means of assuring individual self-fulfillment."¹⁸⁹ For Emerson this individual interest in self-fulfillment outweighed in importance all social interests that might be advanced on behalf of protection for speech. Free speech was at bottom an affirmation of human "freedom" — an affirmation of the potential of humans as causal agents.¹⁹⁰

Emerson's singling out of freedom qua self-fulfillment as the predominant rationale for protecting speech represented an important watershed in the twentieth-century intellectual history of free speech jurisprudence. This rearrangement opened the way not only for a continued uncoupling of the modernist freedom premise from the constraints of empiricism and rationalism, but also a potential uncoupling of freedom from the idea of democracy.

In particular, Emerson's emphasis on self-fulfillment as the most significant value fostered by protection for expression intimated that protection for free speech rights might clash with outcomes reached through the process of democratic politics, or with an interest in the spread of truth, or with the maintenance of rationality, order, and stability in public discourse. The logic of Emerson's emphasis suggested that an individual speaker's freedom primarily inhered not in his membership as a citizen in a democratic community, or as a searcher after truth,

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187. *Id.*

188. See MEIKLEJOHN, *supra* note 146, at 25-27.

189. EMERSON, SYSTEM, *supra* note 176, at 6.

190. See *id.* Emerson's conviction of the importance of self-fulfillment as a rationale for protecting free speech may have been enhanced by his involvement in efforts to protect the choice of married couples to receive information about birth control, which eventually led to the Supreme Court's 1965 decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Progeny decisions on the part of individuals within a marriage amounted to an example of human cognitive freedom.

or as a contributor to rational decisionmaking, but as an autonomous human being.¹⁹¹

Emerson's rearrangement of the premises underlying protection for free speech thus helps distinguish his contribution from those of his influential twentieth-century predecessors. That feature of Emerson's free speech jurisprudence, however, was not the only defining one. Equally important was Emerson's failure to grasp fully the implications of his rearrangement. Emerson, like Chafee and Meiklejohn, developed an approach to free speech that led to troublesome conceptual puzzles. But, as some examples will illustrate, Emerson barely addressed, let alone attempted to solve, those puzzles.

2. "Hard" Free Speech Cases

In the first chapter of *The System of Freedom of Expression* Emerson confronted the question of how one could justify an active role for the judiciary as a protector of free speech rights when judicial activism on behalf of economic "liberties" had become discredited. His response was characteristic of those who sought to promote bifurcated review:

In considering the role of the judiciary in a system of freedom of expression it is essential to . . . establish a fundamental distinction. We are not dealing here with any general function of our judicial institutions to foster the whole range of freedoms in a democratic society. Nor are we dealing with any broad power to supervise or review all major actions of the legislative and executive branches. We are concerned with the specific function of the judiciary in supporting a system of freedom of expression.¹⁹²

Emerson's conception of the judiciary "as a mediator between the government and the people," exercising the power of judicial review, was limited to free speech cases.¹⁹³ He did not seek to revive aggressive judicial review as a general proposition.

Emerson's emphasis on the self-fulfillment rationale, however, suggested that the idea of protection for free speech might be severable from the idea of promoting democratic theory. It suggested that some expressions, unrelated on their face to the democratic model of politics

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191. Another way to describe Emerson's self-fulfillment rationale was that it implicitly began to incorporate emotive as well as cognitive expressions within a constitutionally protected category. The inclusion of emotive speech within the First Amendment's umbrella of protection arguably applied modernist aesthetics to free speech jurisprudence — freedom of taste in addition to freedom of thought — and stripped protected speech of the constraints of empiricism and rationalism. Emerson did not fully anticipate these developments. See *infra* text accompanying notes 225-42.

192. EMERSON, SYSTEM, *supra* note 176, at 13.

193. See *id.* at 12.

or even, arguably, to the expanded idea of democracy itself, nonetheless might come under the umbrella of the First Amendment.

In addition to the problem of justifying bifurcated review itself, Emerson encountered at least four types of free speech cases in which his successive rationales for protecting speech seemed to contradict, rather than support, each other, with the self-fulfillment rationale threatening to swallow up the others. The first of those was commercial speech. "The rule that communications in the 'commercial sector' of our society are outside the system of freedom of expression," Emerson noted, "has never been fully explained."¹⁹⁴ He suggested that neither the courts nor commentators had made clear just what constituted the "commercial sector." Although that term seemed to signify a class of cases involving "the production and exchange of goods and services for profit," as distinguished from those involving "the production or exchange of ideas on political, religious, artistic, and similar matters," Emerson thought the distinction "very crude."¹⁹⁵ He also found that it had not been consistently followed in the Court's free speech cases: some decisions sharply distinguished between a "public right" of expression and "purely commercial advertising,"¹⁹⁶ and others declared that the First Amendment rights of booksellers were unaffected by the fact "that the dissemination takes place under commercial auspices."¹⁹⁷

Nonetheless the "commercial sector" doctrine was still "well established" at the time of the publication of *The System of Freedom of Expression*,¹⁹⁸ and Emerson sought to advance some justifications for it. He could only come up with two and presented them perfunctorily. One was that "it speaks well for a society that it accords greater freedom to the exchange of ideas than it gives to the exchange of material things."¹⁹⁹ The other was that "society feels it necessary to give greater protection to its citizens in material affairs than in the affairs of the mind."²⁰⁰ Both justifications were related to the intuitive distinctions between ideas and material entities that were made by proponents of the bifurcated review project.

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194. *Id.* at 414.

195. *Id.* at 414-15.

196. *Id.* at 416 (internal quotation marks omitted) (quoting *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942)).

197. *Id.* at 417 (internal quotation marks omitted) (quoting *Smith v. California*, 361 U.S. 147, 150 (1959)).

198. *See id.* at 415 & n.1.

199. *Id.* at 415.

200. *Id.* Emerson called this "[a] less worthy rationale." *Id.* It is not clear how the absence of protection for commercial speech would give "greater protection to . . . citizens in material affairs than in the affairs of the mind." *Id.*

But despite those intuitions, Emerson's self-fulfillment rationale threatened the lower level of protection accorded speech in the commercial sector. Who was to say that a creative slogan for a product was any more or less a realization of human potential than a novel about the advertising industry? Who was to say that expressive activities designed to generate money for their speakers were any less noble than other expressive activities? Meiklejohn's distinction between public and private speech had initially located all commercial expressions as outside the ambit of First Amendment protection, but Meiklejohn eventually concluded, in a 1961 article, that literary and artistic expressions were versions of public speech.²⁰¹ That conclusion blurred his initial distinction considerably, most noticeably in the cases of literary and artistic contributions disseminated for profit. With the public status of certain commercial expressions now recognized, Emerson's self-fulfillment rationale only weakened the commercial sector doctrine further.

The second area was libel law. Emerson noted that, beginning with the *New York Times* case, the Supreme Court appeared to be organizing the constitutional law of libel around Meiklejohn's distinction between public and private speech. He then attacked the distinction, asserting that "there has never been a satisfactory definition of what is meant by 'public speech.'" ²⁰² He pointed out that if the public speech realm was defined narrowly — as Meiklejohn originally had intended — it excluded "communication relating to art, literature, music, science and recreation."²⁰³ If used expansively, however, the term "would seem to have no limits," for "[i]t is hard to conceive of anything . . . that cannot be said to have some relation to social issues."²⁰⁴

Emerson clearly was troubled about the relationship of libel law to his general approach to First Amendment issues. It appeared that all of the rationales he advanced for protecting speech were served by allowing full protection for false statements on public issues, even if they injured someone's reputation. Such statements were part of the process by which citizens informed themselves about public issues, learned the truth, and helped themselves make rational decisions. They also furthered the value of self-fulfillment, because they were devices through which citizens expressed themselves on public matters.²⁰⁵

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201. See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257, 262-63.

202. EMERSON, SYSTEM, *supra* note 176, at 541.

203. *Id.*

204. *Id.*

205. See *id.* at 531-43.

Emerson balked, however, at expanding protection for libels whose only purpose seemed to be to “injur[e] . . . individual feelings.”²⁰⁶ Although he had previously rejected Meiklejohn’s public-private speech distinction as unworkable, he advanced another distinction, that between “expression” and “action.”²⁰⁷ Communication having the sole effect of hurting another individual’s feelings, he felt, was “the equivalent of ‘action,’ similar to a physical assault. The harm done tends to be direct and instantaneous, and not remediable by longer-range social processes that can prevent subsequent damage.”²⁰⁸ Such communication was like speech that called for “imminent and dangerous” action: its major impact was not as “expression” at all.²⁰⁹

Emerson’s strained distinction between expression and action in libel cases helps reveal the tension between his successive rationales for protecting speech. Three of his four rationales had a distinctively public dimension. The search for truth and the promotion of rationality as an alternative to force were associated with the goal of enlightened public decisionmaking in a democracy, and the rationale of promoting comment on matters of public concern was explicitly linked to the voting process. But the self-fulfillment rationale, especially as the concept of speech expanded to include the creative arts, could not be so easily associated with the public sphere of life. Emerson recognized that Meiklejohn’s distinction between public and private speech had proved increasingly untenable. Yet he continued to retain an intuitive sense that merely private communications, bearing no apparent connection to democratic self-government, should not receive the same high level of First Amendment protection, even though they obviously furthered self-fulfillment.

Two other forms of expression presented Emerson with comparable problems: campaign contributions or expenditures and lobbying. Those areas differed from ordinary commercial speech or defamation, however, in that the traditional purpose of legislative efforts to control corrupt practices or lobbying was that of purification of the electoral process so as to make it more democratic. Here Emerson confronted an obvious clash between self-fulfillment and his other rationales, because corrupt practices and lobbying legislation sought to further self-government by restricting speech.

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206. *See id.* at 543.

207. *See id.*

208. *Id.*

209. *See id.*

In a series of cases going back to the nineteenth century, including the 1934 decision in *Burroughs v. United States*,²¹⁰ the Court had sustained federal and state legislation regulating corrupt practices in election campaigns. Such legislation required disclosure of the sources of campaign funds, set limits on campaign contributions and expenditures, prohibited certain groups from contributing to campaigns, prohibited federal employees from making campaign contributions, and in one instance prohibited comment on election issues on the day the election was scheduled.²¹¹ As late as the mid-1960s the constitutionality of most of this legislation still seemed taken for granted.

Emerson wondered why comparatively little attention had been given to the free speech implications of corrupt practices legislation. "If a candidate in an election can be required to disclose his income and expenditures for expression," he asked, "why cannot all other persons be required to make similar disclosures in connection with other expression?"²¹² He also suggested that if the government could "equalize the amount of speech uttered in a campaign" by controlling the volume of campaign expenditures, why could it not "equalize the amount of speech uttered on any subject?"²¹³ The Court's corrupt practices decisions, he concluded, had "advanced no theory upon which to base an answer to these questions."²¹⁴

There was in fact an intuition driving the decisions, although it had perhaps not reached the level of a theory. Corrupt practices legislation, even though it restricted speech, could be seen as fostering all of the rationales for protecting speech in a democracy except self-fulfillment. By preventing any one individual or group from dominating public debate about electoral issues, the legislation ostensibly promoted the search for truth, encouraged the formulation of rational policies, and fostered self-government. That it did so at the expense of free expression was obvious, but the kind of expression being limited could be seen as undermining the democratic process.

If Emerson recognized the above defense of corrupt practices legislation, he did not weigh it very heavily. He proposed limiting such legislation to regulations on individual candidates in election cam-

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210. 290 U.S. 534 (1934). A nineteenth-century decision exhibiting a similar view was *Ex parte Curtis*, 106 U.S. 371 (1882).

211. See Rabban, *Forgotten Years*, *supra* note 4, at 531, 541, 551-53 for additional cases. The last example was raised by an Alabama statute that the Court invalidated, as applied to a newspaper editorial that appeared on the day of a municipal election, in *Mills v. Alabama*, 384 U.S. 214 (1966).

212. EMERSON, SYSTEM, *supra* note 176, at 639.

213. *Id.*

214. *Id.*

paigns. He did not think that most groups should be restricted in their contributions, or that noncandidates should be prevented from distributing anonymous campaign literature. To the extent he thought corrupt practices legislation useful, it was as a check against "the potential monopoly control over expression conferred upon the candidate."²¹⁵ He felt that "corporations could be controlled on the theory they were part of the commercial sector and thus outside the regular system of freedom of expression."²¹⁶ The contributions and expenditures of labor unions, on the other hand, could not be controlled.²¹⁷

Emerson was equally doubtful about the constitutionality of legislation regulating lobbying. He pointed to *United States v. Harriss*,²¹⁸ in which the Court sustained the Federal Regulation of Lobbying Act, which required detailed reports to Congress from any persons who had received contributions or who had expended money to influence Congressional legislation. The Court had narrowed the reach of the statute to persons who had engaged in "direct communication" with members of Congress. That did not impress Emerson, who concluded that "lobbying legislation is difficult to reconcile with the principles of the First Amendment."²¹⁹ The primary purpose of lobbying legislation, he believed, was "to curtail bribery or expose the political motivations of the legislator to the electorate, interests that cannot constitutionally be advanced by curtailing expression."²²⁰

Here again Emerson confronted an issue in which restrictions on speech allegedly were designed to promote freedom of expression in a democracy by improving the search for truth of legislators and equalizing the weight of the views of all members of the electorate. But of course restrictions on lobbying, like restrictions on commercial speech or on campaign contributions, affected the self-fulfillment of particular members of the public in a direct way. The reason such restrictions had been tolerated — in some instances not even seen as raising First Amendment issues — was that as twentieth-century free speech jurisprudence had developed in the shadow of the bifurcated review project, the self-fulfillment of lobbyists, political interest groups, or corporations had implicitly been ranked lower than that of, say, dissident political speakers.

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215. *Id.*

216. *Id.* at 640.

217. *See id.* at 639-40.

218. 347 U.S. 612 (1954).

219. EMERSON, SYSTEM, *supra* note 176, at 641-42.

220. *Id.* at 642.

B. *The Surfacing of Internal Contradictions in Free Speech Jurisprudence*

With the appearance of Emerson's *The System of Freedom of Expression*, free speech jurisprudence began to exhibit some significant internal strains. Emerson did not act as if his emphasis on self-fulfillment had undermined the traditional twentieth-century rationales for protecting speech. He listed them alongside self-fulfillment. But as the logic of protection for self-expression gained momentum in the 1950s and 1960s and widened the category of constitutionally protected expressions, thereby placing pressure on Meiklejohn's distinction between public and private speech, the self-reinforcing nature of the modernist premises of cognitive freedom, empiricism, and rationality threatened to dissolve.

An implicit assumption of the search for truth rationale, and, for that matter, of the Supreme Court's decision in the early 1940s to identify a category of "lower value" expressions that were not candidates for First Amendment protection, was that eventually Americans could agree as to what constituted true information, or rational policies, or, for that matter, coarse or immoral behavior. Excluding lewd or profane speech as playing "no essential part of any exposition of ideas,"²²¹ or "epithets or personal abuse" as "not in any proper sense communication of information or opinion safeguarded by the Constitution,"²²² was consistent with this assumption.

Meiklejohn appeared initially to acquiesce in a similar assumption, at least in the sense of not suggesting that his analysis required a reconsideration of lower value categories of speech. But as he, and the Court, began to give a wider scope to the category of public expressions in the 1960s, sweeping into that category literature, the arts, and even libelous speech directed at public officials or matters of public concern, it appeared that eventually some of the archetypal candidates for lower value categorization might be capable of being conceptualized as public speech.

Two such candidates surfaced in the 1970s. In both instances the Supreme Court concluded that the expressions deserved First Amendment protection.²²³ But when the justifications for protecting the expressions are examined, there is little evidence that they were being protected primarily because of their public character, that is, because of

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221. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

222. *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940).

223. Only one case produced an actual Supreme Court opinion; in the other the Court denied certiorari, letting stand a federal circuit court opinion conferring protection on the expression.

their contributions to the processes of self-governance. In both cases the courts that concluded that the expressions should be protected primarily emphasized their value as representations of the diverse viewpoints anticipated by a society dedicated to the freedom of individual expression. The fact that the expressions were coarse, or highly provocative, or arguably even false or irrational, as much emotive as cognitive, not only did not diminish their eligibility for First Amendment protection, it arguably cemented that eligibility; the message in both cases was that free speech above all meant, as Holmes had once said, "freedom for the thought that we hate."²²⁴

The first case was *Cohen v. California*,²²⁵ in which the Supreme Court overturned the conviction of a young man for disturbing the peace by "offensive conduct." His offense was wearing a jacket in a municipal courthouse bearing the words "Fuck the Draft." Justice Harlan, for the Court, found that the message on the jacket was "speech" rather than "conduct"; that it did not represent "fighting words"; and that it was not "obscene." It was merely "offensive" speech, which was protected by the First Amendment despite its allegedly "annoying" and "distasteful" character. "[O]ne man's vulgarity," Harlan declared, "is another's lyric."²²⁶

The second was *Collin v. Smith*,²²⁷ in which the National Socialist Party of America (NSPA) requested and was denied a permit to march, wearing Nazi-style uniforms, through the village of Skokie, Illinois, a Chicago suburb whose population included about 40,000 Jews, several thousand of whom were survivors of Nazi World War II concentration camps.²²⁸ The denial was based on several village ordinances, the most salient one prohibiting the incitement of hatred based on race, national origin, or religion. Since that ordinance had not been narrowed to cover only face-to-face confrontations — "fighting words" — it was held unconstitutional by the U.S. Court of Appeals for the Seventh Circuit, and the Supreme Court denied certiorari.

Neither Cohen nor the NSPA would have received First Amendment protection under doctrinal formulations in existence from the World War I Espionage Act cases through at least the mid-1960s. Wearing a jacket with a vulgar message was, alternatively, treated as fighting words or as conduct rather than speech when that distinction surfaced in

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224. *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

225. 403 U.S. 15 (1971).

226. 403 U.S. at 25.

227. 578 F.2d 1197 (7th Cir. 1978).

228. See BOLLINGER, *supra* note 153, at 13, 24.

picketing cases after World War II.²²⁹ The message "Fuck the Draft" was lewd or profane, and thus "no essential part of any exposition of ideas" under *Chaplinsky*.²³⁰ NSPA's "message" in the Skokie case employed the use of epithets directed at personal abuse, which *Cantwell* had singled out as unprotected speech. The slogans exhibited by the marchers might have been treated as a form of group libeling of Jews, or even potentially as subversive advocacy.²³¹

The opinions in both *Cohen* and the Skokie case, however, appeared to have started with an altered consciousness about the existence of empiricist and rationalist constraints on speech. Rather than assuming, as earlier courts had, that the messages in *Cohen* and *Collin* were so patently juvenile or unsound that they played "no essential part in any exposition of ideas," courts in the 1970s assumed that such messages might be sought to be suppressed because they were "inherently likely to provoke violent reaction."²³² In *Cohen* Justice Harlan described what he took to be the "constitutional backdrop" against which free speech cases should be made:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It 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, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.²³³

Although there are echoes of Meiklejohn in this excerpt, those echoes appear in a passage whose unmistakable purpose is to center the focus of free speech cases on "individual dignity and choice." Although freedom of expression is identified with "a more capable citizenry" and a "more perfect polity," the American political system ultimately rests

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229. See *Cox v. Louisiana*, 379 U.S. 536, 545 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 235-38 (1963).

230. *Chaplinsky*, 315 U.S. at 572.

231. See *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding the constitutionality of group libel statutes). The assertions of Jewish inferiority that lay at the core of Nazi ideology could have been treated as "false statements of facts" about Jews. Similarly, the Court's subversive advocacy decisions, from *Schenck v. United States*, 249 U.S. 47 (1919) through *Dennis v. United States*, 341 U.S. 494 (1951), suggested that if the distribution of antiwar pamphlets during wartime or the exchange of ideas by leaders of the American Communist Party during peacetime could be suppressed, a march by neo-Nazis through an American suburb might be as well. See the discussion of the Skokie case in BOLLINGER, *supra* note 153, at 31-33.

232. *Cohen v. California*, 403 U.S. 15, 20 (1971).

233. 403 U.S. at 24.

on the free choices of the autonomous individual. The model of democratic politics did not "effectively empower a majority to silence dissidents simply as a matter of personal predilections."²³⁴

With *Cohen*, the Skokie case, and other developments in First Amendment jurisprudence that arguably represented even greater departures from Meiklejohn's original formulation of self-governance,²³⁵ Emerson's self-fulfillment rationale had been expanded to create a perspective on First Amendment issues that could be seen as affirming emotive as well as cognitive freedom as the superordinate First Amendment value ("one man's vulgarity is another's lyric"), and arguably disassociating that freedom from empirical inquiry and rational policymaking.

The relationship between self-governance and self-fulfillment in a society committed to democracy is complicated, and one could argue that the two rationales can be made complementary in a First Amendment jurisprudence that gives the widest possible latitude for individual citizens to engage in public discourse on subjects that arguably have a bearing on the process by which citizens participate in public affairs.²³⁶ But at some point such a jurisprudence requires some criteria for determining what are appropriately public subjects, unless freedom of individual expression is invariably going to trump majoritarian efforts to restrict it. Meiklejohn, in formulating the concept of "public," unabridgable speech, was quite confident that such criteria could be found, and his criteria were closely connected to the implicit constraints of relevance and rationality that he found in town meeting discourse.²³⁷ Put another way, Meiklejohn was quite confident that the modernist premises undergirding special status for free speech in American society were self-reinforcing.

But *Cohen*, the Skokie case, and the Court's decisions narrowing the definition of proscribable obscene expression either sanctioned a much broader, perhaps even boundless, conception of public discourse or suggested that in certain instances speech that bore no true or rational relationship to collective policymaking in a democracy nonethe-

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234. 403 U.S. at 21.

235. Consider the Warren Court's decisions in obscenity law, in which two Justices, Douglas and Black, declared that obscenity was "absolutely" protected by the First Amendment, and several others showed a tendency to invalidate most obscenity prosecutions. That line of cases culminated in *Stanley v. Georgia*, 394 U.S. 557 (1969), in which the Court held that an individual could not be prosecuted under the First Amendment for watching even concededly "obscene" material in his home.

236. See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 270-72 (1995).

237. Post develops this point effectively. See *id.* at 274-76.

less should be protected. In *Stanley v. Georgia*, the Court invalidated a conviction for possession of allegedly obscene films viewed solely in one's home, and declared that "[i]f 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 films he may watch."²³⁸ It is hard to see how the private viewing of an obscene film bears any meaningful connection to public discourse. It is easy to see, by contrast, how freedom to determine the sexual content of materials that one reads or views in one's home can be derived from the rationale of self-fulfillment.

Emerson might have anticipated that his emphasis on self-fulfillment as a paramount First Amendment value could lead to decisions such as *Cohen* and the Skokie case; he had already noted, and applauded, the Court's libertarian posture toward subversive speech in *Brandenburg v. Ohio*,²³⁹ and he had been a proponent of First Amendment protection for most forms of obscene expression.²⁴⁰ But he hardly could have anticipated that the momentum on behalf of freedom in First Amendment cases, and the severing of the freedom premise from the empiricist and rationalist premises in First Amendment theory, would have threatened the bifurcated standard of constitutional review that he and his predecessors had sought to develop.

Yet that was precisely what occurred as libertarian free speech theory discovered new beneficiaries in the 1970s and 1980s. As the self-fulfillment rationale gained momentum, it threatened to sever freedom of speech from democratic theory and from the empiricist and rationalist premises that had undergirded the marketplace of ideas and self-governance rationales. The implicit limits established on categories of protected speech by those rationales came under strain as self-fulfillment took on a more openly pluralistic character. As more speakers, and more types of speech, seemed candidates for First Amendment protection, an original basis for launching the bifurcated review project — that speech was a particularly special cultural activity in a democratic society — appeared more problematic. For if everyone's speech, in any form, is free from restriction by the state, it is hard to discern why the state, as personified by its democratic majorities, has an investment in speech in the first place.

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238. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

239. 395 U.S. 444 (1969); see EMERSON, SYSTEM, *supra* note 176, at 156-57, 159-60.

240. See EMERSON, SYSTEM, *supra* note 176 at 495-503.

VI. THE RETRENCHMENT OF FREE SPEECH THEORY: SUNSTEIN'S DEMOCRACY AND THE PROBLEM OF FREE SPEECH

We have seen that prior to the severance of freedom from democratic theory in First Amendment jurisprudence, the main source of doctrinal tension in free speech jurisprudence lay in the delineation of the boundaries of public (unabridgable) and private (abridgable) speech, a process that was central to Meiklejohn's approach. But with the elevation of the self-fulfillment rationale, and the potential severance of freedom from democratic theory in First Amendment jurisprudence, a different locus of tension surfaced. As the value of self-fulfillment became implicated in an increasing variety of expressive contexts, doctrinal puzzles began to emerge from cases that were seen as illustrating the potential opposition of the self-fulfillment rationale and democratic theory itself.

A. "Unexpected Beneficiary" Cases

Beginning in the 1970s and continuing to the present, the logic of the self-fulfillment rationale for protecting speech, with its emphasis on the cognitive and emotive capabilities of the individual, produced a series of First Amendment decisions in which new sorts of claimants found their expressions swept within the category of protected speech. Some of the claimants — such as commercial advertisers or contributors to political campaigns²⁴¹ — were persons whose expressions had explicitly or implicitly received little First Amendment protection prior to the 1970s.²⁴² Others — such as those who burned crosses on the

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241. See *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) (commercial speech); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (same); *Federal Election Commn. v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985) (campaign contributions and expenditures); *First Natl. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (same); *Buckley v. Valeo*, 424 U.S. 1 (1976) (same).

242. Prior to the 1970s there was an absence of First Amendment challenges to corrupt practices legislation, such as the Federal Corrupt Practices Act of 1925, 18 U.S.C. § 602 (1994), which required all political organizations to render a detailed accounting of contributions received and expenditures made for the purpose of influencing the election of presidential electors or candidates in two or more states. The constitutionality of that act was upheld in *Burroughs v. United States*, 290 U.S. 534 (1934), but only on the issue of whether Congress possessed sufficient power to regulate state elections. No First Amendment issues were raised in *Burroughs*, and Congress took for granted its power to place ceilings on the amount of contributions and expenditures by individuals, doing so in the Hatch Political Activity Act of 1939, ch. 410, 53 Stat. 1147 (codified as amended in scattered sections of 5 and 18 U.S.C.).

Commercial advertising and campaign expenditures involving corporations were treated as "part of the commercial sector" and "thus outside the regular system of free-

property of neighbors as expressions of their racial animosity²⁴³ — had been treated as either engaging in lower value speech or not engaging in speech at all.²⁴⁴

The emergence of unexpected First Amendment beneficiaries since the mid-1970s conventionally has been described in commentary as a surprising liberalization of free speech jurisprudence by a Court taken to be more conservative in its general outlook than the Warren Court of the 1960s.²⁴⁵ From the perspective of this article, such conventional political labels are misleading. The recent cases creating new beneficiaries of the free speech principle can be seen more fruitfully as examples of the theoretical fragmentation of twentieth-century free speech jurisprudence brought about by the severance of the concept of freedom from democratic theory.

One way to approach the various expressions implicated in the new beneficiary cases is to consider them, simultaneously, as potential exemplars of cognitive or emotive freedom and as potential tests of an asserted inextricable connection between free speech and the ideal of democracy. Under this approach, one would ask which of the expressions could be said to receive First Amendment protection because they manifest *both* freedom and democratic theory; and which, by contrast, could be said to threaten democratic theory or to have arisen in contexts

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dom of expression." EMERSON, SYSTEM, *supra* note 176, at 640; see *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

243. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (concerning cross burning as group defamation or hate speech).

244. *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940), and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), referred to "epithets or personal abuse" as "not in any proper sense communication of information or opinion safeguarded by the Constitution," *Cantwell*, 310 U.S. at 309-10, and as falling within "certain . . . classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *Chaplinsky*, 315 U.S. at 571-72. See also *Beauharnais v. Illinois*, 343 U.S. 250, 251 (1952) (upholding a statute making it a crime to portray "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion, which . . . exposes [those citizens] to contempt, derision or obloquy"). The statute was enforced against the president of the White Circle League, who had distributed a pamphlet identifying "the negro" with "aggressions, rapes, robberies, knives, guns, and marijuana," and with "the . . . encroachment, harassment and invasion of white people, their property, neighborhoods, and persons." 343 U.S. at 252.

As late as *Cohen* the issue of whether "symbolic expressions" such as wearing clothes with messages or burning flags or crosses amounted to speech was still regarded as up for grabs: three of the four dissenting justices asserted that "Cohen's absurd and immature antic . . . was mainly conduct and little speech" and thus completely unprotected. *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting).

245. An illustrative example of this line of commentary is Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 IOWA L. REV. 51 (1994).

where the goals of democratic theory and individual freedom appear incompatible.

1. *Commercial Speech*

If we consider the set of protected expressions in the unexpected beneficiary cases in this fashion, the recent severance of freedom from democratic theory in free speech jurisprudence becomes apparent. In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*,²⁴⁶ the first case squarely holding²⁴⁷ that purely commercial expressions were entitled to a measure of First Amendment protection, the Court suggested that "the free flow of commercial information" — in this instance about the prices of prescription drugs — was not only "indispensable to the proper allocation of resources in a free enterprise system," it was also essential "to the formation of intelligent opinions as to how that system ought to be regulated or altered."²⁴⁸ One set of commentators called this argument "a non sequitur" and maintained that "in terms of relevance to political decisionmaking, advertising is neither more nor less significant than a host of other market activities that legislatures concededly may regulate."²⁴⁹

That insight seems accurate. *Virginia Pharmacy* represented a situation, common enough in the years after 1940, in which a legislative majority had concluded that regulation of market activity was necessary to promote consumer welfare, whether or not individual consumers wanted the activity to be regulated. The Virginia legislature was concerned that advertising of prescription drug prices might induce consumers to trade off quality against price, with potentially adverse health effects. The Court, straining to demonstrate that the regulation affected "public decisionmaking in a democracy,"²⁵⁰ suggested that because information about the price of drugs might enhance the individual economic choices of consumers, that information would necessarily also enhance the collective political choices of consumers who would then have an enhanced basis for evaluating policies directed toward deregulation of the pharmaceutical industry.²⁵¹ But one just as well could have

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246. 425 U.S. 748 (1976).

247. *Pittsburgh Press Co. v. Pittsburgh Commn. on Human Relations Commn.*, 413 U.S. 376 (1973), and *Bigelow v. Virginia*, 421 U.S. 809 (1975), suggested that *Valentine v. Chrestensen*, 316 U.S. 52 (1942) was on shaky ground.

248. *Virginia Pharmacy*, 425 U.S. at 765.

249. Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 17-18 (1979).

250. 425 U.S. at 765.

251. See 425 U.S. at 765.

argued that by electing representatives who chose to regulate commercial speech for the protection of consumers, individual citizens had already signaled their political choices.

The fact was that a decision expanding protection for commercial speech bore only a remote nexus to the self-governance rationale. It was, rather, a product of a progression in Meiklejohnian logic that actually served to redirect speech-protective jurisprudence away from his central distinction between public and private speech. Mindful that a narrow definition of public speech would place in an unprotected category most forms of literary and artistic expression, Meiklejohn, we have seen, expanded his conception of public speech to include nonobscene art and literature on the theory that exposure to such expressions educated the citizenry and thus enhanced the climate that nurtured democratic theory and self-governance.²⁵²

The inclusion of artistic and literary expression in a protected category of public expression may well have made conceptual and strategic sense to Meiklejohn and his supporters, but it helped elevate to protected status a variety of expressions engaged in for profit. Thus by the time *Virginia Pharmacy* appeared on the Court's docket, not only was it settled that books, magazines, and paintings did not forfeit First Amendment protection because they were sold commercially, but paid political advertisements²⁵³ and other communications "dependen[t] . . . on the expenditure of money"²⁵⁴ also had been included within a protected category of speech.

Although decisions expanding First Amendment protection for arguably expressive activity that took place in a commercial setting took pains to suggest a connection between the activity and self-governance,²⁵⁵ a passage in *Virginia Pharmacy* was more revealing of the principal rationale of the Court's commercial speech cases. In that passage the Court acknowledged that "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."²⁵⁶ Protection for commercial speech harmonized with a view of First Amendment speakers as autonomous individuals seeking to make choices that reflected their utility preferences. As one commentator put it, "[i]f free speech was defended with the metaphor of the market, it

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252. See Meiklejohn, *supra* note 201, at 262-66.

253. See *New York Times Co. v. Sullivan*, 376 U.S. 255 (1964).

254. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (upholding First Amendment protection for campaign expenditures)

255. See *New York Times*, 376 U.S. at 273-76; *Buckley*, 424 U.S. at 48-49, 52-53.

256. *Virginia Pharmacy*, 425 U.S. at 763.

was only a matter of time . . . before the market was defended with the metaphor and substance of free speech."²⁵⁷

2. *Political Campaigns and Expenditures*

In cases deriving a First Amendment right to make unlimited expenditures, and limited contributions, to political campaigns,²⁵⁸ the Court confronted situations in which the legislative rationale for restricting the amount of money that could be channeled into a political campaign was directly tied to democratic theory. Congress and the states assumed that unlimited campaign contributions or expenditures created the possibility of unequal access to the electoral process on the part of citizens. Money begat access, and access begat influence, potentially undermining the egalitarian premises of participatory self-government.²⁵⁹

But even though it identified this rationale in the contribution-expenditure cases, the Court concluded that it was insufficient, at least where expenditures were concerned, to withstand an individual's First Amendment claim to access to political candidates. Neither individuals, corporations, nor political organizations could be prohibited from expending sums of money on political campaigns, whatever the consequences for the political process.²⁶⁰

One could conceptualize these cases as presenting intractable problems for the self-governance rationale. If free speech were identified with self-governance, would self-governance be furthered by granting individual citizens *maximum* access to the political process, so that they could participate as freely as possible, or granting them *equal* access to the political process, so that the participation of others did not dilute their contributions? This intractability can be associated with democratic theory itself, which posits both individualistic and egalitarian conceptions of citizen participation.

But if campaign financing can be seen as conceptually intractable, it certainly had not been treated as doctrinally intractable by the Court prior to the 1970s. Legislative efforts to restrict campaign contributions and expenditures, on the part of both individuals and corporations, had been treated as unproblematic. They had been seen as prototypical legislative allocations among economic rights in cases involving commer-

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257. Mark Tushnet, *Corporations and Free Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 260 (David Kairys ed., 1982).

258. See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *First Natl. Bank v. Bellotti*, 435 U.S. 765 (1978); *Buckley*, 424 U.S. at 1.

259. See, e.g., *Bellotti*, 435 U.S. at 788-89; *Buckley*, 424 U.S. at 25-29.

260. See *Bellotti*, 435 U.S. at 790-92; *Buckley*, 424 U.S. at 44-59.

cial activity. Thus the unexpected dimensions of the First Amendment campaign finance cases, from the point of view of established free speech doctrine, were that the Court had swept a hitherto economic right into the category of a speech right and then concluded that the First Amendment required courts to intervene in the process of legislative allocations to protect the right to spend as much money on a campaign as one chose. In one of the standard areas in which the bifurcated review project anticipated judicial deference — scrutiny of reasonable legislative allocations of economic activities undertaken in the name of democratic theory — the Court had read the First Amendment as requiring judicial intervention. And since the beneficiaries of that intervention were neither the traditional mavericks whose speech had been repressed nor other types of *Carolene Products* minorities habitually denied access to the legislative forum, the Court's intervention, to those invested in the bifurcated review project, may well have appeared not only unexpected but, given the memory of *Lochner*, ominous.²⁶¹

3. "Hate Speech"

It is possible to see *R.A.V. v. City of St. Paul*²⁶² — in which the Supreme Court invalidated a St. Paul, Minnesota, ordinance applied to criminalize burning a cross on the front lawn of a black family as a means of communicating racial animus — as illustrating the same theoretical fragmentation of free speech jurisprudence typified by the other unexpected beneficiary cases. More fundamentally, it is possible to see the issues raised in *R.A.V.* as evidence that free speech jurisprudence has begun to fragment because of the increasing incompatibility of the central premises of modernism. Two dimensions of *R.A.V.* lend themselves to this line of analysis. One demonstrates that the case, like the previous unexpected beneficiary cases, presents a conflict between freedom and democratic theory. The other, which was present in a more muted form in the commercial speech and campaign finance cases,

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261. The problem with conceiving the contributions to and expenditures of political campaigns as another example of speakers seeking to enter the marketplace of ideas is that the market of information about political candidates is not limitless. It is significantly affected by the access of speakers to certain information outlets, such as the broadcast media, that dominate the market. Money — generated by campaign contributions and expenditures — largely controls that access. Thus one could argue that even if a true marketplace of ideas exists for ordinary speech, sorting out popular from unpopular, true from false expressions, it does not exist with respect to information about political campaigns. Instead, one has the equivalent of "market failure," justifying government intervention to equalize the position of speakers through campaign finance restrictions.

262. 505 U.S. 377 (1992).

demonstrates that *R.A.V.* presents a conflict between freedom and equality. Locating the latter conflict in an intellectual history of free speech in the twentieth century requires a brief detour.

a. *The Emergence of the Equality Premise in First Amendment Jurisprudence.* One of the central developments of constitutional jurisprudence from the 1950s through the 1980s was the growing momentum of arguments from the premise of radical equality, or what one commentator called the "antidiscrimination principle."²⁶³ Not only did the Equal Protection Clause of the Fourteenth Amendment emerge as a constitutional lodestar in those years,²⁶⁴ commentators began to suggest that the idea of equality was one of the foundations of free speech in America.²⁶⁵ A series of cases, those focusing on the concept of a "public forum" for expression, made it plain that the antidiscrimination principle had begun to radiate in First Amendment cases.²⁶⁶

The idea of equality can also be associated with the cognitive freedom premise of modernist consciousness. If the innate cognitive capabilities of humans were an important shaping force in the cosmos, it made sense to recognize the innate potential of all humankind, and thus not to treat some humans as worth more than others. At the same time, if tyranny and arbitrariness were to be checked, it made sense to give humans equal concern and respect. The momentum of egalitarianism and the antidiscrimination principle thus logically flowed from modernist epistemological assumptions.

But of course the antidiscrimination principle, with its accompanying premise of radical human equality, could also be at odds with the premise of cognitive freedom. Indeed the association of equality with the idea of America as a democracy can be seen as potentially contributing to the severance of freedom from democratic theory. Treating all humans equally meant, arguably, giving equal respect to all human expressions, even if the content of those expressions was offensive to a majority of the citizens in a democracy, and even if that majority had

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263. See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976). By "radical equality" I simply mean the proposition that as a normative matter differences among human beings should presumptively be regarded as insignificant, so that policies that treat humans unequally are presumptively suspect.

264. See Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991).

265. See, e.g., Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

266. See, e.g., *Perry Educ. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 55-72 (1983) (Brennan, J., dissenting); *Carey v. Brown*, 447 U.S. 455 (1980); *Greer v. Spock*, 424 U.S. 828, 849-70 (1976) (Brennan, J., dissenting); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972).

"voted," in the form of a legislative enactment, to censure the offensive expressions. Thus the premise of radical human equality sometimes reinforced, and sometimes conflicted with, a theory of widespread protection for individual expression, and it sometimes reinforced, and sometimes conflicted with, the model of democratic politics in America.

b. R.A.V. and the Puzzle of "Hate Speech." Given the cross-currents described above, *R.A.V.* can be seen as a complicated, possibly intractable puzzle. Statutes proscribing hate speech, like all statutes distinguishing between higher value and lower value speech, offend the equality principle by labeling some ideas as not worth saying. They also arguably offend democratic theory because by excluding some ideas from public discourse they presumably deprive the proponents of those ideas of an opportunity to influence public policy.

But the same statutes, in their content, arguably reinforce the antidiscrimination principle as well. They also arguably reinforce the idea of democracy in America, at least if one adopts Meiklejohn's dictum that what is essential in a society dedicated to political self-government is "not that everyone shall speak, but that everything worth saying shall be said."²⁶⁷

One could defend hate speech statutes, in fact, by starting from Meiklejohnian premises and merging them with arguments based on the antidiscrimination principle. One could argue that the expressions proscribed by the St. Paul ordinance in *R.A.V.* were precisely those that could be expected to offend others because they conveyed coarse animosities, or indulged in crude stereotypes, and thus denied the proposition that all persons in America should be treated with equal concern and respect. In seeking to eliminate such expressions from public discourse, the framers of the ordinance suggested that equality in America requires respect for others not only in theory but in practice. Moreover, by eliminating such expressions from public discourse, the ordinance arguably reinforced the principle of democratic self-government by designating certain worthless and distracting expressive activities as wasteful of the time and energies of a majority of the citizens, who should be encouraged to devote their limited resources to constructive activities that benefit the political community.

In addition, the premise of cognitive freedom could cut both ways in *R.A.V.* One could argue that hate speech ordinances infringe upon the self-fulfillment of the proscribed speakers. One could also argue, how-

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267. MEIKLEJOHN, *supra* note 146, at 25. It should be pointed out that Meiklejohn also referred, in numerous places, to "[t]he unabridged freedom of public discussion." *Id.* at 91. Thus it is not clear what he meant by "everything worth saying."

ever, that protection for hate speech legitimates that variety of speech, invites it into public debate, and creates the risk that those who do not share the animosities or who reject the stereotypes may be deterred from expressing their views. Finally, one could argue that unlimited protection for hate speech offends the freedom of the majority to believe that hate speech is wrong, harmful, and should no more be legitimated than cigarettes or cocaine.

Thus *R.A.V.* can be shown to continue the pattern of theoretical fragmentation in free speech jurisprudence. *R.A.V.* implicitly asks the Court not only to decide whether it prefers freedom to democracy or to equality in First Amendment jurisprudence, but to decide what definitions of freedom, democracy, and equality are compatible with the First Amendment. It is no wonder that *R.A.V.* is the case most frequently associated with the emergence of a retrenchment in free speech jurisprudence, a retrenchment in which Wigmore's distinction between "freedom of speech and freedom of thuggery" and Meiklejohn's distinction between everyone speaking and everything worth saying have been revived.

B. *Sunstein and the Retrenchment of Free Speech Theory*

1. *Retrenchment and the Bifurcated Review Project*

The elevation of self-fulfillment as a predominant First Amendment value, the emergence of unexpected beneficiaries of First Amendment protection, and the severance of freedom from democratic theory in free speech opinions from at least the 1970s have thrown into question a central assumption of bifurcated review: since economic allocations were properly the province of the legislature, judicial deference to legislative regulation of economic rights was appropriate, but First Amendment rights were not economic rights. To those with traditionally progressive or liberal political intuitions, these developments are foreboding. The First Amendment rights given protection by the Court in cases in the 1970s and 1980s included those of large campaign contributors, both individual and corporate, political action committees, and commercial advertisers. These were not only willing and powerful participants in the economic marketplace, they were groups whose views had ample representation in legislatures and significant access to legislators. In no sense were these beneficiaries of First Amendment protec-

tion the powerless minorities of *Carolene Products*.²⁶⁸ They more resembled the employers of bakery workers in *Lochner*.

As freedom in First Amendment jurisprudence became successively severed from the other premises of modernism, conventional characterizations of those who favored aggressive judicial review in First Amendment cases and deferential review in economic regulation cases broke down. Judges pictured as conservatives joined Justices seen as liberals to form the majorities in the unexpected beneficiary cases.²⁶⁹ It may have been this development coupled with the spectre of a discernible conservative, Justice Scalia, authoring the opinion in *R.A.V.*, that galvanized commentators into action. It may also have been something more ephemeral but also more fundamental: a sense that free speech jurisprudence was suddenly antifoundationalist, lacking theoretical rudders, "up for grabs."²⁷⁰ If so, despite the apparent inexorability of First Amendment libertarianism over the course of the twentieth century, a theoretical retrenchment might be possible.

At any rate, the 1990s has produced a striking number of arguments suggesting that the value of freedom for expressive activity can and should be qualified in the service of a more civil and less corrosive model for communities of discourse in America, a model in which civic responsibility and respect for others is taken at least as seriously as freedom and rights. Most of the arguments can be said to be associated with the issue of hate speech, especially if pornography, another area that has spawned calls for restrictions on expressive activity, is characterized, as many of its opponents would characterize it, as a version of

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268. The yearning in the academic community as late as the 1980s to retain momentum for the project of bifurcated review can be seen in the wide acclaim generated by John Hart Ely's *Democracy and Distrust* and Jesse Choper's *Judicial Review and the National Political Process*, two works that appeared in 1980 and were explicit attempts to engraft a *Carolene Products* exception on a general theory of deferential judicial review in constitutional cases. The works shared the American Association of Law Schools' Order of the Coif Triennial Book Award in 1983.

269. For example, Justice Blackmun, conventionally identified as a liberal on the Burger and Rehnquist Courts, was prominently involved in carving out protection for commercial speech, as was Justice Powell, conventionally identified as a conservative. For example, see Justice Powell's opinion for the Court in *Ohrlik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978). In contrast, then-Justice Rehnquist initially opposed such protection and dissented in *Virginia Pharmacy*.

270. That is surely the message of STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH* (1994). The very intervention of Fish, a prominent antifoundationalist, into debates about free speech might be taken as a signal that foundational premises in First Amendment jurisprudence are under strain. The collapse of foundational premises in an area of scholarly discourse appears to energize Fish: see his comments on traditional standards of textual criticism in STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* (1980).

hate speech in which women are invidiously stereotyped and degraded.²⁷¹

But at least one prominent commentator, Cass Sunstein, has called for a broader retrenchment of free speech jurisprudence, one intended to affect not only unexpected beneficiary cases but others he finds troublesome.²⁷² Because Sunstein incorporates the contributions of opponents of hate speech into his own arguments and gives an extended theoretical justification for the reconfiguration of First Amendment jurisprudence he proposes, a focus on his work as representative of current retrenchment theory seems appropriate.²⁷³

2. *Sunstein and the Legacy of Speech-Protective Jurisprudence*

Here is how Sunstein sees the current world of First Amendment jurisprudence:

In the last decade, the commitments that emerged from the previous generation of free speech law have come under severe strain. . . . There are abundant ironies in this. For one thing, the new coalitions have spurred plausible arguments of hypocrisy and brinkmanship. Free speech advocates say that the liberal's commitment to free speech has been abandoned as soon as it turns out that the commitment is inconvenient, or requires protection for causes that are unpopular with liberals. . . .

On the other hand, the broad enthusiasm for application of free speech principles to the new settings seems ironic as well, especially when it comes from conservatives usually respectful of tradition and of the need for restrained use of the Constitution. . . . Insistence on the protection of all words and pictures seems especially odd when it is urged by people who otherwise proclaim the need for judicial restraint.²⁷⁴

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271. I am thinking here of the contributions of Mari Matsuda, Charles Lawrence, Richard Delgado, and Kimberlé Crenshaw on hate speech and of Catharine MacKinnon on pornography and hate speech. See, e.g., MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993); CATHARINE A. MACKINNON, *ONLY WORDS* (1993).

272. Sunstein lists, in addition to commercial advertising, campaign finance regulation, hate speech (including pornography), "speech in connection with the sale of securities, sexual and racial harassment in the workplace, scientific speech, nude dancing . . . and regulation designed to produce quality and diversity in broadcasting." CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 14 (1993).

273. In singling out Sunstein as representative of contemporary commentators advocating a retrenchment of free speech theory, I do not want to be understood as suggesting that Sunstein's arguments and perspectives can be ranked, in some kind of hierarchy of stature, above those articulated in the work of a number of other contemporary commentators on free speech. I have singled out Sunstein's work for the same reason I singled out that of Emerson: in my judgment his work most clearly embodies the theoretical orientation of free speech commentary at a particular point in time.

274. SUNSTEIN, *supra* note 272, at 14-16.

But the fact that he perceives the current First Amendment landscape as chaotic, or ironic, is not what galvanizes Sunstein to propose a theoretical reconfiguration of free speech jurisprudence. It is that for self-described liberals such as Sunstein²⁷⁵ the landscape is politically threatening. The unexpected beneficiaries of recent libertarian free speech jurisprudence potentially force liberals either to abandon "the liberal's commitment to free speech" or to support "unpopular causes." Sunstein's response is to propose a retrenchment of the libertarian tendencies of free speech theory so as to exclude from its coverage some of the unexpected beneficiaries of the last two decades.

The most significant feature of Sunstein's retrenchment, from the perspective of this article, is not the substantive positions he endorses. He would virtually deny constitutional protection to violent pornography,²⁷⁶ to a limited category of hate speech ("fighting words" involving race, color, or creed),²⁷⁷ and to false or misleading commercial advertising.²⁷⁸ None of the previous commentators showed an inclination to protect those expressive activities,²⁷⁹ and support for their protection is overwhelmingly unpopular in the current academic community, at least among persons who define themselves, with Sunstein, as heirs to a liberal tradition of support for free speech.

In addition, Sunstein would permit government regulation of a number of expressive activities, including campaign contributions and expenditures, communications in the securities industry, scientific speech, and electronic broadcasting.²⁸⁰ Deference to government regulation of speech in those areas can fairly said to be responsive to the fear that large corporations and wealthy individuals, traditional bogeymen of

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275. Sunstein associates himself with "the forms of liberalism" associated with "the commitment to 'government by discussion,' " by which he means, in free speech jurisprudence, commitment to the "idea . . . that . . . [l]iberal rights are pervasively democratic," and that "[o]ne of their prime functions is to furnish the preconditions for democratic deliberation." *Id.* at 248 (footnotes omitted).

276. *See id.* at 225.

277. *See id.* at 203-04.

278. *See id.* at 135, 220. I use the phrase "virtually deny" with respect to commercial advertising, violent pornography, and hate speech because Sunstein's approach would not completely exclude those activities from the domain of First Amendment law but rather would classify them as lower value, more regulable activities. *See infra* text accompanying notes 285-92.

279. Even Emerson attempted to exclude "hard-core" or child pornography from the class of protected expressive activities on the ground that it constituted action rather than expression. *See* EMERSON, SYSTEM, *supra* note 176, at 500-02. Emerson's discussion of pornography revealed that he was reacting viscerally against the logic of his own libertarian theories of free speech.

280. *See* SUNSTEIN, *supra* note 272, at 87-88, 99-101, 163-64.

those committed to the bifurcated review project, recently have been getting too much shelter from the First Amendment.

The results Sunstein would reach in current free speech controversies, in short, seem predictable consequences of a belief in an ideal of bifurcated constitutional review and an identification with the tradition of twentieth-century liberal reformist politics in America.²⁸¹ More interesting, from the perspective of this article, is the theoretical apparatus Sunstein proposes as a foundation for reframing free speech cases. That apparatus represents an effort to respond to the severance of freedom from democratic theory in First Amendment jurisprudence by insisting that those premises be reconnected. Sunstein wants free speech jurisprudence once again to insist that only speech intimately connected to the processes of democracy receive full protection — that the only freedom at the core of the First Amendment is democratic freedom. When unpacked, Sunstein's perspective strikingly resembles that of Meiklejohn.

In erecting his theoretical foundations Sunstein employs four related strategies. First, he asserts that, under a "Madisonian" view of the Constitution and the First Amendment, the central purpose of American constitutional government is to further deliberative democracy.²⁸² This means that he shares Meiklejohn's belief that "'political speech' lies at the heart of constitutional concern."²⁸³ But Meiklejohn's insistence that private (nonpolitical) speech was not covered by the First Amendment at all appears problematic to Sunstein, who chooses to "depart from Meiklejohn" at this point.²⁸⁴

Sunstein's conclusion that Meiklejohn's bright-line distinction between public and private speech was unworkable²⁸⁵ precipitates his second strategy. Rather than entirely exclude nonpolitical speech from First Amendment protection, he revives the higher value-lower value categorization, tying it to a "two-tier" approach to free speech cases. Sunstein's choice of the two-tier approach, in which even nonpolitical speech is afforded some level of protection, enables him to incorporate into his theoretical foundations for doctrinal retrenchment in free speech jurisprudence what he characterizes as a "New Deal" approach to constitutional issues. That approach rejected absolutist conceptions of pri-

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281. "With respect to freedom of expression," Sunstein maintains, "I think that American constitutionalism has failed precisely to the extent that it has not taken the New Deal reformation seriously enough." *Id.* at 34.

282. *See id.* at 18.

283. *Id.* at 122, 273 n.2.

284. *See id.*

285. Sunstein notes that Meiklejohn kept progressively expanding the meaning of public or political speech as new difficulties for his interpretation arose. *See id.* at 273.

vate (unregulable) and public (regulable) spheres of activity and recognized that distributions of material and intellectual resources took place whenever the state chose to act or not to act.²⁸⁶ Sunstein proposes an analogous approach to speech issues.

Sunstein's third strategy is to craft a syllogism in which his "deliberative democracy" theory of the First Amendment is linked to his two-tier theory of speech. He argues that just as the New Deal approach to economic issues obliterated the notion of a private sphere immune from governmental regulation, free speech theory can obliterate two comparable notions, that there is a class of private speech in which the First Amendment is not implicated at all, and that there is a class of public speech that the government must necessarily leave unregulated.²⁸⁷

A two-tier approach to speech issues, according to Sunstein, would treat all speech as theoretically regulable, but would establish a category of speech — "political" speech as Sunstein defines it — as presumptively free from regulation, with a very strong burden on government to rebut that presumption. "Nonpolitical" speech would not be completely outside the ambit of First Amendment protection, but the government would bear a less severe burden of justifying its regulatory efforts.²⁸⁸ Thus Sunstein's approach revives the higher value-lower value distinction, but it includes even low value expressions within the ambit of the First Amendment.

In order to develop his two-tier approach, Sunstein concededly needs to treat the distinction between political and nonpolitical speech as meaningful and central to First Amendment analysis. He is well aware that in order to do this he needs to revive Meiklejohn's self-governance rationale as the central justification for freedom of speech, which means undercutting the self-fulfillment rationale. This leads him to his fourth strategy, that of reducing the significance of the value of self-fulfillment, or, in his terms, the "autonomy principle,"²⁸⁹ in free speech theory.

Sunstein suggests that the logic of self-fulfillment "make[s] it difficult or impossible to distinguish . . . among different categories of speech."²⁹⁰ If "we protect speech because people want to talk [or listen]," Sunstein argues, "it is not easy to come up with standards by which to distinguish among different kinds of talk."²⁹¹ And if "we can-

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286. *See id.* at 30-32.

287. *See id.* at 35-38.

288. *See id.* at 37-38, 132-37.

289. *See id.* at 141.

290. *Id.*

291. *Id.*

not come up with such standards," an approach based on self-fulfillment "will not be able to do what a theory of free speech is obliged to do, that is, to make distinctions among different categories of speech."²⁹² So ultimately Sunstein's argument against autonomy becomes more than a justification for his categories of analysis; it becomes an insistence that when there are no standards for determining why some speech is afforded more constitutional protection than others, the very basis for singling out speech for constitutional protection is undermined.

Having explored the strategies Sunstein employs in support of his two-tier approach to First Amendment issues, we are now in a position to locate his perspective in the intellectual history being set forth in this article. Sunstein proposes a retrenchment, a breaking of the libertarian momentum of free speech theory that has emerged in the period encompassing Emerson's *The System of Freedom of Expression* and the unexpected beneficiary cases. He grasps the potential conflict between freedom and democratic theory in free speech theory and seeks to reestablish an inextricable connection between free speech and the idea of democracy in America. In short, he seeks to repair the strains in modernist free speech jurisprudence.

The analytical linchpins of Sunstein's proposed retrenchment — a two-tier approach to free speech cases in which the standard of judicial scrutiny varies and a higher value-lower value distinction between categories of speech that triggers the appropriate level of scrutiny — require that speech tied to deliberative democracy be elevated to a more protected position than other speech. Any other treatment of speech, for Sunstein, raises the spectre of the self-fulfillment rationale run wild, equating freedom with autonomy and severing it from the idea of democracy in America.

With the appearance of Sunstein's proposed retrenchment of free speech theory, which has strong echoes of Meiklejohn, one is tempted to say that the twentieth-century intellectual history of First Amendment jurisprudence shows signs, at the century's close, of doubling back on itself. But the implications of a retrenchment in the libertarian progression of free speech theory may be quite different from what Sunstein may have intended. For although Sunstein openly identifies his re-

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292. *Id.* One could argue, of course, that an "absolutist" view of protection for speech, in which all forms of expression are given constitutional protection, does not diminish the stature of speech. But the problem is that such an approach has never existed: there have always been some forms of speech capable of being suppressed. So there has always been an implicit valuing of the forms of speech given protection. Once those forms become almost limitless, it is not clear what makes them valuable.

trenchment with the Meiklejohn interpretation, the perspective he supplies on free speech issues bears traces not only of Meiklejohn, but of the perspective exhibited by Wigmore in his criticism of Holmes's dissent in *Abrams*. In order to grasp this dimension of Sunstein's retrenchment, we need to take one more look, that of a concluding overview, at the twentieth-century intellectual history of free speech jurisprudence in America.

CONCLUSION: THE DEATH OF FREE SPEECH?

A. *The Modernist Heritage of Free Speech Theory*

Wigmore's position in his critique of Holmes in *Abrams* — that leaflets directed toward workers in a munitions factory during wartime could be treated as the equivalent of what Holmes called "any other overt act we don't like"²⁹³ and suppressed as if they were bombs or any other examples of thuggery — proceeded, we have seen, from the premise that freedom of speech was simply another of the ancient rights and liberties of English-speaking citizens, liberties that could be suppressed if they threatened the state itself. The difference between Wigmore's and Holmes's perspectives toward the sort of speech implicated in *Abrams* was that Wigmore attached no special value to speech that distinguished it from other forms of activity. Holmes, on the other hand, associated "the ultimate good" in the universe with "free trade in ideas" and asserted that such an association was "the theory of the Constitution."²⁹⁴ Holmes was thereby suggesting that cognitive freedom, as embodied in speech, ought to be treated as constitutionally and culturally privileged because it facilitated a search for truth on which rational policymaking ultimately was grounded. That conception of First Amendment freedom was associated, by Chafee, with "the social interest in attainment of truth."²⁹⁵

We have seen that Holmes's and Chafee's implicit definitions of the "meaning" of free speech followed from modernist premises. Thus one way to explain the early and mid-twentieth-century discovery of speech as a central cultural value, and the associated elevation of First Amendment rights to a status of high constitutional significance, is to see them as consequences of the broad acceptance in America of modernist causal explanations of experience.

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293. Holmes made this statement as late as 1918, before writing his dissent in *Abrams*. Letter from Oliver Wendell Holmes Jr. to Harold J. Laski (July 7, 1918) in 1 HOLMES-LASKI LETTERS, *supra* note 63, at 160, 161.

294. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

295. See *supra* text accompanying notes 48-50.

But at the same time we have seen that the modernist-inspired perspective on free speech advanced by Holmes in *Abrams* and synthesized by Chafee in *Freedom of Speech* was by no means orthodoxy in the early twentieth century. On the contrary, the perspective on free speech illustrated by Wigmore's critique, the roots of which we have seen in premodernist theories of causal attribution, exhibited remarkable staying power as an orthodoxy, as it was not displaced until the 1930s. The controlling evaluative standard for subversive activities cases remained bad tendency until that decade, and that standard had its own roots in the orthodox late nineteenth-century perspective embodied in Wigmore's critique of the *Abrams* dissent.

Thus it would be erroneous to assert that the idea of speech being culturally and constitutionally special in America had become entrenched in the first three decades of the twentieth century, although that idea was growing in momentum. It also would be erroneous to claim that the central premises of modernism had become widely internalized in American culture in those decades. Those premises were in the air between 1900 and 1930, especially among progressive intellectuals, but in the realm of constitutional jurisprudence they competed with premodernist premises. *Lochner*, after all, was revived in *Adkins v. Children's Hospital*²⁹⁶ in the 1920s and remained orthodoxy in due process cases until 1937.²⁹⁷

The appearance of Meiklejohn's *Free Speech* in 1948 can be taken as signifying that modernist premises had come to control the orientation of free speech jurisprudence, and that enhanced protection for free speech was the driving force in the bifurcated review project. Meiklejohn's elevation of self-governance to the primary rationale for protecting freedom of speech, his substitution of the town meeting metaphor for the now pejorative marketplace of ideas metaphor, his bright-line distinction between "public" and "private" speech, and his explicit linking of the cultural value of free speech to democratic theory were each signals that the intellectual history of free speech jurisprudence in America had entered another phase. In particular, they were signals that modernist assumptions about the close connections between free speech, a democratic model of politics, and the conditions of modernity — the same assumptions that had driven the intuitive characterization of First Amendment rights as occupying a preferred constitutional position — had become embodied in a self-contained, comprehensive perspective on free speech.

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296. 261 U.S. 525 (1923).

297. See *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins*).

The modernist premises of Meiklejohn's perspective, we have seen, were that in a universe in which humans had come to be thought of as the principal causal agents affecting their destiny, and in a nation whose governmental system presupposed a democratic model of politics, speech was more than just an activity in which Americans participated. The free expression of ideas, channeled along the lines of empirical inquiry and rational policymaking, was a precondition to effective governance in America. Freedom of speech, as the preferred position cases suggested, was an indispensable requirement of democratic theory.

Chafee and Holmes had started with similar premises. But Meiklejohn had developed them into a fullblown interpretation of the First Amendment. That interpretation contained an overriding rationale for protecting speech; an explicit linking of cognitive freedom to democratic theory; an explicit association of enhanced judicial protection for public speech with the bifurcated review project; and, with the legacy of *Lochner* in mind, an analytical formula for including and excluding given categories of expression from First Amendment protection. That formula encapsulated the intuitive judicial efforts, in the preferred position cases, to distinguish high value from low value speech.

Two additional features of the Meiklejohn interpretation, both previously discussed, underscore its modernist dimensions. One was that it was incompatible with the perspective on speech I have associated with premodernist jurisprudential orthodoxy. For Meiklejohn, First Amendment speech rights could never be lined up against state police powers in the fashion of nineteenth-century doctrinal analysis because of their special constitutional and cultural status. The problem with Holmes's clear and present danger standard was that it had echoes of this police power analytic. Meiklejohn assumed that political speech could never pose a clear and present danger to the American government because it was the principal foundation of that government.²⁹⁸ Meiklejohn's category of constitutionally protected speech thus could come to equal what Wigmore called thuggery. Once the premises of the Meiklejohn interpretation were granted, Wigmore's belief that some concededly political expressions nonetheless could be suppressed because they offended the social interest in preserving order, civilized discourse, and morality was necessarily abandoned. Meiklejohn, in fact, had gone well beyond Holmes.²⁹⁹

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298. See MEIKLEJOHN, *supra* note 146, at 89-91.

299. Meiklejohn directed a fair amount of his energy in *Free Speech* to disassociating his perspective from the theory of free speech he ascribed to Holmes, and he in-

The other feature of Meiklejohn's *Free Speech* that signals wide acceptance of the premises of modernist consciousness was Meiklejohn's blithe conviction that his formula for deciding speech cases posed few significant conceptual and practical difficulties. Meiklejohn, and those who followed his interpretation, proceeded as if everyone knew which types of expressions qualified as public or private, higher or lower value speech. Although Meiklejohn progressively extended his category of public expressions, he took as beyond dispute the fundamental distinction between private and public speech and sought to solve particular free speech puzzles, such as the status of literary or artistic expression, within the distinction's parameters.

The progression of free speech jurisprudence from Meiklejohn through Emerson to the unexpected beneficiary cases, however, suggests that the original premises that drove the enshrinement of freedom of speech as a constitutional and cultural value had lost their integrated, self-reinforcing quality. As First Amendment jurisprudence has become increasingly speech protective, freedom as autonomy or self-fulfillment has taken on emotive as well as cognitive dimensions and has separated itself, and come to compete with, freedom as self-governance. And as the assumed naturalness of Meiklejohnian doctrinal categories, which prevented economic rights from taking on the stature of speech rights, has collapsed, an important modernist function of speech-protective First Amendment jurisprudence, that of nourishing and sustaining the bifurcated review project, has been threatened.

These developments may well signify the fracturing of the central premises of modernist American constitutional jurisprudence, premises that helped channel constitutional doctrine³⁰⁰ along the familiar and reassuring paths created by modernist American jurisprudence — the paths of empiricist inquiry and rational policymaking within a democratic model of politics. In the unexpected beneficiary cases, and in other cases, most conspicuously obscenity cases, Meiklejohnian catego-

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cluded in his discussion an extended critique of the clear and present danger standard. See, e.g., *id.* at 70-90.

300. I believe that the judicially deferential treatment of legislation challenged under the Commerce Clause or Due Process Clauses — the other prong of the original bifurcated review project — can also be fruitfully analyzed from the perspective adopted in this article. I am currently pursuing that project and might venture, at this point, that evidence suggests that the elevation of Holmes's 1905 critique of *Lochner* to juristic orthodoxy in Supreme Court due process cases in the late 1930s, and the analogous development of deferential judicial review in Commerce Clause jurisprudence in the same time period, can be closely linked to the transformation of the central premises of modernist consciousness, at least among elite judges and legal commentators, from a marginal and contested cultural status to one of intellectual orthodoxy.

ries of speech have been blurred, and the assumption that eventually either the marketplace of ideas or the processes of self-government will subject expression to empiricist or rationalist constraints appears to have been abandoned. In some of those cases speech, now expanded to include emotive as well as cognitive expressions, appears to be protected simply because it is an embodiment of the feelings or tastes of an individual.

B. *The Shadow of Wigmore: Premodernist Free Speech Theory and Retrenchment*

Sunstein has recognized that if everyone can speak on any subject, not only does no intelligible governing theory of free speech exist, but speech itself has ceased to be regarded as special. Meiklejohn took that proposition as a given and sought to implement it by identifying a category of speech that needed to be given constitutionally protected status in a modern, democratic society, and by protecting only that speech. If the modernist premises that guided Meiklejohn seem as much self-opposing as self-reinforcing, or even potentially unintelligible, perhaps one is left only with the autonomy of individual speakers and listeners.³⁰¹ How, then, does contemporary free speech jurisprudence avoid conferring First Amendment protection on everyone, and thus arguably robbing free speech of its special status in America?

That question tempts Sunstein to revive the Meiklejohn interpretation as a guide for retrenchment. But Meiklejohn's perspective was not formulated in a vacuum. As a historical actor, situated in his own time, Meiklejohn can be said to have stood in the shadow of Wigmore and those who had invested in the premodernist premises of early twentieth-century theoretical orthodoxy in free speech jurisprudence. Meiklejohn, of course, rejected those premises, but he supplanted them with a comparably strongly held set of his own. His conviction that only public speech need be protected, since only that form of speech embodied the

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301. For example, if one treats truth and rationality as ideological, socially constructed, and contingent concepts, one can hardly expect them to channel speech consistently in the direction of wise collective public decisions, at least in Meiklejohn's sense. Thus if wisdom is taken to be the equivalent of short-run, ideologically dependent constructions of current experience, one might as well let everyone speak and count all speech of equal value. Wisdom will emerge anyway, the product not of the inherent cogency of any expression but of a series of predetermined interpretive canons or culturally imposed ideological boundaries. Under such postmodernist conditions one could argue that in America, at least, it is more consistent with egalitarian and antitotalitarian traditions, as well as the text of the Constitution, to let everyone speak on any subject rather than having government powerholders dictate the parameters of protected speech.

special cultural and constitutional status of the First Amendment, was just as confidently maintained as Wigmore's conviction that he and his contemporaries could easily discern the line between speech and thuggery.

What Wigmore and Meiklejohn shared in common, then, was a set of foundational premises that enabled them to know the boundaries between protected and unprotected expression. The premises were radically different, but their assumed foundational status was similar. Alongside that one might compare Justice Harlan's statement in *Cohen v. California* that "we think it is largely because governmental officials cannot make principled distinctions in [the] area [of expression] that the Constitution leaves matters of taste and style so largely to the individual."³⁰²

So neither Sunstein, nor any of us, can wholly restore Meiklejohn's interpretation of the First Amendment because we cannot wholly restore his intellectual and contextual universe. Our foundational premises, if we have any, are not his. Indeed one of the arguably troubling features of the collapse of Meiklejohn's categorization scheme, the progression of free speech libertarianism, and the fragmentation of First Amendment jurisprudence is that it acquaints us to the possibility that no overreaching perspective on free speech issues can be formulated, because there is currently no agreement as to the foundational premises on which such a perspective might be built.

Suppose, then, that First Amendment jurisprudence is destined to be in a fragmented state for at least the balance of this century. Suppose, further, that a group of potentially influential commentators, the retrenchment theorists, are deeply troubled by that possible trend, either because of their ideological distaste for the results in the unexpected beneficiary cases, or because of the threat those cases pose for the project of bifurcated constitutional review, or, more fundamentally, because of their belief in the proposition that when everyone can speak and anything can be said freedom of speech may well lose its special place in American civilization.

Then a retrenchment may be attempted, but it cannot replicate Meiklejohn's universe. It can only take place in the universe of the last years of the twentieth century: a universe in which the foundationalist premises that elevated modernism to a position of influence are, at best, contested. Given our current epistemological climate, what confidence can one have that the foundational premises of Sunstein's retrenchment — that speech associated with deliberative democracy be favored, that a

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302. *Cohen v. California*, 403 U.S. 15, 25 (1971).

two-tier theory of protection for speech be implemented, that autonomy be abandoned as a central First Amendment principle — will be accepted? Each bristles with conceptual and practical difficulties in application, difficulties akin to those that Meiklejohn ignored.³⁰³ Perhaps those difficulties could be solved in the short run if each of us shared Sunstein's commitments to the liberal political agenda of the New Deal and to the accompanying bifurcated review project. But the emergence of unexpected candidates for First Amendment protection, candidates incompatible with the original ideological orientation of bifurcated review, itself suggests that Sunstein's commitments are not universally shared.

Sunstein, doubtless aware that he cannot assume that the foundational premises of his retrenchment approach will be treated as unproblematic, has, we have seen, advanced another justification for modifying the libertarian emphasis of current free speech theory. Here is where I find the shadow of Wigmore lurking most prominently. Sunstein has combined two arguments in his justification. One argument is that libertarian free speech jurisprudence fails sufficiently to recognize that what is special about speech in America is its indispensable connection to democratic deliberation. The other argument is that the progression of libertarian free speech jurisprudence ultimately may become so overprotective of speech as to rob speech of its special constitutional and cultural status.

The two arguments could be combined to reach the conclusion that if one wants to preserve the special status of speech in America, there

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303. To take just one example, how does Sunstein's reformulation of free speech theory solve the problem of hate speech, one of his central concerns? Composed of stereotyping assertions and generalizations, hate speech unmistakably expresses an ideological point of view, and even holds up a vision of a "good society," one that creates a social hierarchy resting on the truth of such generalizations. It is thus clearly political speech and would seem to be speech inviting dialogue and deliberation. Sunstein, however, would not protect at least two forms of hate speech: speech associated with hate crimes, such as the burning of a cross on the property of a black family protected in *R.A.V.*, that is "limited to the exceedingly narrow category of unprotected fighting words," and speech in a college or university that is singled out as "incompatible with [the institution's] educational mission." SUNSTEIN, *supra* note 272, at 192, 203.

Such an approach revives the older, and arguably shaky, *Chaplinsky* categorization of high and low value speech — after *Cohen*, one person's fighting words may now be another's music, and after *R.A.V.* that categorization cannot support viewpoint-discriminatory restrictions on hate speech. It then adds an undefended assertion that the state, as in *R.A.V.*, has a greater interest in suppressing speech that causes anger on the basis of race, color, or creed, than on the basis, say, of gender, sexual preference, size, or age.

One may agree completely with Sunstein's analysis of hate speech cases. The point is simply that his categorization of protected speech seems as capable of being contested as that advanced by Meiklejohn.

seems no reason to give significant constitutional protection to those expressive activities that are taken to be largely unconnected to the democratic governmental process. There also seems ample reason to allow those institutions that allegedly personify democracy and reflect majoritarian views — legislatures — to restrict individual forms of expression if they conclude that the expressions in question bear no reasonable connection to the process of deliberative democracy. Under this approach certain expressions might become candidates for restriction because a majority of the public deemed them so inherently lacking in stature as to not be worth deliberating about.

Treating speech in this fashion bears a striking resemblance to the treatment of speech cases in late nineteenth- and early twentieth-century police power cases, in which, as we have seen, individual constitutional rights, whether implicating expression or not, were subordinated to government interests in restricting them, such as morality, order, and decency. In Wigmore's hands such an approach easily sanctioned a legislative determination that certain kinds of expressive activities — such as those engaged in by the defendants in *Abrams* — exemplified not freedom of speech but freedom of thuggery. An approach that elevates freedom of speech to an advantaged position primarily because it reinforces deliberative democracy claims to be just as capable of identifying what an appropriate subject for deliberation is as Wigmore was capable of knowing when an expression amounted to thuggery.³⁰⁴

C. *The Paradox of Current Free Speech Theory*

The intellectual history set forth in this article helps explain the ways in which the proposed retrenchment of free speech jurisprudence, as exemplified in Sunstein's work, has echoes of both Meiklejohn and Wigmore. Sunstein expresses the hope that many of the discomforting results of progressive libertarianism in First Amendment jurisprudence

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304. Sunstein, of course, is not situated in the same point in time as Wigmore: he advances his theories against the backdrop of a much more speech-protective First Amendment jurisprudence. His two-tier theory of speech appears to include a number of expressions as presumptive candidates for protection that Wigmore might have allowed legislatures categorically to restrict. But the shadow of Wigmore can nonetheless be said to fall upon Sunstein, as it did upon Meiklejohn. For Sunstein's two-tier theory of protection for speech to work smoothly, those implementing it need to have confidence that everyone will be able to discern the boundary between those expressions that implicate deliberative democracy and those that do not, just as Wigmore's contemporaries were able confidently to discern the boundary between speech and thuggery. But that very difficulty in erecting confident boundaries in free speech jurisprudence is arguably what has precipitated the recent explosion of libertarian, unexpected beneficiary decisions.

can be alleviated by a retrenchment premised on narrowing the constitutional and cultural meaning of speech in America. He offers that solution as a guide for the twenty-first century, but the solution also has the potential to restore something like the treatment of speech that predominated before the First Amendment came of age. A retrenchment of free speech jurisprudence in the 1990s thus might bring the century of the First Amendment in America to a close in more than one sense.

A century earlier, speech in America was treated as one of the time-honored liberties of English-speaking peoples. Speech was no more immune from government restrictions than any of those other liberties. That was the very conception of speech that Meiklejohn classified as Fifth Amendment speech and sought to distinguish from the First Amendment, public, unabridgable speech that he argued was indispensably connected to self-governance in a democratic society.

Of course Meiklejohn could sustain his faith that some speech was unabridgable because of his conviction that the category of public speech was easy to discern. Developments since the appearance of *Free Speech* undermined that assumption. As the category of public speech got broader and broader, it became apparent that the expressions of many individuals were being protected not because of their relevance to public debate but because of their connection to the principle of human cognitive and emotive freedom. At that point freedom came to be seen as implicated in some unexpected contexts, and the impulse toward retrenchment began.

Thus the paradox that current free speech theorists are confronting is as follows: If one returns to a First Amendment jurisprudence in which some expressions, by not furthering deliberative democracy or meeting some other inclusionary criterion, are excluded from being candidates for protection, one threatens to revive the categorical apparatus for evaluating speech claims that resulted in speech rights being treated as nothing special in late nineteenth-century America. On the other hand, if one endorses the current libertarian progression of free speech theory, emphasizing the connection between speech and individual autonomy in a pluralistic society, one appears to invite a world in which anyone can talk on any subject; speech thus becomes the equivalent of noise, and free speech theory becomes unintelligible. In neither instance, arguably, is free speech in America continuing to be treated as special, continuing to be invested with the stature that the premises of modernist consciousness conferred upon it.

I share some of the ideological goals of retrenchment theorists, such as desiring a society in which the level of human discourse, and the instincts and attitudes reflected in that discourse, becomes less

coarse and more respectful of others. I also am opposed to some of those goals, such as the project of channeling individual thoughts and expressions into the rubrics of deliberative democracy, rubrics I find either confining or not easily intelligible. I am less disturbed than Sunstein about the momentum of self-fulfillment in First Amendment jurisprudence, and the ideological perspective from which I address free speech issues is less invested in the symbols of the New Deal and the bifurcated review project than his.

But the purpose of this article has not been to offer specific suggestions about the resolution of contemporary First Amendment issues, or to advance any overriding theoretical perspective on free speech. It has been, rather, to place in historical perspective the paradox confronting contemporary commentators on free speech issues, so as to gain some enhanced understanding of the predicament in which those of us who teach and write about the First Amendment at the end of the century in which it came of age find ourselves. The problem of the relationship of hate speech cases to the constitutional and cultural status of free speech in America, with which this article began, is just one symbol of that predicament. Behind it lies a rich, suggestive, and currently troubling intellectual history.