UIC Law Review

Volume 44 | Issue 1 Article 2

Fall 2010

The Transformation of Freedom of Speech: Unsnarling the Twisted Roots of Citizens United v. FEC, 44 J. Marshall L. Rev. 69 (2010)

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THE TRANSFORMATION OF FREEDOM OF SPEECH: UNSNARLING THE TWISTED ROOTS OF *CITIZENS UNITED V. FEC*

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I. INTRODUCTION

The roots of the conflict represented by the positions of the majority and minority opinions in *Citizens United v. FEC*[1] lie hidden–embedded in the debris of a fundamental change in the legal treatment of rights that occurred almost a century ago. The conflict is the product of a basic shift in liberal perspective in reaction to the rise of wealthy and powerful industrial magnates following the Civil War. The intellectual legacy that accompanied this shift resulted from the impact of Progressive thinking that rose to the fore after the War Between the States. This legacy created and left unresolved a philosophical clash between precepts developing out of contemporary and classical liberal thought. While the *Citizens United* case hints at the contours of the theoretical sources of the conflict and gives voice to the practical ramifications of the logical outcomes of these theoretical approaches, it does not identify the conflict and provides no guidance to resolve it.[2]

This intellectual legacy produced two philosophical outlooks bearing on the treatment of speech.[3] Their irreconcilable

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1. Citizens United v. FEC, 130 S. Ct. 876 (2010).

2. One student of the shift in free speech thought, observing the absence of analysis relating to how the accepted doctrine for protecting First Amendment activity pertains to the objective of achieving social equality, has remarked that "[c]ontemporary libertarian theory largely ignores the mixed questions of expression and economics presented by such issues as campaign finance reform and access rights to mass media." MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 2 (1991).

3. As will be seen, one justified uninhibited free speech as instrumental to the overarching public good of facilitating the informed and free process of self-governance. Another justification restricted certain speech in the name of the public good to prevent the disparate impact upon the political process by large agglomerations of individuals or of private wealth. The first, a "marketplace" rationale for free speech that came to provide the starting point for judicial analysis just prior to the 1920s, was essentially a classical liberal individual rights protective paradigm. This free enterprise approach found

differences are illustrated in the *Citizens United* case.[4] As is so often the case in democratic systems, the conflict, distilled down to its essence, balances concerns of social equality versus claims of individual autonomy. How these concerns are expressed within the framework provided by constitutional jurisprudence is what bears examination.

The Supreme Court's "Hillary Tape" split decision was marked by a battle over the question of how to treat election-related speech by corporations.[5] The majority regarded corporate speech, in terms of free speech doctrine, as logically indistinguishable from any other associational speech and entitled to the same protection against government regulatory efforts as any other political speech:

> When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.[6]

The minority cast political speech by corporate entities as posing a gross impediment to the integrity and fairness of the democratic process, and therefore, presenting a proper subject for regulatory restriction.[7] "[T]he Government has a legitimate interest in 'regulat[ing] the substantial aggregations of wealth amassed by the special advantages which go with the corporate form,' . . . . [T]hose aggregations can distort the 'free trade in ideas'

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itself at loggerheads with the very ideological perspective that had spawned it and with the second justification that regarded it as necessary to regulate the social structure to achieve an equalizing of access to the political process and fairness in its function.

4. *Citizens United*, 130 S. Ct. at 876.

5. *Id.*

6. *Id.* at 908. The majority's opinion is hardly anchored in libertarian rhetoric concerning the "inalienable rights" of individuals. *Id.* at 876-917. This would have an awkward application to artificial entities, although these fictitious beings are perceived by the Court as embodiments of the associational rights of individuals, uniting to advance their individual speech interests. The thrust of the opinion justifies free speech in terms of its importance to the electorate: "On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials." *Id.* at 912.

> The Government has "muffle[d] the voices that best represent the most significant segments of the economy." And "the electorate [has been] deprived of information, knowledge and opinion vital to its function." By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.

Id. at 907 (citations omitted).

7. *Id.* at 917-29 (Stevens, J., dissenting).

crucial to candidate elections . . . ."[8]

The foregoing differences in approach that came to a head in *Citizens United* have been brewing in free speech jurisprudence since the beginning of the last century. Recent campaign reform law jurisprudence became a focal point for the conflict and the resultant illogic; and the Supreme Court's treatment of this area has been a growing cause of concern.[9] Considering that the conflict poses an impending crisis of modern libertarian theory, it is surprising that most scholarly discussion of free speech issues entirely misses the point.[10]

On the one hand, the *Citizens United* majority opinion expanded first amendment protection to allow all private voices to participate in the marketplace of ideas, thereby theoretically increasing public access to more perspectives concerning important public issues.[11] On the other hand, the minority decried that approach as skewing the political process unfairly in favor of entrenched powerful interests that tend to have private economic gain rather than the commonweal as their primary motivation in speaking out on issues.[12] The majority's approach is characterized

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8. *Id.* at 955 (Stevens, J., dissenting).

9. GRABER, *supra* note 2, at 197-198. *See generally*, Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in* FEC v. Wisconsin Right to Life, 92 MINN. L. REV. 1064 (2008) (noting that "[s]ince 1976, the Supreme Court's approach to campaign finance law has swung like a pendulum . . . ."); Nathaniel Persily, *Fig Leaves and Tea Leaves in the Supreme Court's Recent Election Law Decisions*, 2008 SUP. CT. REVIEW 89 (2009) (discussing the many recent Supreme Court decisions); Timothy Sandefur, *What Part of 'No Law' Don't You Understand?: Getting Government Out of the Politics Business*, 12 NEXUS 135 (2007) (concluding that political speech is too important to allow the government to interfere with it).

10. GRABER, *supra* note 2, at 13. Graber observes:

> Today, the most important First Amendment issues facing American society concern the ways that disparities in economic resources affect access to the marketplace of ideas. Since 1973, major cases before the Supreme Court have explored the extent to which owners have a constitutional right to control the expressive uses of their holdings. Nevertheless, contemporary civil libertarians, working within the tradition invented by Chafee, continue to place these problems on the outskirts of theory. Such prominent defenders of free speech as Thomas Emerson and Norman Dorsen rarely discuss the constitutional status of campaign finance reforms, corporate speech, and speech rights that depend on access to private resources; for example, they only briefly analyze the right to hand out political leaflets in a privately owned shopping center otherwise held open to the public. Rather, their works and other contemporary discussions of the general theory of the First Amendment continue to emphasize the relationship between speech and lawless conduct, even though there has been little significant repression of this sort over the past twenty years.

Id.

11. *Citizens United*, 130 S. Ct. at 876-917.

12. *Id.* at 917-29.

as distorting the process in numerous ways beyond pluralist consequences contemplated by the Founding Fathers.[13] This ranges from the drowning out of important minority perspectives by means of overwhelming advertising campaigns or monopolization of the media to rendering political candidates beholden to these powerful interests for their financial support. Remarkably, both perspectives have common roots in first amendment jurisprudence.

II. THE FOUNDERS' UNDERSTANDING OF THE RIGHT OF FREEDOM OF SPEECH

A. The Basis for Free Speech Rights

The classical liberal perspective that pervaded the thinking of the Founding Fathers draws from a natural law tradition that conceives of fundamental principles.[14] These principles, familiar to any political philosophy student, accept *a priori* the individual as rational and autonomous and free. Thus, the individual is self-determining and endowed with the quality of reason and it is entirely up to him or her to decide what freedom to retain and what to give up. In other words, the individual inherently and exclusively has the right to determine if and to what form of government to cede power. This is conceived as occurring by means of a hypothetical social contract. By virtue of this contract, the compacting individuals have the right to choose self-government.[15] Self-governance may involve delegating power to representatives to make decisions within the scope of delegated power allowed. Because of the innate desire to expand power that affects all members of mankind, the system must be structured with devices to check any government, once empowered, from exceeding its limited purpose and to prevent factions from trampling on those individual rights not ceded to the State.[16]

Certainly the Founders appreciated the significance of free speech for self-governance. It was intrinsic to their thinking that the process of delegating power in self-governance by electing representatives and making fundamental policy decisions and maintaining accountability requires an informed populace free to discuss issues openly and arrive at reasoned decisions.[17] And the distrust of aspects of pluralism–political parties and emerging

13. *Id.* at 876-917.

14. *See* STEVEN HEYMAN, FREE SPEECH AND HUMAN DIGNITY 7-22 (2008) (discussing the philosophical milieu of the Founders).

15. *See, e.g.*, Gary L. McDowell, *The Explosion and Erosion of Rights*, *in* THE BILL OF RIGHTS IN MODERN AMERICA 18, 18-35 (Bodenhamer and Ely ed., 2008) (analyzing, thoroughly, the history of individual rights and liberties).

16. THE FEDERALIST NO. 10 (James Madison).

17. New York Times v. Sullivan, 376 U.S. 254, 273-277 (1964).

corporate power–as posing a factional threat to the Anti-Federalists' conception of majority rule was certainly expressed.[18] Nevertheless, the bases for the rights to petition and free speech were not tied by the Framers to such instrumental values, but purely and simply to the principled sense of liberties with which all individuals are graced by virtue of god or nature and that were not contracted away.

This perspective on the basis for free speech actually gained little traction with the courts before adoption of the Fourteenth Amendment.[19] In the eyes of the courts, the miniscule claims of rights by individuals failed to compare favorably when weighed against the good of the entire commonwealth.[20] When the Fourteenth Amendment finally became a vehicle to apply individual rights guarantees to the states, the concept had come to present more of a danger for liberal thinkers than a protection.[21] The fundamental rights approach was largely regarded as insulating from reform all manner of commercial conduct that unjustly exploited the gap between powerful and powerless.[22] Liberals declined to dignify and lend validation to a legal analysis perceived as serving as a tool of oppression.[23] The classical liberal approach declined in the constitutional horizon.[24] A glint of it has shone through from time to time,[25] but the Court has largely relied upon justifications for free speech protection based upon its significance for the exercise of popular sovereignty.

A different model would supplant the classical rights-based

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18. The dissent in *Citizens United* details the Founders' concerns about corporations consistent with their distrust of any locus of power in the political structure. *Citizens United*, 130 S. Ct. at 906-907 (Stephens, J., dissenting).

19. U.S. CONST. amend. XIV.

20. DAVID RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS: 1870-1920 23-76 (1997). Judicial hostility to libertarian free speech claims was manifested in the application of the "bad tendency" test, which allowed suppression of any speech tending to have deleterious consequences for the status quo. *Id.*

21. U.S. CONST. amend. XIV.

22. GRABER, *supra* note 2, at 23-49.

23. *Id.*

24. *Id.*

25. These cases generally implicate questions of individual autonomy much more than speech. This was the case in the flag salute case with the following recognition:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943). Justice Douglas' eloquent elicitation of a layered protection of rights premised upon the competing claims of the individual and the State has not been accepted as the rationale for protecting speech. Doe v. Bolton, 410 U.S. 179, 210-213 (1973) (Douglas, J., concurring).

approach. This new approach emphasized functional concerns and de-emphasized the importance of the individual's innate autonomy and liberty. This approach transposed upon free speech legal thought an uneasy dichotomy between private economic activity and speech. This distinction that emerged between commercial conduct and expression failed to provide validation for regulatory impositions upon economic activity that involves political speech.

B. The Common Law

The analytic antecedents of judicial recognition of First Amendment petition and speech protections are traceable to the discourse that emerged into a public sphere as a direct product of the increasing emergence of corporate entities in the mid-seventeenth century.[26] The model for public discourse was set by the structured private discussions of corporate shareholders characterized by civility and responsible citizen self-governance.[27] The *ancien regime* declined and, in order to gain funds and allies to stave off the grasping nobles, the king increasingly relinquished power in the form of corporate charters to the rising bourgeoisie.[28] As a result, the standard of reasoned discourse as an essential aspect of self-governance developed in corporate townships throughout England.[29] Access to this process was not limited by ancient notions of rank, but by more functional considerations of the bourgeoisie, such as characteristics like knowledge, judgment, and decorum compatible with serving corporate objectives. The significance attached to public discourse involved departing from ancient dictates of privilege and secrecy.[30] Instrumental to the rise of a new public sphere between the implacable authority of the king and the domestic sphere were the appearance of the printing press and the novel importance given an associational form–coffeehouses, salons, and public meeting places where private

26. The development of the impersonal and fictional entity of the corporation was an awkward anomaly to the emergent western legal emphasis upon personal responsibility. CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 11-18 (1975); Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 452 (1972).

27. *See generally* Phil Withington, *Public Discourse, Corporate Citizenship, and State Formation*, 112 AM. HIST. REV. 1016 (2007) (discussing "the relationship between public discourse and corporate citizenship in early modern England").

28. *See* JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 1-26 (1989) (titling Chapter 1: "Introduction: Preliminary Demarcation of a Type of Bourgeois Public Sphere").

29. *Id.*

30. *Id.*

citizens could freely discuss public affairs.[31]

As a result of these social innovations, it became accepted practice to seek to appeal to public opinion for acceptance of a particular point of view on an issue.[32] This airing of points of view emerged as a central feature of the political process and was conceived, not merely as functionally self-validating, but as having a protected place in the emerging liberal conception of the body politic. The development of the normative sense of public authority–imbuing public opinion with unprecedented power–that emerged distinct from the sovereign's power in the public sphere, was the precursor to the democratic political thought of Locke, Montesquieu, and others, and ultimately to the modern liberal State.[33] This development is where one finds the genesis of the concept of a "marketplace of ideas."[34] Out of the nascent public sphere emerged the idea that public opinion, apart from raw, positivistic manifestation of power by the king, was the source of legitimate authority. This model, spawned from corporate prerogatives, is one of a rational process of opinions competing for acceptance against rival appeals in a free and open process of public debate and is the seminal concept underlying the logical tie relating public discourse to governance that would later come to provide the primary rationale for judicial recognition of first amendment protections.

The scholarship of Leonard Levy has enlightened us as to the limited understanding accorded the meaning of freedom of speech at the time the Bill of Rights was ratified.[35] This original understanding of freedom of speech left it to the states to individually determine the extent to which citizens were free to speak[36] and, far from establishing an absolute freedom from federal restrictions, merely accepted the common law understanding. Specifically, this was understood to preclude prior restraints, but not to exempt speakers from liability for seditious libel and other consequences for their speech.[37]

Levy, although later acknowledging that a vigorous press was

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31. *Id.*

32. *Id.*

33. *See generally* DAVID ZARET, ORIGINS OF DEMOCRATIC CULTURE: PRINTING, PETITIONS, AND THE PUBLIC SPHERE IN EARLY-MODERN ENGLAND (2000) (discussing the historical origins of printing and printed communication and their effect on public discourse in England).

34. *See id.* (discussing the inception of public discourse).

35. LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 176-248 (1960) [hereinafter LEVY 1]; LEONARD LEVY, EMERGENCE OF A FREE PRESS 220-81 (1985) [hereinafter LEVY 2].

36. Barron v. Baltimore, 32 U.S. 243, 243 (1833).

37. LEVY 1, *supra* note 35, at 1-17; LEVY 2, *supra* note 35, at 309-49.

accorded significant leeway,[38] explained that the Framers of the Constitution and the Bill of Rights thought of freedom of speech in terms of the common law understanding articulated by Sir William Blackstone, whose Commentaries stated the English common law and effectively transmitted this understanding to the colonies.[39] Blackstone's statement on the colonial concept of free speech did not entail freedom from liability, only freedom from prior restraint:

> The liberty of the press is indeed essential to the nature of a free State: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.[40]

He distinguished between prior restraint and subsequent punishment when he wrote:

> The liberty of the press . . . consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published . . . . [T]o subject the press to the restrictive power of a licensor is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty.[41]

The common law understanding represented in the First Amendment reference to "freedom of speech" articulated by Blackstone did not include statements that were "blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels."[42] The speaker could still be punished or held civilly liable

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38. This has been explained as a "disconnect" between the official statement of the law and its actual application. Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 785 (2008).

39. LEVY 2, *supra* note 35, at 12-13. Another aspect of the common law understanding, not pertinent here, is reflected in the colonial departure in the Alien and Sedition Act from English law by providing that truth in speech should be a defense. HEYMAN, *supra* note 14, at 10-11. David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97, 122, 146 (1982).

40. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 150-152 (reprint 1992).

41. *Id.*

42. *Id.*

for all sorts of speech, including seditious statements.[43]

How did we get from the foregoing common law understanding of free speech rights to the more protective understanding and the conflict represented by *Citizens United*? Today, the first amendment is applied to the states as well as the federal government and is regarded as insulating citizens from more than prior restraint, including what were regarded at common law as seditious statements, blasphemy, immoral, and schismatical remarks. How was the Court's understanding of freedom of speech so tremendously transformed?

C. Peeling the Layers of the Onion

Tracing the evolution of First Amendment doctrine involves analyzing and understanding the influence of significant historic events, intellectual trends, and the force of prominent legal thinkers coalescing within the framework of the law. We will start by examining significant legal developments that impacted judicial treatment of rights, including free speech.

After the Civil War, the Fourteenth, Fifteenth, and Sixteenth Amendments were ratified (1868).[44] These amendments were designed primarily to protect blacks freed from slavery in the southern states.[45] But by their terms they also protected white Republicans, carpetbaggers, Catholics, Jews, etc. In addition to specifying that a citizen is anyone born or naturalized in the United States, the Fourteenth Amendment protected persons or citizens with three clauses: (1) The Privileges or Immunities Clause; (2) The Due Process Clause, and (3) The Equal Protection Clause.[46] The Privileges or Immunities Clause sought to extend basic federally recognized civil rights protection to citizens vis-a-vis the states.[47] It would have extended the protections of the First Amendment, prohibiting not merely Congress, but state government agents as well, from restricting First Amendment rights. Not only does the plain language of the Privileges or Immunities Clause have this import, but the history of the amendment makes plain that its objective was to impose the

43. Levy explains that the colonial understanding was that protection was afforded the speaker in the form of jury nullification as illustrated by the famous 1735 case of John Peter Zenger in which the jury disregarded the court's instruction in the law to find the publisher not guilty of seditious libel. LEVY 2, *supra* note 35, at 37-47, 129-30. The obvious problem with this method of protection is that it only affords protection when the jury is receptive to the speaker's message. The unpopular speaker who espouses views not appreciated by the jury would not fare as well as Zenger.

44. U.S. CONST. amends. XIV-XVI.

45. *Id.*

46. U.S. CONST. amend. XIV, § 1.

47. *See id.* (noting "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

federally adopted civil rights upon the states.[48]

But with *The Slaughter-House Cases*,[49] the Supreme Court commenced the process of gutting the Privileges or Immunities Clause.[50] Although the Court's ruling–upholding the governmental police power to regulate slaughterhouse practices that posed a plain public health hazard[51]–hardly required it to do so, the Court went out of its way (in rejecting the butchers' claim that the regulations infringed their constitutional right to contract) to also find that the Privileges or Immunities Clause merely (and redundantly) covered the privileges and immunities of national citizenship (such affairs as are the province of the federal government, such as the right to travel amongst the states and to be protected on the high seas).[52] The Court rejected the argument that the Fourteenth Amendment extended the protection of the Bill of Rights to all state citizens and treated it as limited to protecting and redressing the suffering of former slaves.[53]

For those, like the members of the increasingly powerful Progressive movement, seeking some mechanism to reform free market excesses such as the problem with New Orleans' slaughterhouses, the message was clear: Legislative efforts to regulate private conduct that harmed the commonwealth were having some effect. But efforts to obtain judicial support of civil rights were being given short shrift. The court process was not going to provide the answer the Progressives sought to rein in industrialists' gluttony and improve the conditions of the downtrodden. Government regulation seemed to provide the path to success.

The *Cruikshank*[54] case finished the job of gutting the Privileges or Immunities Clause by explicitly holding that it did not incorporate the First and Second Amendments as to the states.[55] Only later would the Court seek to replace the guts of the Privileges or Immunities Clause by developing the oxymoronic

48. Leslie Friedman Goldstein, *The Second Amendment, the Slaughterhouse Cases (1873), United States v. Cruikshank (1876)*, 1 ALB. GOV'T L. REV. 365, 374-377 (2008).

49. The Slaughter House Cases, 83 U.S. 36 (1872).

50. Randy E. Barnett, *Foreword: What's So Wicked About* Lochner*?*, 1 N.Y.U. J. L. & LIBERTY 325, 331-32 (2005).

51. *The Slaughter House Cases*, 83 U.S. at 36. New Orleans slaughterhouses were dumping offal into the waterways causing serious health and sanitation problems. RONALD M. LABBE AND JONATHAN LURIE, THE SLAUGHTERHOUSE CASES 1-16 (2003). Louisiana responded by establishing a slaughterhouse monopoly to address the need for sanitation reform. *Id.*

52. *Id.* at 209-10, 216-20, 225, 228 n.63.

53. *The Slaughter House Cases*, 83 U.S. at 36.

54. United States v. Cruikshank, 92 U.S. 542 (1876).

55. Goldstein, *supra* note 48, at 369.

substantive due process doctrine.[56] That doctrine awkwardly sought to achieve the same result that ought to have been accomplished by the Privileges or Immunities Clause by means of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[57] Because these clauses were not designed to accomplish the conferring of substantive federal rights to state citizens, their application has proved inadequate as a means of doing so. One scholar has described the awkwardness as follows:

> As a result of the Slaughter-House Cases, then, the entire Fourteenth Amendment was distorted as the Due Process and Equal Protection Clauses were stretched beyond their original meaning to restore a portion of the original meaning of the Privileges or Immunities Clause. Consequently, the use of the Due Process Clause in this manner has been vulnerable to historical claims of illegitimacy from its inception during the Progressive era until today. Not only has this shift in meaning undermined the legitimacy of protecting the rights of individuals from violation by state governments, it has also become a potent weapon against the practice of originalist constitutional interpretation. To the extent that distorting the Due Process and Equal Protection Clauses in this way is thought to be morally desirable, indeed essential, the moral imperative of this distortion provides a powerful argument against adhering to what is made to look like a morally inferior original meaning.[58]

The upshot of *The Slaughterhouse Cases* and *Cruikshank* was that an individual rights-based First Amendment jurisprudence that might have flowered prior to World War I did not. And by the time the Great War rolled around, the surrounding nationalistic fervor presented a poor climate for constitutional rights challenges to the new wartime federal statutes broadly targeting anti-authoritarian activity.

David Rabban's study of the First Amendment[59] takes issue with the idea that national concern with the right to free speech was stagnant following the expiration of the Sedition Act of 1798 until the 1917 Espionage Act and 1918 Sedition Act were enacted to suppress opposition to the First World War.[60] Rabban reveals

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56. James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 318-19 (1999); GRABER, *supra* note 2, at 35-36.

57. Barnett, *supra* note 50, at 331-32.

58. *Id.* at 332. Barnett, like many scholars and some Supreme Court Justices, would like to see *The Slaughter-House Cases* reconsidered and reversed. *Id.*

59. *See generally* RABBAN, *supra* note 20 (discussing judicial hostility to radical, libertarian speech proponents prior to World War I).

60. *Id. See also* MICHAEL K. CURTIS, FREE SPEECH "THE PEOPLE'S DARLING PRIVILEGE:" STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 2-7 (Neal Devins ed., 2000) (questioning the freedom to challenge anti-war protests during the Civil War). In his book, Curtis focuses on struggles for

that there were numerous controversies surrounding the social debate preceding the heavy-handed suppression that occurred during WWI.[61] The bitter opposition to the Civil War pitted agitators against government suppression.[62] Activists throughout the labor movement, in particular the International Workers of the World (IWW or Wobblies), pressed the limits of suppression and the issue of the right to free speech.[63]

In 1902, radicals founded the Free Speech League to combat legislation restricting the rights of anarchists to promote their views in the wake of President McKinley's assassination by an anarchist.[64] The 1873 Comstock Act inspired opposition both in the political arena and the courts. Abolitionist activity[65] and the suffrage movement[66] were also sources of controversy over the extent of free speech rights. The struggle to repeal prohibition was perceived as a battle for liberty—a question of individual autonomy akin to free speech. In spite of a repressive culture and a judiciary that remained unreceptive to the claim of a right to dissent, these sources of social discontent made headway in impressing the concept that government could not prevent unpopular speech into the public consciousness.

What characterized the justification for free speech prior to the twentieth century remained the natural rights, social contract rhetoric of the revolutionary era of the Founders. Free speech, like other individual rights involving autonomous acts that caused no physical harm to other individuals, was solidly propped on both universal principles and the literal language of the Bill of Rights, which was now applicable to the states. This was an analysis of the First Amendment steeped in Lockean natural law notions of individual autonomy and liberty. It had the potential to flower beyond its restricted common law understanding—to embrace an understanding that precluded government from restricting or

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freedom of speech during the time period from 1791 to 1868. *Id.* He analyzes: (a) the controversy surrounding the 1798 Sedition Act and the question of whether criticism of elected officials would have been protected speech, (b) the battle against slavery and the question of freedom to challenge a perceived social injustice, and (c) and the controversy over anti-war protests during the Civil War. *Id.* at 52-79, 117-94.

61. *See* RABBAN, *supra* note 20, at 77-128 (dedicating an entire chapter to the IWW free speech fights).

62. Paul Finkelman, *Civil Liberties and Civil War: The Great Emancipator as Civil Libertarian*, 91 MICH. L. REV. 1353, 1365-69 (1993).

63. *See* Bradley C. Bobertz, *The Brandeis Gambit: The Making of America's "First Freedom," 1909-1931*, 40 WM. & MARY L. REV. 557, 560-67 (1999) (discussing the IWW organizers).

64. CHRISTOPHER M. FINAN, FROM THE PALMER RAIDS TO THE PATRIOT ACT 6 (2007).

65. CURTIS, *supra* note 60, at 155-93.

66. ELEANOR FLEXNER & ELLEN FITZPATRICK, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES 241-68 (1996).

penalizing speech—by the sheer force of the extension of its logic. But the courts did not take the opportunity to embrace this approach.

Another analytic construct rose to prominence and was received with open arms instead; the perspective that emerged in the early twentieth century was functionalist, emphasizing the importance of free speech as a means to the end of achieving the common good.[67] The Progressives, who ultimately would press this approach in the courts, consciously rejected the principles of the Founders in favor of an organic perspective on the individual's place in the social order[68] and an unflagging faith that science applied by bureaucrats should be the solution to social inequity.[69] The following section identifies and traces the effect of the significant forces responsible for this shift.

III. THE SHIFT TO A NEW LIBERAL CONCEPTION OF FREEDOM OF SPEECH

A. The Progressive Movement

The influence of the Progressive movement permanently altered liberal conceptions regarding issues of freedom and individual rights. The classical liberal emphasis upon private property rights was left behind. The Progressives recognized the glaring disparity between the classes that was a product of an unrestrained treatment of individual autonomy. The old world aristocratic distinctions had been replaced by a new hierarchy in which the nouveau riche were far more rapacious and were no longer bound by the sense of moral obligation that prevented excesses under the old regime. A key device for increasing private wealth to the detriment of workers and others was the proliferating corporation.[70]

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67. GRABER, *supra* note 2, at 2, 17-45.

68. They would have accepted Rousseau's articulation of freedom over that of John Locke. *Id.*

69. *See generally* THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE: TRANSFORMING THE AMERICAN REGIME (John Marini & Ken Masugi eds., 2005) (explaining the impact of the Progressive movement). The Progressives emphasized the science of Darwin as revealing a dynamic process of social change throughout history. The emerging field of sociology captured the Progressive imagination as well, and the emphasis upon society as a biological entity in which individuals were interdependent organs supplanted the Founders' emphasis upon the individual. *Id.* The notion that the individual was paramount was rejected as antiquated in favor of a conception that freedom, far from being inherent, is something that exists by virtue of society and flows from the State. *Id.* From this perspective, the individual stood in the path of social reform and, therefore, of greater freedom. *Id.*

70. *Citizens United*, 130 S. Ct. at 876. Both members of the majority and the minority in *Citizens United* recognized the explosive growth after the turn

The Progressive movement arose from the ashes of the Populist movement, a movement concerned with agrarian issues. Paradoxically, the Progressives were composed primarily of members of the middle class, yet sought protection for immigrants and laborers. The general welfare was the movement's primary concern. Initially, free speech did not really integrate into Progressive designs for addressing this concern.[71] In fact it could tend to run contrary to Progressive objectives where it was employed to oppose Progressive notions of the common good. Secondary considerations, such as individual interests, that stood in the way of a legislative determination should give way. This inclination to discount individual rights in the face of congressional, administrative, or judicial determinations of the common good found judicial expression as the "bad tendency" test.[72]

The Progressives valued diversity as instrumental to achieving a unified polity. To the extent that this entailed open discussion of disparate views as a process to finding common ground, this meshed well with certain key free speech supportive rhetoric.[73] But the major motivation for Progressive support of free speech, given impetus by the success of muckraking journalism, was that as a practical matter speaking out against social injustice was often the best means of effecting change.[74]

A growing perception of industrialists' dissipation brought concern that a far greater threat to human freedom was posed by private forces than by government. The Progressives attacked the notion that anyone had the right as an individual to relentlessly accumulate wealth without regard for the damage done to others—to society. It was one thing to posit that everyone had this opportunity and was protected equally in this right, but the reality was that a tremendous inequality separated a privileged class composed of wealthy and powerful individuals and corporations from a class of laborers and the poor who were exploited and unprotected from the ravages of those controlling the reins of power in society.[75] The Progressives took to heart the impact this had upon the meaning of freedom.[76]

For the Progressives, the system created by the Founders had

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of the century of the use of fictitious entities developing from the English device—the Charter. *Id.*

71. GRABER, *supra* note 2, at 11.

72. *Id.* at 84-85. "If a doctrine had some tendency to cause social evils, then the people had the constitutional right to forbid its advocacy." *Id.* at 85.

73. RABBAN, *supra* note 20, at 3.

74. *See generally* JOHN M. HARRISON, MUCKRAKING: PAST, PRESENT AND FUTURE (Harry H. Stein ed., 1973) (examining muckraking from the early twentieth century to the present).

75. CURTIS, *supra* note 60, at 423-25.

76. *Id.*

produced grave injustice and needed to be overhauled to equalize opportunity so that everyone might enjoy meaningful freedom. They pointedly addressed the peril to individual freedom posed by a conception of individual liberty that permitted the powerful to run roughshod over the powerless as a conception of freedom in the abstract only.[77] It was illusory[78] for most persons who were reduced to a meager existence of toiling endlessly to just put food on the table and precluded from real opportunities by the avarice of members of a small, exploitative class.[79] In reality, only the rich and powerful could enjoy freedom. The equal right to pursue the American dream was beside the point for those unequally deprived of real opportunity to exercise the right.

The impact of the Progressive movement upon legal thinking was profound. It tremendously affected how courts treat individual rights claims, including free speech. For reformist illuminati, the importance of speech was not premised upon the sanctity of individual rights, but upon its usefulness in facilitating positive change for mankind.[80] As distinguished from the Founders' treatment of the right as something government may not interfere with, the Progressives lent it no intrinsic positive value. Its value as a force for positive change meant that it was essential to regulate it to serve this all-important social purpose. Regulation to achieve social good entailed assuring equality of influence for the voters and financial equalization for candidates and ballot measure supporters.[81] This perspective found its way into legal analysis and has pervaded First Amendment reasoning for almost a century. It was given voice in legislation enacted to address perceived inequities in campaign finance practices. It is this functional approach that we find wholeheartedly articulated by the dissent in *Citizens United,* but only halfheartedly by the majority.[82]

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77. *See* GRABER, *supra* note 2, at 53-65 (discussing theories related to the New Libertarians).

78. *Id.*

79. *Id.*

80. The Progressives regarded the legal process very much in the manner Oliver Wendell Holmes did. *See* discussion *infra* Part III.E-F (analyzing the Progressive movement). This Realist bent meant that a broad social agenda recognized by the Legislature and giving force to significant social needs should override private rights concerns. *Id.* Thus, the Progressives, like the Wobblies, initially considered free speech as a means to an end—achieving improved working conditions and other social reform. Bobertz, *supra* note 63, at 562.

81. Tiffany R. Jones, *Campaign Finance Reform: The Progressive Reconstruction of Free Speech, in* THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE: TRANSFORMING THE AMERICAN REGIME 321-46 (John Marini & Ken Masugi eds., 2005).

82. The majority in *Citizens United* accepts the functional aspect of speech in terms of its supreme importance for the political process of self-governance.

For a number of reasons, other than those already elaborated, Progressives were not inclined to look to the courts to advance their cause.[83] The Progressive movement, like the IWW, was internationalist in orientation.[84] As such, the Progressives were not concerned with elucidating a rights theory based upon an analysis derived from the legal documents legitimizing a single national sovereign order.[85] Their principles derived from a much broader understanding than the Constitution.[86]

The Progressives regarded government as a proper source of policy for regulatory reform and equalization of inequities in the world. Conversely, the courts were ill-equipped to engage in this evaluation.[87] As a practical matter, at this point the courts gave short shrift to the free speech claims raised by the Wobblies, anarchists and others, and it appeared Panglossian, to hold out hope for legal cognizance of a speech protective outlook. Moreover, the courts relied upon Constitutional rights to consistently rule counter to Progressive efforts, utilizing legislation to curtail economic abuses by private forces in the economic sphere. The progress Progressives made in the courts after enactment of the Interstate Commerce Clause toward extending State regulatory power over businesses was eroded by a series of judicial decisions commencing in the 1890s.[88] Judicial cognizance of a rights-based

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Citizens United, 130 S. Ct. at 886-917. But the majority rejects the idea that the government may intercede to ensure that the process works fairly to ensure the common good. *Id.* Contrary to Progressive principles, it leaves the process to be self-regulating. *See* GRABER, *supra* note 2, at 48 (The classical libertarian free speech proponents fulminating their individual rights perspective after the Civil War were similarly disposed toward holding contractual relations to be free from government interference.).

83. *See* discussion *supra* Part III.A.

84. *See* JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 155-208 (2007) (discussing dominant Progressive figures in the transformation of twentieth century American rights consciousness).

85. *Id.*

86. Until at least the mid-1920s, civil libertarians generally justified their defense of political speech by reference to social justice and the broader good, as opposed to individual rights. When they did speak about rights, they emphasized that true "civil liberty" entailed a positive right to engage in government as social and economic equals—not simply a negative right against interference with private behavior (Graber 1991). In other words, for much of the 1920s, civil liberties still meant "freedom to" (participate in government, bargain collectively, protest governmental abuses) rather than "freedom from" (centralized government tyranny).

Laura Weinrib, *From Public Interest to Private Rights: Free Speech, Liberal Individualism, and the Making of Modern Tort Law*, 34 LAW & SOC. INQUIRY 187, 201 (2009).

87. *See id.* at 210 (noting many civil libertarians who believed that the courts lacked the information and expertise to engage in this evaluation).

88. Arnold M. Paul, *Legal Progressivism, the Courts, and the Crisis of the 1890s*, 83 BUS. HIST. REV. 495, 498-500 (1959). The courts in the 1890s dealt

theory appeared to require acceptance of *Lochner*-based recognition of the economic right of the powerful to exploit the poor and working class and to utilize that freedom equipped with ample wealth to make speech an effective weapon to counter Progressive goals.[89]

Recognition of rights, therefore, did not necessarily work to the advantage of the downtrodden and could easily inure to the advantage of powerful forces opposing Progressive objectives. One scholar observed the double-edge sword this presented and indicated:

> During the 1920s one could advocate civil liberties without jeopardizing Progressive ideals in any significant way. Conservative beneficiaries of civil libertarian protection during that decade, like the Ku Klux Klan in Boston, were marginal actors who posed no real threat to Progressive change. In the 1930s, however, as the forces of government allied with labor in their struggle against employers, defending civil liberties (for example, Henry Ford's right to distribute antiunion literature without interference from the National Labor Relations Board) often meant alienating the Left. For the first time, pro-business, antistate conservatives appreciated the conservative implications of free speech individualism.[90]

There was seemingly sound reason for Progressives to decry and to seek to counter this perilous reliance upon constitutional rights. Consequently, the Progressives looked to legislative and administrative branches of government to advance their objectives, including protecting speech rights.[91] They perceived government as an ally in this endeavor.[92]

For the Progressives identifying the enemy was easy. At the turn of the century widespread recognition of the excesses of private power and corruption were prevalent. Grant McConnell observed that muckrakers exposed corruption throughout society: "a long list of individuals and institutions had been treated to muckraking exposure: Carnegie, Schwab, Morgan, Vanderbilt, Rockefeller, Armour, Swift, Harriman, Astor, grain exchanges, oil, sugar, railroads, tobacco, packinghouses, banks, colleges, churches, the press, labor unions, cities, states, and the federal

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brutal blows to two of Progressivism's main agendas—destruction or close control of the trusts and taxation of the large incomes. *Id.*

89. Bobertz, *supra* note 63, at 587.

90. Weinrib, *supra* note 86, at 203.

91. *Id.* at 201. Finan also describes how Progressives, like Roger Baldwin, would seek to work with the War Department to help conscientious objectors and to promote free speech goals. FINAN, *supra* note 64, at 20, 24, 44-53. To modern day civil libertarians this is like expecting help from the enemy. It seems bizarrely akin to asking the devil to turn down the heat in Hades so one can make ice cream.

92. *See* Weinrib, *supra* note 86, at 201 (noting that the Progressives utilized the government to further their objectives).

government."[93] The Progressive movement challenged private power and countered it with a vision of the public good. But identifying the public good was not as simple as identifying the problems with society.[94] McConnell recognizes this as the key failure of the Progressive movement.[95] The definition of the public interest was lacking and the identification of what authority should implement it was uncertain as well. This failure was evident with respect to Progressive efforts to protect free speech.

Progressive efforts turned to the government to regulate commercial activity in order to provide citizens with the resources and independence necessary to enjoy freedom, including the effective exercise of their free speech rights.[96] But the Legislature would betray the trust the Progressives invested in it to promote the common good by passing the Sedition Act in 1917 and with conscription policies that treated conscientious objectors harshly.

Regulatory agencies similarly dashed Progressive hopes by serving to suppress speech regarded as benefiting the common good. The interwar Progressives looked to bureaucratic expertise to engineer appropriate mechanisms to address social injustice and problems. Regulatory agencies were perceived as eminently suited to scientifically carry out the public will and to effectively counter instances of majoritarian excess.[97] But disillusionment with regulatory mechanisms grew as practice betrayed these grand expectations. This became evident in the areas of government regulation of matters of private morality and personal taste–such as birth control, art, broadcasting, education, and obscenity. Paradoxically, the Progressives began to recognize regulatory agencies as a threat to freedom and became wary of the growth of administrative power.[98]

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93. GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 34 (1966).

94. The Progressives' main themes were to: (1) reign in or abolish trusts, (2) regulate railroads and other public-service corporations, (3) protect workers from unconscionable employers, and (4) impose both income and inheritance taxes on the wealthy. Paul, *supra* note 88, at 496.

95. McConnell observes:

> But in the transformation of the movement from one against evil to one for good difficulties arose which the old righteous formulas of denunciation would not resolve. What was "the greatest good of the greatest number in the long run?" How should it be recognized? Who should determine "the highest use?" Antipathy to private power was no guide to the exercise of public power. Worst of all, a definition of positive goals did not automatically derive from the denial of private goals. The one was not the opposite of the other; virtue was not enough.

MCCONNELL, *supra* note 93, at 46.

96. *See supra* notes 91-92 and accompanying text (discussing the Progressives' relationship with the government).

97. Weinrib, *supra* note 86, at 212.

98. *Id.* at 213.

Reluctantly, Progressives would turn from statism to the courts and make headway in getting the Supreme Court to accept a functional approach to speech as serving the social good in terms of supplying the "marketplace of ideas" and facilitating the public process of arriving at the "truth." But, in doing so, the Progressives accepted the double-edged sword. They were picking up a weapon that might also be wielded by those agglomerations of power the Progressives regarded as antithetical to the public good.

Another development forestalled harm to Progressive ideals from that side of the blade. Headway was made in getting the Court to extend deference to legislative evaluations of the need for economic regulations.[99] As will be seen, while this served in the form of campaign regulations to limit corporate entities for decades from using their economic clout to sway the electoral process, the logical flaw ultimately would surface: Limiting speech by certain associations was at odds with its functional justification. Speech—and this includes spending money to speak—even by large, fictitious entities representing numerous individuals, could not be neatly relegated to the category of economic regulations. The logic was irrefutable that keeping certain private speech from the citizenry—no matter what the source—in keeping with the theory, deprived the public of either the "truth" or information to aid it in discerning the "truth." Such limitations, therefore, did not comport with a vision of speech as an overarching social good—an essential component of self-governance.

B. The ACLU

The American Civil Liberties Union (ACLU), although of Progressive ideological origin, due to historic developments came to pragmatically embrace an individualistic rights-based rhetoric.[100] Ironically, this happened in order to achieve objectives opposed to the concept of such individualistic constitutional protections.

The American Union Against Militarism (AUAM) was organized, by Crystal Eastman and others, to pursue an internationalist, pacifist program.[101] America's entry into the First World War, the resurrection of the Alien and Sedition Acts, and accompanying paranoia and militarism forced Progressive organizations to reassess how they could accomplish their

99. This emerged from the most famous footnote in judicial history, which provided the seminal analysis behind the distinction between the rational basis standard and the protective strict scrutiny standard applicable to fundamental rights. United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938).

100. Weinrib, *supra* note 86, at 193.

101. *Id.* at 193-94.

objectives in a climate severely opposed to any activity that threatened the war effort.[102] In 1917, Roger Baldwin, a young pacifist who was highly connected and credentialed, volunteered his services to Eastman, who was at that time executive secretary of the AUAM.[103] The war resulted in the AUAM being bombarded with requests for assistance from conscientious objectors seeking to avoid the draft. Baldwin worked with other pacifist organizations to form the Bureau for Conscientious Objectors (BCO), which became a division of the AUAM.[104]

At this point, a number of factors can be cited as contributing to a shift in organizational focus away from an internationalist theme and toward domestic rights issues. Baldwin did not share Eastman's internationalist commitment.[105] Efforts to cooperate with and enlist government agents in protecting conscientious objectors flopped badly.[106] The AUAM's pacifist and internationalist agendas came under fire as disloyal in the hostile and suspicious political climate.[107] Baldwin, who came to head the organization when Eastman became ill, channeled efforts toward domestic rights issues. The political expediency of guising protection of those opposing the war as a neutral policy of protecting the civil liberties of all Americans became apparent as a question of organizational survival.[108] As a result, the BCO was renamed the Civil Liberties Bureau in the hope that this would prove more acceptable to government critics.[109] This did not succeed and the AUAM board severed ties with the Civil Liberties Bureau, which in 1917 took on the new name of the National Civil Liberties Bureau (NCLB) and would in 1920 be renamed the

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102. *Id.* at 191-96.

103. FINAN, *supra* note 64, at 19.

104. *Id.* at 20.

105. WITT, *supra* note 84, at 155, 160, 206.

106. Finan describes Baldwin's misplaced confidence in assuming that government agents would be receptive to protecting loyal, patriotic draft resisters:

> He felt sure that he would be able to influence high Washington officials. Many of them were wellborn like him, and not a few of them were former Harvard classmates. The Wilson administration also included men like Secretary of War Newton Baker, who had been leaders in the reform movement. Baldwin assumed that he shared certain values with these officials; certainly no one wanted to see conscientious objectors abused, and everyone agreed on the importance of free speech. He did everything he could to assure them that he wanted to cooperate with the government in resolving the problems created by the draft . . . . Baldwin was certain that breeding, contacts, and public relations would go a long way toward minimizing wartime repression.

FINAN, *supra* note 64, at 20.

107. *Id.* at 20-21; Weinrib, *supra* note 86, at 193.

108. FINAN, *supra* note 64, at 21.

109. *Id.*

ACLU.

The effect of this transition was to reshape the organizational image from one pursuing a suspect agenda of internationalist governance to a sanitized and unassailable one dedicated to neutrally protecting American rights.[110] An inevitable consequence of this reformulation was that free speech, which had previously been regarded as of functional and secondary significance to the greater objective of achieving the social good, was resituated and enshrined as the organization's primary goal and came to be defended and promoted as a good in and of itself.

Progressive agendas continued to control ACLU analysis of free speech issues. From its founding, the ACLU made it a policy to not handle cases involving morals issues such as obscenity because it regarded such matters as involving individual, rather than social issues.[111] The organization's Progressive ideals left it inclined to accept government regulation of personal expression in the name of the greater public good.[112] But it would reposition to a perspective strongly protecting individual matters of choice against governmental forces seeking to impose official views of morality upon the nation. Ten years after its founding, the ACLU accepted the role of protecting "non-political" speech. Progressive thinkers had begun to reevaluate the role of the State as the arbiter of morality and the value of individual expression as a mechanism for developing moral consensus as well as political truth. This thinking prevailed upon the organization's leadership to branch out into censorship issues.[113]

The ACLU's activity in this regard served to catalyze the widespread public acceptance of an ideology incorporating individual free speech rights as essential and of overarching significance for a cohesive American way of life. The sensational Scopes Monkey trial, pitting the evangelical William Jennings Bryan against the atheistic Clarence Darrow, captured the nation's attention and brought home to Americans the desirability of protecting matters of individual conscience from the intrusive meddlings of those microcephalic forces in society who would dictate what people can and cannot learn.[114] Another prominent

110. WITT, *supra* note 84, at 201-207.

111. Laura M. Weinrib, *The Sex Side of Civil Liberties:* United States v. Dennett *and the Changing Face of Free Speech*, LAW & HIST. REV. (forthcoming 2011) (manuscript at 3) [hereinafter Weinrib forthcoming].

112. RABBAN, *supra* note 20, at 304-16.

113. Weinrib forthcoming, *supra* note 111, at 17-22.

114. Finan covers the impact of the 1925 Scopes trial in detail. FINAN, *supra* note 64, at 62-68, 95, 97. Finan observes how the case allowed civil libertarians to place the issue in the context of a broader, eternal battle for man's right to think freely. *Id.* The Scopes case brought home the danger of extinguishing the individual freedom that kindles expression of novel ideas and the frailty of free speech in a system dominated by smothering

legal case involving the sex education pamphlet of suffragette and birth control activist Mary Ware Dennett underscored for the nation the danger posed to personal freedom by overzealous government bureaucrats. The case represented a departure for the ACLU from its prior policy of only involving itself in political speech cases.[115]

Popular receptiveness to the positions taken in these cases resulted in the ACLU taking more cases protecting individual conscience. Philosophically the move was not easy for the Progressive-oriented organization to make. As indicated,[116] Progressives regarded rights not as deriving from fundamental natural law principles of individual reason and autonomy. Diversity was not regarded as intrinsically necessary for the democratic process of governance by the People, but as an important means to effect valuable social change. Once social betterment was accomplished, the Progressives saw no more need for critics. Flux was not regarded as a permanently desirable state of social existence. The individual was biologically a component of and naturally subservient to the needs of the social body and a healthy stasis was what was desirable. Deviations from cultural uniformity were counter to the general will of the social body as identified by government authorities.

But intolerance of deviations from the cultural mainstream through government suppression came at some point after World War I to be regarded not just as obstructive of forces for positive change, but as placing an unwarranted and hazardous trust in government.[117] The Progressives, not unlike the Founders, had come through experience to distrust government as a shepherd to enlightened positive social regulation and, instead, to perceive it as posing a threat to their conception of freedom.

The individual morals cases and accompanying publicity fostered a new perspective on the part of the general public regarding the significance of free speech. This provided a more palatable analytical starting point—much more readily identified with by mainstream Americans—than abstract concepts imparting

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majoritarian forces in a way that resonated with personal concerns of a broad spectrum of the American public. *Id.*

115. United States v. Dennett, 39 F.2d 564, 565 (2d Cir. 1930). Weinrib identifies the popularity of the ACLU's success in the Dennett case as instrumental in: motivating the organization to move beyond political speech cases to the realm of "cultural expression," and achieving widespread public acceptance that protecting free speech was fundamentally important. Weinrib forthcoming, *supra* note 111, at 5-6. She concludes that the case "introduced the possibility of a free speech agenda premised on personal autonomy, a cause that resonated strongly with mainstream Americans, rather than political equality, which polarized them." *Id.*

116. *See supra* pp. 79-80 (examining the Progressive movement).

117. Weinrib forthcoming, *supra* note 111, at 202-203.

value to protecting the rights of distasteful individuals such as Klan members and revolutionaries. The vernacular had mainstream appeal. The significance of protecting individual autonomy became associated as an essential corollary of free speech.[118]

So the worm turned. Ironically, the ACLU born of an ideological movement that favored government regulation of speech in the name of the common good found its own speech curtailed by the provisions of the Bipartisan Campaign Reform Act (BCRA).[119] That the ACLU has shaken loose from its Progressive moorings is most abundantly clear from the fact that it submitted an amicus curiae brief in *Citizen United* on behalf of the Appellant, Citizens United—arguing against government regulation of corporate speech to ensure political equality.[120]

C. *World War One and Progressive Disillusionment with Judicial Protection of Speech*

As noted, the Progressives were internationalist in orientation and objected to embroilment in the squabbles of national entities. America's entry into World War I was marked domestically by massive public opposition and protest. The heavy-handed suppression of anti-war dissent by self-appointed and quasi-government private agencies and by the government under the Espionage and Sedition acts was followed by remarkable judicial spinelessness in protecting even the most innocuous speech. Three Supreme Court decisions devastated the aspirations of contemporary liberal civil rights proponents.

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118. *See* FINAN, *supra* note 64, at 96-97 (describing prosecutions targeting upstanding figures who were trying to achieve something positive and with whom the general public could identify). It seems folks were more peeved at the pretentious assertion that they should not be allowed to hear or look at certain things than the idea of shutting up some irritating, loud-mouthed radical. *Id.* The notion that rather than making up their own minds some government authority or self-appointed moral vigilante could say what they ought to look at or listen to galled the American public, and presented something its members could empathize with far more than the scenario of government suppressing some dissident who was disruptive and most folks disagreed with anyway. *Id.*

119. The 2002 amendment to FECA sought to curb the use of soft money and the use of "issue advocacy" advertisements to indirectly support the campaigns of federal candidates. Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §§ 441i, 441k, 441a-1, 438a, 510 (West 2002).

120. The ACLU argued that McConnell should be overruled and that Section 203 should be declared facially unconstitutional. Brief for the American Civil Liberties Union as *Amicus Curiae* supporting Appellant, Citizens United v. FEC, 130 S. Ct. 876 (2009), 2009 WL 2365203, at *2-*3. The ACLU also strongly suggested that Austin should likewise be overruled and argued "that there is no precise or predictable way to determine whether or not political speech is the 'functional equivalent' of express advocacy." *Id.* at *2.

Schenck v. United States[121] unanimously upheld the Espionage Act of 1917 against a First Amendment challenge by socialists convicted of violating its terms by passing out leaflets objecting to the draft.[122] In *Schenck* the Court first articulated the "clear and present danger" test in a manner emphasizing that protection of speech was far from absolute and as permitting the government in that case to impose criminal liability for the distribution of leaflets opposing the draft.[123] *Frohwerk v. United States*[124] unanimously upheld the conviction of German immigrants charged with violating the Espionage Act by publishing a newspaper containing articles opposing the war.[125] *Debs v. United States*[126] unanimously upheld the conviction of socialist presidential candidate, Eugene V. Debs, for a speech stating his personal opposition to the war, approving of the activities of those convicted for aiding and abetting non-registrants, and telling the audience they were "fit for something better than . . . cannon fodder."[127] The Court, treating the "clear and present danger" test as encompassing the expression of sentiments that merely had the "tendency" to obstruct recruiting activity, made it apparent the test it was applying implicated conduct that posed an unclear and remote danger.[128]

Disappointment was all the more profound because the decisions were authored by Justice Oliver Wendell Holmes,[129] who was regarded as sympathetic to Progressive ideals and supportive of efforts to reign in the abuses of private power.

D. The Impact of Legal Realism: Justice Holmes

Oliver Wendell Holmes, Jr., who authored the decisions in *Schenck*, *Frohwerk*, and *Debs* was a towering legal force.[130] In 1881, he had published "The Common Law," which marked a departure from parochial "inside the box" legal analysis that regarded judicial decisions as inevitable products of formulaic calculations involving application of established legal rules analogized to the particular facts of a case.[131] He rejected the

121. Schenck v. United States, 249 U.S. 47 (1919).
122. *See id.* at 47-48 (upholding the Espionage Act of 1917).
123. *See id.* at 52 (articulating the "clear and present danger" test).
124. Frohwerk v. United States, 249 U.S. 204 (1919).
125. *Id.* at 204-06.
126. Debs v. United States, 249 U.S. 211, 211-12 (1919).
127. *Id.* at 211-12, 214.
128. *Id.* at 211.
129. *Schenck*, 249 U.S. at 47; *Frohwerk*, 249 U.S. at 204; *Debs*, 249 U.S. at 211.
130. *Id.*
131. OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881). Holmes famously remarked that to discern the law one must place oneself in the position of the bad man. *Id.* at 392-93.

notion that the process was purely one of deductive reasoning.[132] The logical process took a back seat to overriding pragmatic considerations related to the power relations in society. The life of the law was not logic, but experience.[133] For Holmes the process involved far more significant factors outside the box.[134] He emphasized that judges' decisions, in actuality, derived primarily from their personal experiences and from what they personally believed was socially desirable.[135] These beliefs that established a judge's mindset were not the product of rigorous legal training, but like all value judgments, were tied to the judge's particular upbringing and other environmental considerations.[136]

Legal rules, both in their substantive and procedural aspect, were not fixed in time, but were malleable and could be molded to serve the practical needs of those forces driving society forward. Legal prose, cast in a logical form, merely masked judges' true guide: experience. Stare decisis was to be disregarded where precedent no longer made sense in a new social context. Holmes, in yet another pithy comment stated: "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[137]

Holmes's cynical perspective, which came to be known as Legal Realism, was highly positivistic. It gave no weight to profound principles that purportedly underlie the law. Natural law principles and transcendent moral truths were not the foundation for legal principles. Instead, the Realist view espoused by Holmes, which rose to become a prominent influence in legal analysis throughout the early twentieth century, emphasized that the law was force brought to bear by ascendant powers in society and expressed "through the instrumentality of the courts."[138]

Holmes's approach to legal analysis was not purely academic. His willingness to give great weight to broad societal demands as expressed by the Legislature and the great body of intellectual thought is reflected in his legal opinions as well. His famous dissent in *Lochner v. New York*—rejecting the Court majority's

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132. *Id.*

133. Max Fisch, *Justice Holmes, The Prediction Theory of the Law and Pragmatism (1942), in* PIERCE, SEMEIOTIC AND PRAGMATISM 6, 6-18 (Kenneth Laine Ketner & Christian J.W. Kloesel eds., 1986).

134. *Id.*

135. *Id. See generally* Edward A. Purcell, Jr., *American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424 (1969) (discussing Holmes's perceptions and ideas).

136. *Id.*

137. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

138. *Id.* at 457.

acceptance of individual rights claims of corporate employers seeking to protect their freedom to contract regarding wages and hours from government regulation—is an apt example.[139] Holmes would have upheld Congress's ability to legislate what it regarded to be in the common good.[140] This approach understandably won Holmes the admiration of Progressive thinkers. In response to the majority's willingness to champion private contract rights in the face of the Legislature's assessment of the need for regulation, Holmes retorted, "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*."[141]

Holmes's positivistic outlook was at odds with acceptance of the Founders' principled approach to rights.[142] *Schenck*, *Debs*, and *Frohwerk* demonstrate Holmes's lack of commitment to individual rights.[143] They reveal his willingness to bow to what he perceived from a Realist's perspective as social forces being brought to bear to accomplish practical social ends.[144] The analysis of Holmes's majority decisions in *Schenck*, *Debs*, and *Frohwerk* followed the view that the First Amendment merely embodied the common law understanding of the meaning of freedom of speech as prohibiting only government prior restraint.[145] One was free to shout fire in a crowded theater, publish seditious statements, and so on, but remained liable—civilly and criminally—for the consequences.

The Court's application of the "clear and present danger" test, developed in these cases, revealed that this was a standard that

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139. Lochner v. New York, 198 U.S. 45, 65 (1905) (Holmes, J., dissenting).

140. *See id.* (Holmes, J., dissenting) (stating that "[i]t is settled by various decisions of this court that state constitutions and state laws may regulate life in many which we as legislators might think as injudicious . . . .").

141. *Id.* (Holmes, J., dissenting).

142. H.L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES: FREE SPEECH AND THE LIVING CONSTITUTION 4-5 (1991).

143. *Schenck*, 249 U.S. at 47; *Frohwerk*, 249 U.S. at 204; *Debs*, 249 U.S. at 211. Graber observes with respect to the reaction of civil libertarians to Holmes's failure to protect individual rights in *Schenck*, *Debs*, and *Frohwerk*:

> American libertarians had no reason for surprise. Holmes had always been the leading authority for the narrowest interpretations of the constitutional meaning of free speech. He wrote the Court's opinion in *Fox v. Washington*, which held that states could punish advocacy of nudism. In other cases, Holmes rejected the good faith defense in libel suits, insisted that persons had no right to speak on public property, and suggested that the First Amendment merely rendered constitutional Blackstone's rule of no prior restraint. Furthermore, no progressive jurist had developed a broad constitutional defense of expression rights that was consistent with Holmes's dissent in *Lochner v. New York*, a dissent that claimed "the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion."

GRABER, *supra* note 2, at 107.

144. *Id.*

145. *Id.*

gave full sway to government suppression. As applied, it really amounted to an elaboration of the Court's "bad tendency" test,[146] rather than a protective requirement that the speech at issue pose a definite, extreme, and immediate threat of harm.[147]

Less than a year later Holmes would be dissenting and arguing against conviction of the radical social malcontent in *Abrams v. United States*.[148] His *Abrams* dissent was to prove far more enduring and influential than the majority decision. In one paragraph he expressed a new premise for protecting dissent, extolling the beneficial function of the marketplace of ideas as a device to allow the self-governing people to shop for political truth.[149] This sparse statement was met with adulation by civil libertarians. Holmes was now praised for his judicious sensitivity to civil rights concerns.[150] In spite of Holmes's assertion that the anarchist's literature posed no threat, the facts seem essentially indistinguishable from the proximity of danger posed by the speech involved in *Schenck*, *Debs*, or *Frohwerk*.[151] If the critical facts were the same and the same legal test was being applied, why was the outcome different?[152] A legal realist would undoubtedly conclude that something had changed outside of the box.

The traditional explanation for Holmes's turnabout has been

146. Patterson v. Colorado, 205 U.S. 454, 454 (1907).

147. The employment of loose, flabby, "weasel-word" terminology is nothing novel in the parlance of legal tests. Prior to *Schenck*, Judge Learned Hand articulated a tighter and more speech protective standard in Masses Pub. Co. v. Patten, 244 F. 535, 535 (S.D.N.Y. 1917). In the case, Crystal Eastman's brother was prosecuted for publishing a Marxist periodical, but the ruling was reversed on appeal. *Id.* Hand's formulation required that the danger be both definite and imminent, requiring direct incitement to illegal action rather than a mere tendency to induce illegality. *Id.* at 537. This would not comport with Holmes's proclivity to eschew verbiage that would cobble or confine the dominant force in society from having its day. Holmes opted for language that did not bind courts to immutable principles and that allowed sufficient laxity to accommodate the political climate shaping national policy at any given moment.

148. Abrams v. United States, 250 U.S. 616, 624-30 (1919) (Holmes, J., dissenting).

149. *Id.* (Holmes, J., dissenting).

150. *Id.* at 630 (Holmes, J., dissenting).

151. *Schenck*, 249 U.S. at 47; *Frohwerk*, 249 U.S. at 204; *Debs*, 249 U.S. at 211.

152. Bobertz describes Holmes's perspective: "[a]ccording to Holmes's pre-*Abrams* philosophy, speech was no different than other forms of human activity, and it could be restricted by laws that 'correspond with the actual feelings and demands of the community, whether right or wrong.'" Bobertz, *supra* note 63, at 571. What is unclear is whether this basic philosophical outlook actually changed. *See* GRABER, *supra* note 2, at 110-12 (positing that what actually did change was not Holmes's outlook, but his perception of social conditions as demanding a less repressive approach to dissident activity).

painted as a process of intellectual persuasion and conversion to a principled, moral view of the importance of speech pressed by Brandeis and scholars such as Zechariah Chafee.[153] This postulated epiphanous awakening[154] by Holmes to an unpragmatic and ahistorical analysis of speech deriving from a political theory combining ideas articulated by John Stuart Mill with Spencerian notions of social Darwinism[155] is not plausible. Holmes, the intellectual giant and cynic who scoffed at the notion of individual rights,[156] is mischaracterized as becoming sensitized and embracing such lofty ideals.[157] More practical developments far more consistent with Holmes's approach to the law offer a far better explanation for the shift evident in *Abrams*.[158] Indeed, the quick turnabout in Holmes's approach can best be explained in light of a rising awareness of pragmatic considerations concerning the social implications of suppressing dissident speech.

Two much less high-minded factors can be identified as influencing Holmes to shift his approach in the eight-month hiatus

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153. *See* Bogen, *supra* note 39, at 98-99 (discussing the transition in Holmes's outlook on free speech).

154. *Id.*

155. The influence of Mill and Darwin upon Holmes's thinking, like that of so many of his contemporaries, is detailed by Bogen. Bogen *supra* note 39, at 113-22.

156. POHLMAN, *supra* note 142, at 12.

157. GRABER, *supra* note 2, at 7-8. Graber points to Holmes's acceptance of a positivistic outlook on political power bordering on "might makes right" as necessitating rejection of principled conceptions of individual rights:

> Holmes's reluctance or unwillingness to offer free speech any substantial or wholehearted protection followed from his fundamental political belief that "the proximate test of good government is that the dominant power has its way," a maxim he reiterated in the crucial passages of both the *Lochner* and *Gitlow* dissents. Dominant power, he stated, was established by "physical power," not by elections or persuasion. "Truth was the majority vote of that nation that could lick all others."
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> Because Holmes considered force the basis of sovereignty, he maintained that the dominant forces of any community had the "right" to remove any obstacle in the way of the present attainment of their goals. Holmes thought that "no society has ever admitted that it could not sacrifice individual welfare to its own existence." "Whenever the interest of society, that is, of the predominant power in the community, is thought to demand it," he declared, "the most fundamental right of the supposed preexisting rights—the right to life—is sacrificed without a scruple." In contrast to early civil libertarians, who consistently emphasized that more speech would ameliorate social conflicts, Holmes seemed to regard expression as ultimately worthless. "When men differ in taste as to the kind of world they want," he wrote, "the only thing left to do is to go to work killing."

Id. at 109 (footnote omitted).

158. *See* Bogen, *supra* note 39, at 98-99 (discussing the historic events intervening between *Schenck* and *Abrams*).

between *Schenck*, *Debs*, and *Frohwerk* and *Abrams*.[159] One provided the practical basis and the other the logical reasoning or legal articulation.[160] First, Professor Chafee's shrewd reinterpretation of the "clear and present danger" test as a speech protective standard spun dross into gold.[161] Second, a new perspective emerged that rapidly advanced and pervaded media and intellectual thinking of the day, launching a drastic reevaluation of the effectiveness of suppression as a lasting, viable technique for social control of dissident activity.[162]

E. Free Speech as an Essential "Safety Valve" to Relieve Revolutionary Pressures

Prior to the First World War, the Wobblies had sought to tie their outspoken efforts to secure better working conditions to constitutional considerations.[163] The courts were not receptive. But progress was made through the IWW's efforts in convincing regulatory authorities that suppression was not an effective policy.[164] In fact, confrontations with the Wobblies' tactics convinced many officials that heavy-handed policies were self-defeating and would terribly backfire, whereas pursuing a policy of tolerance generally served to burn out or defuse the revolutionary fervor.[165]

After the war, the concern with controlling radicals and preventing revolution was exacerbated by the specter of the communist revolution that had swept Russia in 1917, becoming a reality in the United States. The conclusions reached by those who were unsuccessful at stamping out radical activity with a policy of suppression before the war were confirmed by the experience under the iron fisted czarist regime in Russia. There was a danger inherent in employing intolerant and heavy-handed methods to control dissentient elements in society. Just as a pressure cooker

159. *See Schenck*, 249 U.S. at 47; *Frohwerk*, 249 U.S. at 204; *Debs*, 249 U.S. at 211; *Abrams*, 250 U.S. at 624-30 (Holmes, J., dissenting).

160. *See* GRABER, *supra* note 2, at 107-08, 122, 178 n.115 (discussing the reasons for Holmes's shift).

161. DONALD L. SMITH, ZECHARIAN CHAFEE, JR., DEFENDER OF LIBERTY & LAW, 18-31, 89-95 (1986).

162. *Id.*

163. Bobertz, *supra* note 63, at 563. An important theoretical undercurrent emerged as regulatory agencies addressing the unrest and labor uprisings before the war considered the parallels between suppression of the Wobblies and the suppression of speech by the British as a precursor to the American Revolutionary War. *Id.* at 563-64, 568, 574. The supposition was that suppression intensified dissent and drove it underground to spread in secret. After the Russian revolution, the analogy was made to czarist Russia's policy of suppression of dissident speech. *Id.* at 572-77, 585.

164. *See supra* note 163 and accompanying text (discussing pre-WWI and the Wobblies).

165. *Id.*

that provides no safety valve can explode, suppression of the expression of radical sentiment only serves to turn up the heat. The dissident forces, if not allowed to vent, will go underground, fester, and eventually emerge with dangerous revolutionary force. Free speech was reconceived as a mechanism for discharging and dissipating such hostility and thereby maintaining social control and the status quo.

Holmes's critics after the *Schenck* decision were not entirely unconstructive.[166] Bobertz observes the criticism from one law professor published in a national publication of some import:

> Ernst Freund, a law professor at the University of Chicago, criticized Holmes even more pointedly in an article published in The New Republic. He wrote that the Debs decision represented "the arbitrariness of the whole idea of implied provocation." The "draconic sentences" imposed under a "crude piece of legislation" were intended to silence political agitators through intimidation and terror, Freund wrote. Instead of silencing radicalism, however, the tactic would "merely serve to create animosity and bitterness with reference to our processes of justice."
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> To identify Debs and his followers as felons, Freund declared, would "dignify the term felony instead of degrading them." The social impact of the Debs ruling would be to legitimize lawlessness and public disorder, for "every thief and robber will be justified in feeling that some of the stigma has been taken from his crime and punishment." Freund noted that, by sanctioning repression, the Supreme Court created "an enormous amount of dissatisfaction" and strengthened "the forces of discontent." He warned that "in the long run sound law cannot be inimical to sound policy." Although government officials might believe that suppression stops rebellion before it gathers steam, they were actually unleashing a "loose and arbitrary law which at some time may react against [them]." Freund concluded that "[t]oleration of adverse opinion is not a matter of generosity, but of political prudence."[167]

The safety valve theme gained ground from that of an abstract proposition. The weight of its argument increased in light of recent world events and the failed practices of suppressing dissident activity in Europe and czarist Russia. A series of highly publicized 1919 outbreaks, strikes, and riots throughout the nation, fanned the fears of communist revolution.[168] These

166. Bobertz, *supra* note 63, at 572, 594.

167. *Id.*

168. *See* Jay, *supra* note 38, at 840-43 (discussing the communist revolution). Bobertz also describes the Red Scare. Bobertz, *supra* note 63, at 595-99. A citywide strike in Seattle in support of shipyard workers brought national media attention to the imminence of Bolshevik uprising in the United States. *Id.* at 595-96. Bombs addressed to numerous prominent national public figures, including Holmes, were intercepted. *Id.* at 596. May Day

outbreaks of social disorder following on the heels of Holmes's decisions served to move the safety valve concept from the realm of theory and to bring it much closer to home. The backlash generated by a policy of suppression sanctioned by the Supreme Court was looking very real indeed. "By the early 1920s, the safety valve theory had gained widespread acceptance as a valid rationale against the repression of free speech."[169] Holmes would pick up on this analysis and, with usual pithy eloquence, express it as: "[w]ith effervescing opinions, as with the not yet forgotten champagne, the quickest way to let them get flat is to let them get exposed to the air."[170]

F. The Insinuation of Progressive Doctrine into Judicial Analysis: The Influence of Zechariah Chafee

At this juncture, a young Harvard professor eager to make a name for himself took the revisionist tact with respect to Holmes's "clear and present danger" test.[171] Ignoring the reality of the test's actual application in *Schenck*, *Debs*, and *Frohwerk*, Zechariah Chafee applauded the test as speech protective.[172] Trashing Blackstone as an authority and inventing a false history of free speech,[173] he constructed new credentials and a new basis for a policy of judicial protection of free speech. Most significantly, for purposes here, Chafee provided a rationale for protecting dissident speech, departing from the classical libertarian tradition and tying it to its important social function.[174] For Chafee, the right to free speech was protected for its societal value, rather than as a right inhering to the individual.[175] It was an elevated social interest

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demonstrations and riots in cities throughout the nation turned ugly and received attention from a media drawing parallels with the events preceding the Russian Revolution. *Id.* at 596-97. Race riots attributed by the press to Bolshevik activism occurred with deadly effect in cities throughout the nation. *Id.* at 597."Imported Bolshevism also was blamed for causing the Boston police strike, the steel strike, and the soft coal strike—the three 'great fall strikes' of 1919." *Id.* In the face of this dissent and turmoil, intolerance reared its ugly head in the form of the formation of reactionary organizations such as the American Legion and the expansion of existing groups such as the Ku Klux Klan and in the form of proliferating legislation designed to suppress the expression of views distasteful to the status quo. *Id.* at 572-573.

169. Bobertz, *supra* note 63, at 580.

170. JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 139 (Harry C. Shriver ed., 1936).

171. Zechariah Chafee, *Freedom of Speech in Wartime*, 32 HARV. L. REV. 932, 967-71 (1919) [hereinafter Chafee 1].

172. *Id.*

173. Chafee would persist in his historic revisionism later when he depicted American political culture as highly tolerant of dissident voices in contrast to Communist and Totalitarian regimes. Bobertz, *supra* note 63, at 581-82.

174. *See infra* note 180 (citing to GRABER and CHAFEE 2).

175. *Id.*

deserving protection against all but competing social interests posing a most "clear and present danger."[176]

Chafee articulated an ideal of self-governance involving a popular search for truth that is, by now, quite familiar to anyone who has completed a basic civics course.[177] Truth was portrayed as a commodity competing in a marketplace of ideas alongside other (untruthful) commodities.[178] Chafee expressed the Millsian ideas concerning the need to protect unpopular speech and the utility of such speech in facilitating the process of evaluating different ideas by the electorate as a means to arriving at the truth.[179] If the people are deprived of the opportunity to consider certain ideas they might thereby be deprived of the truth entirely or at least prevented from properly assessing the merits of other ideas weighed against the merits of the suppressed idea.[180]

More importantly, this model was intrinsically incompatible with the organic concepts infusing Progressive ideology, but was entirely compatible with the classical liberal concepts of autonomy and rights understood by the Founders. The significance of protecting free speech as a mechanism of social change reflected a Progressive emphasis upon the public welfare. The social attribute of speech was its indispensability for the commonwealth, not its inherent value as an unrelinquished individual liberty.[181] The social value held paramount was the ascertainment of truth through an evaluative process promoted by exposure to a variety

176. SMITH, *supra* note 161, at 967-71.

177. *Id.*

178. *Id.*

179. *Id.* at 168.

180. Chafee adhered to the Progressive ideal that economic matters were appropriately the subject of government intervention and likewise the regulation of public discourse to ensure that it did not conflict with other important social interests. GRABER, *supra* note 2, at 150. This evidently would entail government regulation to maintain meaningful discussion and access to the truth in the marketplace of ideas. *Id.* Curiously, Chafee acknowledged that government was a threat to the ascertainment of political truth when he observed that the danger to the marketplace of ideas was "[j]ust as great where the interference comes from corporations as when it comes from government . . . ." ZECHARIAH CHAFEE JR., GOVERNMENT AND MASS COMMUNICATION: A REPORT FROM THE COMMISSION ON FREEDOM OF THE PRESS 545 (1965) [hereinafter CHAFEE 2]. Proper subjects of regulation included commercial speech and obscenity since they involved only individual interests. GRABER, *supra* note 2, at 144. The contradiction in regulating the rights of some actors in the marketplace of ideas on the basis of economic considerations is what the Court was left to grapple with in *Citizens United.*

181. Graber observes, "[C]hafee insisted that the Constitution primarily protected the social interest in free speech, rather than the individual's interest in self-expression." GRABER, *supra* note 2, at 125. But this purposefully ignored the Founders' reliance upon a natural law, individualistic basis for protecting a speaker's interest in spouting off. *Id.* at 143.

of opinions hawking different representations of verity.[182] But the analysis also represented a departure from Progressive rhetoric. It did not accede social value to the promotion of diversity.[183] And, most significantly, it provided no solid footing to sanction governmental regulation of the public discourse to ensure that this process unfolded fairly.[184]

Holmes's dissent in *Abrams* adopted both the revised, speech-protective "clear and present danger" standard *and* the "marketplace of ideas" rationale for lending speech such protection.[185] The experimental nature of this search for truth was tied to the constitutional concept of popular sovereignty.[186]

The problem again came before the Court in *Gitlow v. New York*[187] and Holmes, joined by Brandeis, would again dissent from the affirmance of the conviction of an anarchist publisher of a "Left Wing Manifesto."[188] The majority again stated the "bad tendency" test allowing that the "State may punish utterances endangering the foundations of government and threatening its overthrow by unlawful means"[189] because "a single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration."[190] Holmes, departing

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182. *See supra* note 181 (noting Graber's observations about Chafee).

183. *Id.* at 112, 135.

184. While Chafee believed that meaningful exercise of free speech is jeopardized by the advantaged manipulation of wealth, such as in the form of corporations, just as it is by government intrusion, the marketplace model does not provide a rationale for equalizing speech anymore than rights analyses provide a rationale for leveling the playing field between big-box chain stores and mom and pop shops. *Id.* at 125, 137.

185. *Abrams*, 250 U.S. at 624-30. (Holmes, J., dissenting).

186. The key language of the dissent, joined by Louis Brandeis, is minimalist:

> 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 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. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Abrams, 250 U.S. at 630 (Holmes, J., dissenting).

187. Gitlow v. New York, 268 U.S. 652 (1925) (Holmes, J., dissenting).

188. *Id.* at 673.

189. *Id.* at 667.

190. *Id.* at 668.

from the approach he took in *Schenck*, *Frohwerk*, and *Debs*, argued the speech protective approach to the "clear and present danger" test pressed by Chafee and adopted in his dissent in *Abrams*.[191] The dissent paid a critical blow to the "bad tendency" test by pointing out that it, in effect, criminalized the process of political change generally.[192] The uprising called for by *Gitlow* was to occur at some "indefinite time in the future."[193] Like any idea cast into the political maelstrom, if accepted by the "dominant forces" of society, it was okay by Holmes.[194]

Holmes's dissents in *Abrams* and *Gitlow* ought not to be taken as the Justice's signal that he was prepared to uphold individual rights in the face of an expression of the will of the "dominant forces" of society expressed in the form of a definite legislative pronouncement of a social objective.[195] Chafee met with Holmes seeking to persuade him to reconsider *Schenck*, *Frohwerk*, and *Debs* and shortly thereafter recounted: "I have talked with Justice Holmes . . . but find that he is inclined to allow a very wide latitude to Congressional discretion in the carrying on of the war."[196] It would appear that Holmes would have deferred to Congress's direct statement that "bad tendency" speech was banned.

Some years would pass, and the Court majority would again iterate the "bad tendency" test in *Whitney v. California*.[197] Brandeis wrote and concurred on the basis that Whitney had failed to procedurally raise a First Amendment defense.[198] Holmes, who had effectively trashed the "bad tendency" test in his dissent in *Gitlow*, joined the concurrence.[199] Brandeis took the opportunity to attack the majority's crumbling "bad tendency" approach with a stunning vision of the fundamental importance of freedom of speech to a fluid process of democratic self-governance.[200] In doing so, he articulated a speech-based concept of underlying principles of democratic governance as though they had existed all along.[201] This perspective enhanced and developed Chafee's themes, linking

191. *Id.*
192. *Id.* at 673.
193. *Id.*
194. *Id.* at 667.
195. *Gitlow*, 286 U.S. at 672-73; *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).
196. Letter from Zechariah Chafee to Justice Charles F. Amidon (Sept. 30, 1919), *in* SMITH, *supra* note 161, at 1, 2, 30.
197. Whitney v. California, 274 U.S. 357 (1927).
198. *Id.* at 649.
199. *Id.* at 380.
200. *Id.* at 649.
201. But they had not. Jay, *supra* note 38, at 872-73. The age of the Founders was actually highly intolerant of revolutionary speech. *Id.*

them to the constitutional origins of the nation.[202] This marked a dramatic departure from Brandeis's prior rights analysis.

G. *Reconciling the Progressive Approach to Regulation with the Protection of Individual Rights: Justice Brandeis*

Justice Louis Brandeis joined in the unanimous majority in *Schenck*, *Debs*, and *Frohwerk*.[203] Brandeis was a Progressive and no friend of corporations–inveighing against railroads, trusts, and the "pathologies" of capitalism (the monopolies, inefficient management, waste, repression, and insurgency).[204] He shared the Progressive view that corporations should be regulated to protect individual freedoms and had written expressing these views.[205] Significantly, he also shared the Progressive reluctance to rely upon rights for such protection.

As we have seen, this jaded view of a rights-based approach stemmed from the Progressives' experience with judicial cases upholding corporate economic interests against efforts to protect individuals, in particular, workers from exploitation.[206] Graber explains Brandeis's deep-seated Progressive reluctance to uphold individual rights against governmental priorities:

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202. Bobertz observes:

> The Whitney concurrence simultaneously accomplished two critical feats. First, it reverberated with the themes that had animated the free speech debate over the previous two decades: the destabilizing effects of political repression; the notion that the open airing of ideas produces "truth"; the "safety valve" or "venting" qualities of tolerance; and the availability of counter-propaganda to defeat objectionable ideas . . . . The second feat was perhaps even more dazzling. Although the concurrence obviously expressed the ideas of its time, Brandeis packaged these ideas in a manner that thoroughly obscured their origins. These ideas were not of recent coinage, but were the core principles of "[t]hose who won our independence by revolution" and those who "amended the Constitution so that free speech and assembly should be guaranteed." . . . It was these brave souls, not Brandeis himself, who conceived the ideas set forth in the opinion; and because they believed in them so strongly, they amended the Constitution to enshrine them forever as timeless principles of American liberty.

Bobertz, *supra* note 63, at 594.

203. *Schenck*, 249 U.S. at 47; *Frohwerk*, 249 U.S. at 204; *Debs*, 249 U.S. at 211.

204. *Id.* at 575.

205. Louis Brandeis, *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis*, *in* OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 120, 120-133 (Melvin I. Urofsky ed., 1995).

206. GRABER, *supra* note 2, at 101, 118. Likewise, Graber observes that Brandeis was proclaiming that because speech was the same sort of right the Court had committed to protect with private economic rights, then respect for precedent required it to protect speech. *Id.* "The judicial obligation to respect precedent, he concluded, overrode the otherwise superior logic of the new constitutional attack on free speech." *Id.* at 118.

> In contrast to conservative libertarian jurists, Brandeis did not think courts were authorized to safeguard individual freedoms. He specifically contended that the due process clause of the Fourteenth Amendment only limited the procedures that state governments could use when they sought to deprive a person of life, liberty, or property.[207]

Obviously, in order for him to wholeheartedly embrace the rights evident in the *Whitney* concurrence, something had to change in Brandeis's thinking.[208] This change would impel him to articulate a conception of American democracy in which speech was fundamental.[209] Brandeis shared the view that unrestrained capitalism would produce revolutionary sentiment and believed that tempering these abuses would serve to defray backlash and mollify radical elements and ensure continuation of the capitalist order.[210] Brandeis, like other Progressives, preached what was ultimately a policy of appeasement and assimilation.[211] He, like Roger Baldwin, Chafee, and all leading Progressives came from a comfortable middle class background and had every personal inclination to preserve the existing distribution of wealth.[212] Whether his Progressive social thinking was also motivated by pity, noblesse oblige or a concern to prevent an escalation of inequality that would culminate in revolutionary destruction of the status quo, he regarded it as essential to address the excesses of capitalism.[213] This was not to be achieved so much by radically changing the system as by facilitating regulation and extending

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207. *See supra* Part III.A, F and accompanying text (discussing the Progressive movement).

208. *Whitney*, 274 U.S. at 372-80 (Brandeis, J., concurring).

209. This conception has pervaded Court doctrine ever since. The unresolved tension it entails between the Progressive view that speech must be equalized and the natural corollary of a free market model—that government must remain neutral—lies at the heart of the dispute in *Citizens United*. *Citizens United*, 130 S. Ct. at 888.

210. Bobertz, *supra* note 63, at 588-89.

211. Bobertz describes Brandeis as recognizing the need to defuse revolutionary potential by assimilating the dissident factors into the existing power structure and allowing them to harmlessly ventilate their frustrations there. *Id.* at 634. Bringing radical elements into the legitimate process prevented suppression from forcing them underground where they would oppose the system from outside and foment revolution against a power structure from which they were explicitly excluded:

> Toward this end, Brandeis encouraged the formation of institutions and practices, such as trade unions and collective bargaining, that would tame the disorderly politics of the left by bringing its members into the political mainstream. As one writer suggested, Brandeis's efforts throughout his career can be seen as being directed toward the development of "far-sighted strategies of system maintenance.

Id. (footnotes omitted).

212. *Id.* at 623-49.

213. *Id.* at 630-49.

participation (or at least the perception of participation) to those marginalized sectors of society.

This meant convincing those circumscribed segments of American society on the brink of accepting revolutionary recourse that they did have a say in determining the status quo.[214] By opening the channels of communication between the radical labor movements such as the Wobblies and the instruments of government and through acceptance of their participation in the process of determining what was fair within the existing framework, the oppressed—who would otherwise turn to revolutionary methods to achieve change—accepted the legitimacy of the system that oppressed them.[215] Of course, this also meant that they accepted the fundamental structure of the social system with any inherent inequalities as well. The carrot on the end of the stick was the prospect of the ability to achieve positive change within that system.[216]

It was apparent from Brandeis's frustration over the Court's continued willingness to punish people for expressing their views on matters of national importance in *Schaefer v. United States*[217] and *Pierce v. United States*[218] that he was approaching his limit.[219] Another source of vexation was at work upon Brandeis as well. Bobertz relates how Brandeis's frustration with the Court's repeated willingness to overturn economic regulation enacted in the name of the social good on the basis that it infringed upon individual rights led him to endorse a judicial philosophy he did not share.[220] For pragmatic reasons, Brandeis ratified the judicial perspective that individual constitutional rights override legislative determinations concerning the common good.[221] While

214. *Id.* at 601.

215. *Id.* at 628-30.

216. Whether the promise of such change within a structure whose design inherently produced and perpetuated inequality was illusory or not probably was obscured to most laborers. They were struggling to survive and were above all immediately concerned with providing for their welfare. They were thrilled to receive a portion of the pie and the promise of more to come if they bought into the myth that they would receive equal treatment under the law.

217. Shaefer v. United States, 252 U.S. 466, 482-83 (1920) (Brandeis, J., dissenting).

218. Pierce v. United States, 252 U.S. 239, 253 (1920) (Brandeis, J., dissenting).

219. Jay characterizes *Pierce* as "the last straw for Justice Brandeis, who could not accept the imprisonment of people for expressing a partisan opinion about a matter of the gravest national importance." Jay, *supra* note 38, at 856, 859.

220. *See* Bobertz, *supra* note 63, at 630-49 (devoting an entire section of the article to Brandeis and his thinking).

221. *Id.* at 574; GRABER, *supra* note 2, at 101. Graber points out that Brandeis in articulating his basis for upholding individual rights claims relied upon cases upholding individual economic liberties from regulation in which he delivered "blistering" dissents, effectively relying upon stare decisis in spite

Brandeis undoubtedly bristled at acknowledging the validity of the Court's precedent affirming the primacy of individual rights as trumping important social needs, the silver-lining was that this also vindicated protection for individuals challenging the powers that be in order to achieve worthwhile social change.[222]

With the *Whitney* concurrence, Brandeis developed the functional justifications of Chafee and those expressed by Holmes's dissent in *Abrams* and endowed them with constitutional origin.[223] The Court bought Brandeis's inspiring reinvention of the pedigree of First Amendment protection of free speech.[224] The "bad tendency" test was annihilated by the adoption of a diametrically different approach that embraced gradual political change produced by speech as an intended part of the political process and essential to the Founders' vision: "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[225]

Significantly, public attitude had changed[226] about the importance of protecting the right to express oneself and about the importance of preserving a realm of personal autonomy apart from the wet blanket of social suppression represented by the State. This was expressed not merely in the popular press, but in the intellectual literature of the day to which Brandeis was a contributor.[227] The Court unquestionably felt the impact of this new public support for protecting the individual's personal freedom from such government strictures.[228] The climate had

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of his personal conviction that the Court was acting beyond the pale in protecting individual freedoms in contravention of legislative expressions of the common good. *Id.* at 102.

222. Bobertz, *supra* note 63, at 630-49.

223. *Whitney*, 274 U.S. at 372-80 (Brandeis, J., concurring); *Abrams*, 250 U.S. at 624-30 (Holmes, J., dissenting).

224. Bobertz, *supra* note 63, at 588-95.

225. Stromberg v. California, 283 U.S. 359, 369 (1931).

226. GRABER, *supra* note 2, at 24-26. *See also* Bobertz, *supra* note 63, at 607-08 (describing the emergence of a "new understanding of free speech" that emerged after *Abrams* that coalesced in the popular conscience as the result of the illuminations of Progressive periodicals such as the *Nation* and the *New Republic* and the writings of Progressive thinkers).

227. *Id.*

228. The extent to which the Court leads or follows public attitude change is a subject beyond the scope of this article. The views of the Legal Realists notwithstanding, suffice it to say, the Court's susceptibility to the influence of public opinion is by now well accepted. WILLIAM K. MUIR, JR., LAW AND ATTITUDE CHANGE (1985). *See* Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, How Public Opinion Constrains the Supreme Court (Nov. 5, 2008) (unpublished paper), *available at* http://government.arts.cornell.edu/assets/faculty/docs/enns/Opinion_SC.pdf (on file with Am. J. of Political

changed, and Brandeis provided the intellectual and constitutional foundation to support a new speech-protective model that was easy for the Court to accept.

The Court began ruling in favor of free speech claims.[229] With *Fiske v. Kansas*[230] and the cases that followed,[231] the Court majority moved toward acceptance of a role that protected speech as a right that prevailed against governmental interests.[232] In *Herndon v. Lowry*,[233] the Court applied the "clear and present danger" test.[234] But not in the manner of the "bad tendency" approach seen in *Schenck*.[235] The Court now applied it in the manner expressed by Chafee and by Holmes in his dissent in *Abrams*.[236] It had become a speech-protective standard.

At this point, the *Lochner* era ended and the Court in the *Carolene Products* footnote drew its legendary distinction between personal rights and economic interests to explain its newfound protection of speech rights and tolerance of government regulation of commercial enterprises.[237] The protective version of the "clear and present danger" test would be the standard applied by the Court for decades thereafter. With the onset of World War II and the Espionage Act still on the books, the Court effectively reversed its "bad tendency" application of the "clear and present danger" test in its holdings in *Schenck*, *Frohwerk*, and *Debs*.[238] This

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Science) (indicating the public opinion maintains a significant direct effect on the Supreme Court's decision making).

229. *See* Fiske v. Kansas, 274 U.S. 380, 380 (1927) (ruling in favor of free speech claims); Herndon v. Lowry, 301 U.S. 242, 242 (1937) (ruling in favor of free speech claims).

230. *Fiske* was not really a speech case. *Fiske*, 274 U.S. at 380. Fiske, a Wobblie, was not convicted based on evidence of anything he said, but upon a message in an IWW leaflet urging abolition of the wage system. *Id.* at 381-85. Absent any evidence of advocacy of violence, something the statute required, the Court had no difficulty finding Fiske had not violated the statute. *Id.* at 386-87.

231. *See, e.g.*, *Stromberg*, 283 U.S. at 359 (reversing a conviction for violating a statute that prohibits display of a red flag in opposition to organized government); De Jonge v. Oregon, 299 U.S. 353, 343 (1937) (holding peaceable assembly for lawful discussion cannot be made a crime, nor can it be proscribed). The court composition changed between *Whitney* and *Stromberg*. Five Justices remained from the *Whitney* majority. Three of them voted with the Stromberg majority (Stone and two of the *Lochner* era Four Horsemen, Van Devanter and Sutherland) and two dissented (the other two Four Horsemen, Butler and McReynolds). The new Court members (Hughes, C.J. who wrote the Court's opinion, and Roberts—the switch in time that saved nine) voted with Holmes and Brandeis.

232. *Id.*

233. *Herndon*, 301 U.S. at 242.

234. *Id.* at 252-56, 261.

235. *Id.* at 256 n.10.

236. *Id.* at 252-56, 261.

237. *Carolene Products*, 304 U.S. at 153 n.4.

238. *See* Hartzell v. United States, 322 U.S. 680, 689 (1944) (reversing

remained the Court's analytic approach until it adopted an even more protective standard in *Brandenburg v. Ohio*.[239]

IV. THE NEW LIBERAL IDEOLOGY OF RIGHTS AND THE REGULATION OF CORPORATE SPEECH

Latent in the new liberal approach to rights was an internal inconsistency with respect to regulations targeting commercial activity that involves speech interests. The social interest in speech as an essential prerequisite for the exercise of popular sovereignty mandated protection. But the post-*Lochner* era acceptance of the regulation of commercial activity for the common good was consistent with the idea of promoting fairness and leveling the playing field in all aspects of society. The objective of equalizing election-related speech seemed no different. The popular sovereignty rationale integrated uneasily with regulation of speech for the purpose of ensuring that the electorate was properly informed and exercised the franchise in a wise manner. Ideally, such "economic" regulations would prevent powerful organizations from using financial power to distort the free and considered decision of the sovereign People. But when commercial activity implicates speech, the neat dichotomy between private and public rights erodes. The rationale for protecting speech finds itself at odds with the objectives of commercial regulations.

A. Campaign Regulation of Corporate Spending

Regulation of corporate and union speech is nothing new, as the Court in *Citizens United* observed.[240] It emerged to address Progressive era concerns with political corruption, as expenditures on political campaigns increased. Substantial regulation began with the Teapot Dome Scandal in 1925.[241] But it was not until 1947 that independent expenditures by unions and corporations were restricted.[242] The Federal Election Campaign Act (FECA) was enacted in 1971 to replace the old Federal Corrupt Practices Act that had been in place since 1925.[243] It required candidates to disclose contributions and expenditures.[244]

Addressing widespread public concern over unsavory election practices in the 1972 presidential election campaign, Congress

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Schenck, *Frohwerk*, and *Debs*).

239. Brandenburg v. Ohio, 395 U.S. 444, 448 (1969).

240. *Citizens United*, 130 S. Ct. at 900.

241. BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 25-26 (2001).

242. *Citizens United*, 130 S. Ct. at 900.

243. Federal Election Campaign Act, 2 U.S.C. § 431-457 (1972). *See generally* Buckley v. Valeo, 424 U.S. 1 (1976) (discussing FECA).

244. *See* Federal Election Campaign Act, 2 U.S.C. § 431-457 (regulating contributions and expenditures and requiring disclosure).

acted to impose limits on "hard money" contributions to support candidates and restrictions upon expenditures via 1974 amendments to FECA.[245] The Supreme Court in the bicentennial ruling in *Buckley v. Valeo*[246] addressed a constitutional challenge to those regulations. The Court found some regulations unconstitutional and interpreted others in such a way as to avoid constitutional infirmity.[247] Significantly, for purposes of the analysis here, the Court drew a distinction between direct and indirect (independent) expenditures.[248] It recognized that there was no constitutionally safe means—without impinging upon (chilling) core speech—of differentiating between expenditures to finance speech pertaining to concerns related to an election issue (issue advocacy) and expenditures to fund speech intended to get a particular measure or candidate elected or defeated.[249] Because such speech merited the utmost protection, the Court construed FECA narrowly, applying it only to expenditures for speech involving express advocacy as to how voters should cast their ballots.[250] This avoided any potential chilling of protected speech that might overlap with the speech sought to be regulated.

B. The Lesser Standard of Protection Accorded Corporate Entities

The express advocacy requirement, that the Court read into the statutory scheme in order to avoid constitutional infirmity, protected the discussion of issues that did not involve campaign

245. *See id.* § 451 (imposing limits on money contributions to support candidates and restrictions upon expenditures).

246. *Buckley*, 424 U.S. at 1.

247. *Id.* The Court accepted the argument that direct contributions—donations to campaigns—could be limited. *Id.* The interest in preserving the integrity of the political process was sufficient to sustain limitations imposed on contributions to candidates running for public office. *Id.* at 52. The Court struck down limitations so far as they applied to contributions to one's own campaign or a family member's campaign. *Id.* at 13, 25, 51-54. But otherwise, the State interest in addressing the reality and appearance of corruption in the electoral process warranted reasonable restrictions on direct economic support. *Id.* More indirect modes of supporting a campaign's views (independent contributions) implicated more sensitive first amendment issues. *Id.* at 59.

248. *Id.*

249. The Court interpreted the campaign reform statutes as applying only to speech employing express advocacy to avoid constitutional infirmity. *Id.* at 76-82. The Court's reason for doing so was to prevent the chilling effect application of the campaign regulations would have upon protected speech concerning related public issues: "[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Id.* at 42.

250. *Id.* at 26.

advocacy.[251] This was an imperfect compromise between an important legislative interest in maintaining the integrity of the election process and the constitutional requirement fostering free discussion of election issues. For many years after *Buckley* there was confusion about what express advocacy included.[252] Courts sought to discern whether the term could constitutionally encompass expenditures that did not involve direct exhortation on how a voter should cast a ballot. Whether express advocacy was limited to just such "magic words" or could also constitutionally include speech that amounted to their "functional equivalent" was the subject of regulatory and judicial uncertainty.[253]

After *Buckley*, *Austin v. Michigan Chamber of Commerce*[254] was decided, recognizing that corporate entities may properly merit regulation not accorded individuals.[255] The Court found a compelling State interest in addressing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[256]

With the mindset of the misbegotten child of Progressivism

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251. *Id.* at 47.

252. Judicial frustration in addressing expenditures plainly designed to influence election decisions, but that did not bluntly exhort voters to "vote for" or "vote against," was apparent from tracking the cases in which speech that was unmistakably campaigning was nevertheless held not subject to the campaign regulations. *See, e.g.*, FEC v. Central Long Island Tax Reform Immediately Commerce, 616 F.2d 45, 45 (2d Cir. 1980) (involving a leaflet which expressed the views of a tax reform group and attacked the voting record of a local congressman running for election, whose picture was included); Faucher v. FEC, 928 F.2d 468, 468 (1st Cir. 1991) (dealing with a pro-life voter guide); FEC v. Colorado Republican Fed. Campaign Com., 839 F. Supp. 1448, 1448 (D. Colo. 1993), *rev'd*, 533 U.S. 413 (2001) (dealing with mailings attacking congressional members for opposition to abortion rights and the Equal Rights Amendment); FEC v. American Federation of State, County and Municipal Employees, 471 F. Supp. 315, 315 (D.D.C. 1979) (distributing a poster to union members criticizing President Ford for pardoning former President Nixon); FEC v. Christian Action Network, 894 F. Supp. 946, 946 (W.D.Va. 1995) (noting a television ad which criticized presidential candidate Bill Clinton for allegedly supporting radical homosexual causes).

253. *See* FEC v. Furgatch, 807 F.2d 857, 863 (9th Cir. 1987) (listing such magic words as: "elect," "support," etc.); Governor Gray Davis Comm. v. American Taxpayers Alliance, 102 Cal. App. 4th, 449, 467 (Cal. Ct. App. 2002) (adopting "a more comprehensive approach" to the definition of "express advocacy" under FECA, rather than focusing exclusively on "magic words"); California Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1097-98 (9th Cir. 2003) (citing to *Furgatch* and following the "magic word" approach).

254. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 658-660 (1990).

255. *Id.*

256. *Id.* at 660.

guiding them, legislatures, regulatory agencies, and courts did not perceive any need to apply the same standard applied in *Buckley* to speech by corporate entities.[257] These were fictitious, economic entities, so they seemed the proper subject of regulation. The BCRA of 2002[258] imposed restrictions upon corporate-funded political advertising in certain time periods leading up to a federal election.[259] BCRA amended the Federal Election Campaign Act (FECA) of 1971 to prohibit corporations from funding electioneering communications with general treasury funds.[260] Section 203 of BCRA expanded the range of corporate speech subject to regulation.[261] Consequently, this sequence of legal events brought a great deal more corporate speech under regulatory scrutiny.

Shortly after enactment of BCRA, section 203 was challenged, and in 2003 the Supreme Court addressed the amendments to FECA in *McConnell v. FEC*.[262] The Court bluntly acknowledged the embarrassing reality of the situation in *McConnell*.[263] Limiting the import of FECA to express advocacy really accomplished nothing.

The Court held that application of a standard that encompassed more than the "magic words" of express advocacy survived a constitutional challenge for facial validity even though it included "issue advocacy."[264] It held that the speech regulated by the statute was the "functional equivalent" of express advocacy.[265] The Court concluded there was no overbreadth concern with respect to speech that was the "functional equivalent" of express advocacy.[266] The justifications for regulating independent corporate expenditures constituting express advocacy "apply equally" to ads that are "*the functional equivalent of express advocacy*."[267] The regulation of such expenditures was warranted because they could have the kind of "corrosive and distorting

257. *Id.* at 658-669.
258. 2 U.S.C.A. § 441b(b)(2).
259. *Id.*
260. *See id.* (amending FECA).
261. *Id.*
262. McConnell v. FEC, 540 U.S. 93, 207 (2003).
263. The Court stated: "the presence or absence of magic words cannot meaningfully distinguish electioneering speech . . . . *[B]uckley*'s magic-words requirement is functionally meaningless . . . . [N]ot only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted." *Id.* at 193-194. The Court in *Citizens United* underscored this inadequacy: "[p]olitical speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws." *Citizens United*, 130 S. Ct. at 912.
264. *McConnell*, 540 U.S. at 190-217.
265. *Id.* at 204-06.
266. *Id.* at 204-06.
267. *Id.* at 206 (emphasis added).

effect" on the electorate recognized in *Austin* and because the government had a compelling interest in countering those effects.[268] In other words, corporate entities, and unions, were entitled to a lesser standard of protection under the First Amendment than private actors.

C. The Latent Tension Surfaces

Now the government was regulating a much more indefinite and broader range of corporate speech. The effect this had was to shift judicial focus from the question of whether the regulation could encompass more than "magic words" to the broader issue of whether the regulations could treat some speech differently than other speech based upon economic considerations. This served to bring the problem with regulation of economic activity that overlapped into First Amendment expressive conduct squarely onto the judicial radar. We have now traced how the problem created by this conflicted treatment of government regulation of corporate election speech came into focus as a legal issue.

In this light, we can understand how the conflict surfaced in *Citizens United*.[269] Both the majority and the dissent in *Citizens United* relied upon the same functional approach articulated in the *Abrams* dissent and *Whitney* concurrence.[270] The majority opinion's analysis is infused with references to the marketplace of ideas.[271] The dissent is pure Progressive thinking, emphasizing corruption, inequality, a non-individualistic conception of freedom and the imperative of the social good.[272] The majority makes some

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268. *Id.* at 205.

269. *Citizens United*, 130 S. Ct. at 876.

270. *Id.*; *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); *Whitney*, 274 U.S. at 372-80 (Brandeis, J., concurring).

271. "Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." *Citizens United*, 120 S. Ct. at 900. "*Austin* interferes with the 'open marketplace' of ideas protected by the First Amendment." *Id.* at 884. "And 'the electorate [has been] deprived of information, knowledge and opinion vital to its function.'" *Id.* at 907 (quoting United States v. Cong. of Indus. Org., 335 U.S. 106, 144 (1948)).

272. "[L]egislatures are entitled to decide 'that the special characteristics of the corporate structure require careful regulation' in an electoral context." *Id.* at 947 (Stevens, J., dissenting). "The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare." *Id.* at 949-50. "[C]orporations have 'special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets,' that allow them to spend prodigious treasury sums on campaign messages that have 'little or no correlation' with the beliefs held by actual persons." *Id.* at 956 (citations omitted).

> The legal structure of corporations allows them to amass and deploy financial resources on a scale few natural persons can match. The structure of a business corporation, furthermore, draws a line between the corporation's economic interests and the political preferences of the

effort to dispel the substantive concern of unfairness created by economic disparities.[273] But a valid concern remains that in a social structure embodying disparities in power certain views do not get heard or are drowned out.[274]

On the other hand, the majority's objection to a process involving government efforts to equalize the effect of wealth upon the expression of political views[275] is logically unassailable. As we shall see, the models evincing concern with equalizing the marketplace of ideas do not mesh with the metaphor for free speech evolved in judicial doctrines that emphasizes the social value of speech.[276]

These models provide no toehold for justifying treating some private speakers or speech differently. Their rationales for protecting speech do not differentiate based on source. To the contrary, they explicitly assume that speech—whatever its source—is intrinsically valuable whether for sorting out the "truth" or for the function of the democratic process, or to guard against government malfeasance. They all accept the ultimate objective of speech to be facilitating the exercise of popular sovereignty. But government "by the People" presumes that government remains a creature that is the expression of the unaffected will of the People and takes no part in its own creation.[277] State agent evaluations, as to what speech is or is not significant to the decision being made in an election, involve government in a decisional role reserved to the People. Because such government intrusion into the process of self-governance is antithetical to the ultimate aim of popular sovereignty, the State's

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individuals associated with the corporation; the corporation must engage the political process with the aim "to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities[.]" Consequently, when corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears "little or no correlation" to the ideas of natural persons or to any broader notion of the public good.

Id. at 974 (citations omitted). Those aggregations can distort the "free trade in ideas" crucial to candidate elections. *Id.*

273. *Citizens United*, 120 S. Ct. at 886-917.

274. *See* discussion *supra* pp. 90-91, 96-97 and *infra* note 289 and accompanying text (examining Holmes and Mills).

275. "*[B]uckley* rejected the premise that the Government has an interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections.'" *Citizens United*, 120 S. Ct. at 904.

276. *See supra* notes 1-146 and accompanying text (introducing and discussing free speech concerns). Court observers had noted the Court's increased willingness to look askance at discretion manifested in regulatory efforts acting upon the free play of the marketplace of ideas to produce an anti-competitive effect. Persily, *supra* note 9, at 110.

277. The majority expressed this concept: "'The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it.'" *Citizens United*, 130 S. Ct. 917.

role as a regulator of speakers or content is devoid of theoretical support.

V. EVALUATING THE COMPATIBILITY OF AN EQUALIZATION APPROACH WITH RATIONALES FOR FREE SPEECH

To recap, the conception of freedom of speech extant at the founding of the republic and for over a century thereafter was characterized by the common law conception that while prior restraint was precluded, criminal and civil liability attached to libelous, seditious, and other improper speech, and by the prerogative of federalism—omitting states from the First Amendment's reach. In contrast, a more expansive conception of speech rights rose to the fore after the Civil War. An ideological construct supporting judicial protection of speech had clearly emerged well before the mid-twentieth century. This basis for protecting free speech was functionally linked to fundamental precepts of the American constitutional system of governance. The basic variations on the rationale that have emerged and have come to be recognized as underlying the right can be isolated.[278] Each can then be assessed in terms of its amenability to government curtailment for the purpose of achieving some greater social good.

A. Natural Law/Absolutist Approach to Protecting Free Speech

First, and unrelated to the modern rationale for protecting speech, is a justification based upon inchoate moral principles—the natural law conception of man as a free agent in the state of nature who is able to restrict his freedom rationally and voluntarily by contractual agreement.[279] This view, associated with Jefferson and other Founders and derived from classical liberal thought, regards the Constitution as the contractual delegation of power and relinquishment of specified rights for the purpose of obtaining the benefits associated with representative government.[280] If the rights are not specifically relinquished, the

278. The author acknowledges his reliance upon the work of Professor Powe in the identification and explication of the variants of the basic functional free speech models. *See generally* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA (1991) (identifying and explaining the basic functional free speech models).

279. Hence the conflict between Federalists and Anti-Federalists over whether the Bill of Rights was superfluous. Jefferson held that "no power over the freedom of religion, freedom of speech, or freedom of the press being delegated to the United States by the Constitution, nor prohibited by it to the States, all lawful powers respecting the same did of right remain, and were reserved to the States, or to the people." THOMAS JEFFERSON, THE KENTUCKY RESOLUTIONS OF 1798-99 (1798), *available at* http://www1.assumption.edu/users/mcclymer/His130/PH/Partisan%20Press/FirstKentuckyResolution.html.

280. *Id.*

individual retains them.[281] Moreover, the fact that the First Amendment specifically enshrines certain unrelinquished rights is all the more reason not to abridge them.

Unlike other approaches, this view of the importance of free speech is not instrumental. It does not depend upon any significance the expression of opinions may have for society or the process of self-governance. The right exists as an inherent attribute of personal liberty and is unassailable in terms of broader social needs and the private interests of others.[282] It derives from the principle of individual autonomy that the Court has, on occasion, intimated merits protection from First Amendment considerations.[283]

This absolutist approach is the least compatible with an

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281. *Id.*

282. The "absolutists" such as William Douglas and Hugo Black were prepared to concede limits to speech, but not to the individual conscience. Griswold v. Connecticut, 381 U.S. 479, 479 (1965). For example, one's right to speak was limited by a neighbor's right to peace and quiet. Health and safety considerations override one's right to say anything one likes, as neatly captured by Holmes's aphorism concerning shouting fire in a crowded theater. The national defense has been regarded as proper justification for penalizing (and even restraining) the disclosure of matters imperiling that effort. Public concerns have resulted in judicial acceptance of neutral "time, place and manner" limitations on speakers. Restrictions on child pornography have been justified in the name of protecting a class of persons incapable of protecting themselves. The same argument was pressed by feminists seeking to suppress pornography as subjugating women. *See* FINAN, *supra* note 64, at 242-46. (discussing this particular argument in depth). This raises the greater question of at what point government intrusion in the name of the social good is proper under even the "absolutist" approach. Does it stop at the point of protecting comparable private rights of others to be free from physical harm or does it comprehend less tangible moral harm as well? Examination of that problem, while certainly worthwhile, is not especially germane to comprehending the sources of the conflict in *Citizens United*. *Citizens United*, 130 S. Ct. at 876.

283. *See, e.g.*, Board of Directors of Rotary Int'l. v. Rotary Club of Duarte, 481 U.S. 537, 544-545 (1987) (ruling on a statute requiring an organization to open its doors to women and acknowledging that "the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights" but that "the relationship among Rotary Club members is not the kind of intimate or private relationship that warrants constitutional protection"); *Barnette*, 319 U.S. at 624 (intimating protections of the First Amendment); *Doe*, 410 U.S. at 210-221 (Douglas, J., concurring) (overturning a Georgia abortion statute; Douglas, in his concurrence, notes that rights such as "the autonomous control over the development and expression of one's intellect, interests, tastes, and personality" are "rights protected by the First Amendment and . . . they are absolute, permitting of no exceptions."). Elsewhere, I have addressed at length the Court's protection (or lack thereof) of First Amendment-based privacy rights. *See generally* Steven J. André, *Privacy as an Aspect of the First Amendment: The Place of Privacy in A Society Dedicated to Individual Liberty*, 20 UWLA L. REV. 87 (1989) (discussing First Amendment privacy rights).

analysis permitting government regulation designed to promote the greater social good over individual considerations. Derived from a contractual analysis, the parameters of where society may impinge upon individual rights are not flexible in accommodating fluctuating perceptions of what constitutes the social good. In spite of an upstanding philosophical and historical heritage, the approach met with negative judicial response prior to World War I and a minimal reception since Chafee's marketplace of ideas approach was accepted as a basis for free speech doctrine.[284]

The analysis, to the extent that it precludes government impositions upon the individual's right to say his piece as a matter of innate right, lends no support to the argument that private speech should be regulated for the objective of accomplishing a fairer system of democratic governance.[285] Because the right has no necessary correlation to self-governance, such considerations are immaterial. The fact that enormous private agglomerations of wealth may propel private speech to heights unattainable by other speakers is merely a matter of private concern. People can say what they want and spend whatever they want to say it, so long as they are not hurting anyone else.[286] And the fact that persons

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284. WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 57 (2007 ed.). Implicit, if not explicit, in judicial analysis of the question is the notion that certain impositions upon individual interests are "necessary and proper" as part of the constitutional contract. Government is implicitly empowered by the citizenry to carry out certain functions in the common interest as it sees fit and it is understood that some rights have been ceded to allow this. Thus, balancing individual interests against social goals set by the Legislature was a weighing process that did not bode well for the expression of speech that opposed government agendas. In essence, the assertion that the individual is more important than everyone else is tough for courts to swallow.

285. In view of the essential idea of popular sovereignty, placing a government agent in a capacity of deciding what speech is more meritorious than other speech places them in a role from which government agents are excluded by fundamental constitutional design. This intervention, in the guise of assisting the process of self-governance, actually interferes with the ability of the People to make decisions freely and unadulterated by the meddling of State agents. The casting of government administrators as shepherds or stewards of the public good is totalitarian and contrary to the individualistic precepts accepted by the Founders.

286. The hard lesson learned from efforts to limit the depth and breadth of public discourse is apparent from our long national experience with organizations seeking to regulate the range of public discourse on issues involving moral, artistic, political and social issues. Tocqueville identified our nation's propensity for suppression over 150 years ago. From the efforts of private organizations such as the Moral Majority to those of public organizations such as the House Un-American Activities Commission (HUAC), the attempt to impose the moral agenda of a majority, or at least those wielding power, upon others in the name of the public good has only led to the abuse of individuals and the inevitable suppression of socially valuable speech. The moral evaluation that certain organizations merit regulation to promote a particular conception of fairness in the election process is no different. Such

might unite to pool resources in one associational form or another to do the same thing is likewise a matter of private concern. If people want to hang out together and convey a certain message that makes them happy, then that is their business.[287]

B. The Functional "Free Marketplace" Approach

Second, the modern liberal approach illuminated by Chafee and given life in court doctrine by Holmes in his *Abrams* dissent and by Brandeis in his *Whitney* concurrence finds the reason for protecting speech flows from the systemic value of free speech.[288] This functional justification for free speech perceives its value as one of providing a pathway to truth. Because no one is so naive as to suggest that truth will invariably triumph as a result of this process,[289] a necessary corollary is that the process of searching for the truth is one of trial and error in a competitive process. Truth is a commodity the public shops for in an idealized free marketplace of ideas. The protection of individual rights functions to promote this process.

The fairness of this process is challenged as affecting the ability of some to effectively market their ideas and of some to receive them. The process is impaired as a result of the unequal distribution of resources in society. The conception of freedom is not one of "free" in the sense of a lack of regulation by government. It is "free" in the sense of the right to speak being meaningful. It asks: "[w]hat good is the right if I cannot be heard by anyone? Why

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regulation entails no logical exception compatible with the libertarian theoretical approach. Apart from theory, practice would inevitably reveal the non-neutral imposition of one moral valuation concerning the propriety of certain speech upon one group of speakers, but not others.

287. *Citizens United*, 130 S. Ct. at 958 (Stevens, J., dissenting). The Founding Fathers were not (as the *Citizens United* dissent correctly recognizes) unconcerned about the problem of faction as manifested in the rise of political parties and corporations distorting the process. *Id.* However, the classical basis for free speech does not support compensatory checks and balances to account for such distortion. *Id.* To the contrary, it supports the opposite conclusion; that pluralism should remain unregulated.

288. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); *Whitney*, 274 U.S. at 372-80 (Brandeis, J., concurring).

289. Certainly Mill did not believe this would occur. John Stuart Mill, *On Liberty*, *in* THE BASIC WRITING OF JOHN STUART MILL 29-30 (2002). He readily acknowledged that majoritarian fervor, emotion and other factors interfere with the power of reason to arrive at proper utilitarian principles: "[b]ut, indeed, the dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes . . . . [I]t is a piece of idle sentimentality that truth, merely as truth, has any inherent power denied to error of prevailing against the dungeon and the stake." *Id.* What "truth" represents for the Progressive view advanced by Chafee, therefore, is not some illusory metaphysical ideal, but the social good as conceived by the majority of the public. *Id.*

should I waste my breath standing and shouting from a soapbox while a countervailing view is blasted from all the major television networks?" Without intervention, some voices conveying important information may be drowned out. Other voices containing hyperbole and misinformation may be accepted by the electorate when they ought not. So (the argument goes), the impediments and advantages should be addressed to prevent the search for truth from being distracted or obscured by such obstacles. But the individualistic marketplace model does not comport with such egalitarian objectives.

The problem is not with the premise that the marketplace is unfair, it is with the solution. The very idea of placing government bureaucrats in the role of deciding what the electorate should and should not consider in determining the truth or public interest is problematic in terms of the rationale that speech allows voters to discern the truth. Political truth is a transitory and amorphous concept. Public bureaucrats and legislators have no special access to enlightenment. They have no proper role—in terms of this model—in "helping" the People arrive at the "correct" decision. Regulation essentially places the bureaucrat in the role of deciding what is in the public interest, a role that would seem to obscure and detract from the popular effort to divine truth every bit as much as the inequities in society sought to be addressed by such regulatory action in the first instance. While, its objective is to provide a more even airing of options to facilitate the exercise of sounder judgment by the People, in implementation, regulation serves to prevent this and may effectively allow the fox to guard the henhouse.

Regulation of the "marketplace of ideas" effectively places a government agent in the role of a censor. This unavoidably injects the personal perspective/bias of one person or one agency into the function of the marketplace of ideas—determining the information the People are to have access to and will be allowed to review regarding what the public good should be. This inevitably affects, distorts, and skews that process. Endowing a government functionary with discretion to decide what speech needs to be toned up or down places that official in the inherently non-neutral position of deciding what speaker or viewpoint merits what level of the public's attention.[290] Personal pre-determinations regarding

290. In view of the essential premise of popular sovereignty, placing government agents in a capacity of deciding what speech is more meritorious than other speech places them in a role from which they are excluded by fundamental constitutional design. This intervention, in the guise of assisting the process of self-governance, actually interferes with the ability of the People to make decisions freely and unadulterated by the meddling of State agents. The casting of government administrators as shepherds or stewards of the public good is totalitarian and contrary to the individualistic precepts accepted

what political vision is the "truth" will—either subtly or even blatantly—intrude into their decisions. It does not take a Legal Realist to recognize that regulators will bring with them personal biases that will influence such decisions.[291]

Placing government in the role of modulator—turning down some speech, turning up the decibel level of other speech—is representative of the fatal flaw with Progressive thinking, which is recognizing problems but failing to think through the details and ramifications of the solutions.[292] Progressive trust in the expertise of government agencies as inherently capable of ascertaining the public good was betrayed. Progressive willingness to cede the determination of the public good to legislative or administrative agencies when put into practice was found to result in abuse, intrusion on individual rights, corruption, and all the same perils to the social good that Progressives feared and sought to combat in the first place.[293] The same difficulty holds true with government regulation of speech. The role is subject to abuse, whether intentionally by corrupt government agents or unintentionally by well-meaning public servants. Even if there is no abuse by government officials, the appearance of abuse engendered by a process in which government may second-guess the citizenry threatens the system's legitimacy.

Regulation is contrary to the marketplace paradigm that relies upon the ability of an idea to be accepted in an open marketplace by a free and rational citizenry based upon its worth rather than other factors such as fancy packaging and marketing or the fact that most people endorse it or that it is government approved. The Court has adhered to the view that money, like a speaker's soapbox, enables speech such that money is bound up as

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by the Founders.

291. Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality and Participation*, 101 MICH. L. REV. 2409 (2003). Professor Tokaji elaborated upon the need for the judiciary to reign in governmental discretion as inevitably producing distortion in the marketplace of ideas, coining the term "First Amendment Equal Protection" for a doctrine curtailing government departures from neutrality. *Id.* at 2410-12. Outside of the election context, however, the Supreme Court has not been receptive to the notion that governmental speakers, in contrast to regulators of speech, are subject to constraints upon their discretionary determination to favorably air certain views over others. *Id.* at 2457-60; Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1125, 1127 (2009). Professor Tokaji's concern over the hazard presented by the application of discretion by government officials relating to undermining the free nature of public discourse remains entirely valid and acutely appropriate with respect to the election setting. Tokaji, *supra*, at 2410-12.

292. *See supra* notes 94-95 and accompanying text (mentioning the Progressives' main themes).

293. *See supra* p. 90 and p. 96 (discussing the Progressive movement).

an essential and protected component of the right.[294] The fact that some speakers can afford bigger soapboxes is simply not a concern of government. In keeping with the marketplace analogy, the Court has declined to regard spending money for speech as subject to reasonable time, place, and manner regulations.[295]

C. The Functional "Educational" Approach

A third approach, also conceiving of free speech as an essential prerequisite to democratic governance, emphasizes the importance of an informed, involved public evaluating the issues upon which it is called to govern in a process of robust debate. This approach, pressed by Professor Alexander Meiklejohn, stresses that the freedom to express one's views is essential to the democratic process.[296] He advocated the government's establishment of town hall meetings in each locale for persons to learn about and discuss political issues.[297] He perceived no constitutional limitation upon the State acting to enlarge and enrich "[t]he freedom of mind which befits the members of a self-governing society . . . ."[298]

> Adopting the mode of a New England town meeting, Meiklejohn looked to structured debate with Robert's Rules of Order prevailing. He focused not on "the words of the speakers, but the minds of the hearers." Thus, "what is essential is not that everyone shall speak, but that everything worth saying shall be said." With the focus on the listeners rather than the speakers, the state may play a moderating role to ensure that ideas to decision making are brought forward and redundancies limited.[299]

Other First Amendment pontificators pushed this rationale to its logical conclusion: that the listener's interest in having a fair presentation of the information on a particular subject requires government intervention to ensure that this occurs.[300]

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294. *See Buckley*, 424 U.S. at 65-66 (accepting the use of money to facilitate speech as essentially a form of speech itself). The *Buckley* Court found that the right to join together "for the advancement of beliefs and ideas," is diluted if it does not include the right to pool money through contributions, for funds are often essential if "advocacy" is to be truly or optimally "effective." *Id.* All citizens are equally allowed to use their private property to enable their speech. This ends the inquiry. The question of how the strength of one's convictions compares to the size of one's pocketbook does not get considered.

295. Schneider v. New Jersey, 308 U.S. 147, 159 (1939).

296. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 19-20 (1960).

297. *Id.*

298. *Id.*

299. *Id.* at 26; POWE *supra* note 278, at 247.

300. *See* Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1642-78 (1967) (stating the following assumption: "[f]ull and free discussion has indeed been the first of our faith" and noting "[t]he assumption apparent in this excerpt is that, without

With modern consolidation of media sources, the Progressive nightmare of corporate abuse of the right to free speech to exclude socially valuable ideas and distort the process to favor special interests over the public good is exacerbated. A self-governing society that is left in the dark concerning certain significant facts cannot make wise decisions.[301] The idea that an "invisible hand" operates to motivate the press and interested players to locate and disseminate information into the marketplace of ideas has some merit with respect to information that serves certain political agendas or makes newsworthy material. But the complaint that the mainstream media gives short shrift to significant information of which the public should be aware is worrisome.[302] Resonating such concerns, the perspective advocated by Owen Fiss and Judith Lichtenberg[303] is that where the press and other free market sources fail to fulfill the function of keeping the public adequately informed, government should step in and compensate or regulate to see that this occurs.[304] The problems with this notion, as already detailed, are manifold,[305] and the Court has not been receptive.[306]

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government intervention, there is a free market mechanism for ideas."). *See also* Red Lion Broadcasting v. FCC, 395 U.S. 367, 367 (1969) (adopting the approach to vindicate government regulation of the limited venue of public television).

301. A corollary of the foregoing approach has produced legislation mandating open government or "sunshine" laws and acknowledged the importance of allowing public access to information in keeping with this train of thought. But this means of providing the public with access to information is not self-actualizing. It is still dependent upon motivated individuals who request government agents to provide specific information. The problem with government deciding what public information to impart and what not to impart presents the same danger posed by government regulation of private speech. The Court's adoption of a standard that government regulation of private speech must be content neutral suggests, as its logical analog, that government determinations regarding what information to share with the public pertaining to election issues must likewise be neutral.

302. *See* CENSORED 2010: THE TOP 25 CENSORED STORIES OF 2008-09 8-12 (Peter Phillips, Mickey Huff, & Project Censored eds., 2009) (listing twenty-five news stories that didn't make the news and more accounts of media inadequacy in fulfilling the function of enlightening the public), and the previous publications in this series of books.

303. POWE, *supra* note 278, at 250-55; Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1415 (1986); Judith Lichtenberg, *Foundations and Limits of Freedom of the Press*, 16 PHIL. & PUB. AFF. 329, 333 (1987).

304. *See id.* (hinting that like the Progressives, who through bitter experience came (like the Founding Fathers) to distrust governmental involvement in the process of self-government, these thinkers had not yet become jaded).

305. Government agents have their own motivations for distorting the process. The question of who should decide what information or voices to include or modulate in the public discourse is really no different than the concerns germane to censorship generally. As one scholar observed: "[i]nevitably this requires a value judgment on the part of judges as to which

Ultimately, this public "need to know" model involving administrative intervention to equalize the flow of information suffers from all the same frailties identified with respect to the search for "truth" rationale and butts up against other insurmountable constitutional principles. The Progressive concern over distortion of the marketplace of ideas from the influence obtained by private consolidations of wealth is equally valid with respect to government activity impacting the marketplace of ideas. But government, unlike private players, enjoys no constitutional right to speak, is not immune from regulation, and is likely required to refrain from seeking to influence the electorate based upon fundamental constitutional principles.[307]

The principle of government neutrality that is inextricably bound up with the linkage of the marketplace ideology of free speech to self-governance that coaleced after *Abrams* contemplates that the People, not a governing elite, are charged with the responsibility of determining their destiny.[308] Interference with that role by agents of government, the servants of the sovereign People, conflicts with the effective performance of that responsibility. In practice too, the government regulation of the marketplace of ideas breaks down.[309] And, if not in actual practice, at least in appearance, such that the legitimacy of the process is undermined. The reason for this stems from the fact that regulation unavoidably involves introduction of a value judgment. The government auditor charged with modulating the forum is necessarily placed in the role of deciding who should speak and what speech deserves consideration and/or to what degree that speech should be considered by the listening public.

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interests are legitimate and how much weight they should be given." Jay, *supra* note 38, at 781. The issue concerning the cause of global warming, like the idea that the earth is not flat or that the sun does not revolve around the earth, presents value judgments relating to what information may or may not be worthy of consideration. When the question is before the electorate, this governmental role presents too great an opportunity to discount novel ideas and dismiss them as inconsequential and not worthy of inclusion in the discussion or to favor or disfavor certain ideas over others based upon personal predispositions of the evaluator. The process is inherently non-neutral.

306. "The concept that government may restrict the speech of some elements of our society in order to enhance the relative voices of others, is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48-49.

307. *See supra* note 6 and accompanying text (citing and discussing *Citizens United*).

308. *Abrams*, 250 U.S. at 616.

309. The failure is one of trust: "The state lacks 'moderators' who can be trusted to know when 'everything worth saying' has been said." Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 40 (1975).

D. The Functional "Watchdog" Approach

Another approach conceives of the rationale for protecting free speech and a free press in terms of its watchdog value. Its value is conceived as essential to popular governance by holding government agents accountable, checking government misconduct and excess. "The checking theory, unlike both the marketplace and self-government theories, is bottomed in neither truth nor rationality, but rather in distrust. It assumes a darker side to human nature and holds that those who wield governmental power will be prone to overreaching, and thus that it is essential to provide information for a resisting citizenry."[310] The ability of individuals to disseminate information concerning perceived government malfeasance serves to alert the People to cast their votes accordingly and to keep government agents from departing from their duty to serve the public interest. This rationale does not lend itself to a differential treatment of speech. To the extent that it is primarily based upon skepticism about government motives, it provides no logical basis to entrust government agents with the discretion involved in regulating public debate.

E. The Absence of Support for a Government "Equalization" Role with Respect to Private Speech

Neither the individualistic approach to free speech consistent with the Founders' conception of rights nor the functional rationales that emerged as a product of Progressive efforts to reform society are compatible with government regulation seeking to accomplish some sort of parity in the effectiveness of speech. This incongruity between the dominant marketplace of ideas paradigm[311] and legislative and judicial inclinations to regulate speech in the name of egalitarian considerations has now surfaced with the Court's ruling in *Citizens United*.[312] Regulations based upon perceived inequalities in society will need to await the adoption of a new rationale for free speech that is amenable to government censorship in the name of the greater common good.

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310. POWE, *supra* note 278, at 238.

311. *See* Jonathon Schonsheck, *The "Marketplace of Ideas:" A Siren Song for Freedom of Speech Theorists*, *in* FREEDOM OF EXPRESSION IN A DIVERSE WORLD 27-38 (Deirdre Golash ed., 2010) (observing the entrenchment of the marketplace of ideas paradigm in judicial analysis and lamenting its consequences in terms of skewing analysis due to a faulty analogy); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 4 (1995) (pointing to the ubiquity of the marketplace metaphor in free speech analysis); W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 J. & MASS COMM. Q. 40, 40 (1996) (carefully dissecting the entrenchment of the marketplace of ideas metaphor in the Supreme Court's discussions and cataloguing the scholarly discontent with and criticism of the analogy as "inherently flawed" and the use of it as "naive, unthinking, or both").

312. *Citizens United*, 130 S. Ct. at 876.

This would necessarily entail a substantial departure from what have come to be perceived as fundamental tenets of constitutional governance and the dogma surrounding the role of free speech in that scheme.

VI. CONCLUSIONS

The flaw inherent in balancing tests is that the scales of justice are susceptible to being "tipped." The "thumb on the scale" is manifested in terms of what a court portrays as tossed on each scale. As Professor Shapiro enjoyed pointing out,[313] how you characterize what is at stake makes all the difference. If what is being weighed is merely a silly leaflet to which no one is going to pay much attention, the interest in suppression is not accorded much weight. Conversely, if what lies in the balance is the fate of our entire democratic way of life[314] being undermined by a corrosive doctrine, that whale on the scale pretty well offsets any functional interest in protecting single individuals' speech rights. The "clear and present danger" test suffered the infirmities of scale-tipping until the Supreme Court began placing something new on the "individual" side of the scale.[315]

The Lockean, natural rights-based approach to the protection of speech was largely unsuccessful in capturing public or judicial adherents.[316] In a simple utilitarian calculus, weighing the miniscule individual's right to make a fuss and complain against the hefty popular interest in making the annoying loudmouth shut up, the social interest as represented by the State was bound to

313. Professor Martin Shapiro, United States Constitutional Law, lecture at University of California Berkley (Fall 1982). The marketplace of ideas paradigm, to the extent that it continues to value free speech for its socially beneficial attributes, still leaves the Court poised to weigh such interests unfavorably against other imperative social interests. This is more apparent outside the context of core, political speech. This is because speech that has little to do with the political process has less capital in terms of the marketplace's ultimate purpose—self-governance. The utilitarian calculus of weighing the good of all of society against the interests of one individual remains (as it did with the "bad tendency" and "clear and present danger" tests) an invitation for judicial officers to inject their own valuations of the relative weight to be accorded each side of the scale. This is often tipped by the assessment of what is supposedly sitting on each side of the scale. Placing socially valueless smut on one side and the wholesome concern with protecting society's children on the other is going to tip the scales one way. Plopping the bulky societal interest in protecting freedom of expression and the dissemination of novel ideas on one side versus the attenuated concern with potential harm that hypothetically could befall individual children on the other would produce a different result.

314. What Professor Shapiro referred to as "the parade of horribles."

315. *See supra* notes 229-38 and accompanying text (citing to *Lowry*, 301 U.S. at 242 and *Hartzell*, 322 U.S. at 680).

316. *See supra* notes 114-31 and accompanying text (citing to Weinreib forthcoming, *supra* note 111, FINAN *supra* note 64, and a number of cases).

prevail.[317] When acceptance of an individual rights-based analysis began to gain some traction in the courts it came in a form abhorrent to most liberal supporters of speech as an instrument of social reform.[318] This analysis tipped the scales against legislative objectives because it regarded the entire purpose of government as being the protection of the individual.[319]

The courts utilized this rights-based methodology to protect the industrialists, the trusts, the wealthy, and the powerful—the very forces perceived as working counter to the greater social good. Rather than weighing selfish, private interests against altruistic social objectives, the courts were acknowledging that private rights trumped the Legislature's determination of what was in the public interest.[320] This did not comport with basic Progressive thinking that regarded broad social interests identified by skilled public servants as outweighing individual concerns.[321] Consequently, an individual rights-based analysis was viewed negatively by Progressive thinkers and legal strategists. When another functional rights-based approach was embraced by the Court, a classical liberal rights-based approach would never gain much ground in judicial doctrine.[322]

The new functional approach placed into balance the social value of speech and weighed it against State interests. Free speech was no longer merely a private interest. Progressive judicial tacticians would reconceive speech as an intrinsic social good. Not just any old social good on a par with every mundane governmental evaluation of what would be in the public interest, but a paramount social good. Indeed, it was redefined as the fundamental component of American democracy—an absolute essential of our system of government and way of life.[323] Unlike the private rights concepts that had caused them so much consternation in terms of extending judicial protection to exploitative commercial activity, speech could now pose a hefty counterweight to State interests. Only the most compelling social good could offset the superior value speech now represented. Best of all, this approach left Progressives free to press for regulation of

317. *See* OVERBECK, *supra* note 284.

318. *See supra* notes 88-90 and accompanying text (emphasizing the setbacks that the Progressive movement experienced in the 1890s).

319. *Id.*

320. *Id.*

321. *See supra* notes 91-96 and accompanying text (stating that "the Progressives looked to legislative and administrative branches of government to advance their objectives, including protecting speech rights.").

322. *See supra* Part III.F-G (noting initially the courts receptiveness to the IWW's efforts prior to WWI and the courts subsequent response to the progressive doctrine).

323. *See supra* notes 219-21 and accompanying text (discussing Justice Brandeis).

private activity—to curb the excesses of commercial enterprise that were counter to the social good and carried no significant weight meriting judicial protection.[324]

But in the new functional conception, Progressive priorities with pursuing the broad social good emphasized regulating public discourse to ensure that voices that would otherwise be marginalized would be heard. For many decades the courts would accept the restriction of the speech of artificial entities—corporations—as a proper regulatory measure.[325] But the problem with regulation of campaign activity is that it places government in the role of deciding who can speak about what and how much they can say. For the absolutists, this runs squarely up against the First Amendment requirement that government shall make no laws restricting free speech.[326] The marketplace of ideas rationale for protecting free speech, although arising from functional considerations, is likewise counter to the limitations imposed upon the State's role.[327] From that perspective it does not matter whether the speech is by an association. And it does not matter whether we are concerned with the interests of the speaker or the listener. The problem remains the same. Government decisions concerning what gets said are not merely economic restrictions, but censorship, and they fall within the First Amendment's prohibition because they interfere with the free flow of ideas. Even those regulations intended to enhance the flow of ideas are ultimately self-defeating because they entail value judgments about who can speak and how much they can say.

This was the problem presented by campaign reform regulations in *Citizens United*. The Court was unable to reconcile the individual rights-based marketplace model with government efforts to modulate the public pre-election debate. Although the Court recognized that such regulations are censorship, it did not come to terms with the source of the conflict that brought it to this conclusion. The conflict posed by objectives protecting the interests of individuals versus egalitarian goals is an age-old source of concern for political philosophers contemplating the nature of justice. Reconciling the conflict with respect to the specific issue of free speech is, like the conundrum generally, a perennial source of academic and judicial consternation.[328] The Court simply

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324. *See supra* notes 230-35 and accompanying text (citing to case law and noting the court composition change, i.e., the switch in time that saved nine).

325. *See supra* notes 233-46 and accompanying text (noting the end of the *Lochner* era).

326. *See supra* note 278 (citing to POWE).

327. *See supra* Part IV.B (discussing "the lesser standard of protection accorded corporate entities.").

328. *See generally* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010) (arguing that "support for First Amendment values in fact cuts across conventional political allegiances, and that both

recognized it was constrained by the limits of its own First Amendment doctrine—the metaphor of the marketplace of ideas—from accepting the role of government as an equalizer of citizen speech. It was compelled by the logic of its own paradigm to protect the "individual" rights of artificial entities.

Citizens United makes it clear that governmental interference with speech rights as a means of obtaining some vision of fairness in pre-election debate will not be tolerated.[329] This Article has detailed why such devices are theoretically unsupportable and, as a practical matter, self-defeating. If this Article has made anything clear, it is that the answer to private brainwashing is not governmental brainwashing. If the inequities brought upon the public discourse due to vast differences in wealth in society are to be tempered, this is not going to come from regulating speech. Such a regimen would treat the symptom, not the disease. Both the source of the malady and its cure lie deeper. We need to look at the nature of the social system that maintains such disparities. Merely addressing the consequences of that system, as campaign reform regulations tend to do, is like treating malaria with a band-aid.

The success of modern liberals in obtaining judicial recognition that private economic interests do not warrant the same protection afforded interests enshrined in the Bill of Rights is significant. Nevertheless, this achievement has not been a boon for legislating adequate remedial social change. In fact, the gap between powerful and powerless has widened in the decades of post-*Lochner* judicial deference to government regulation of economic interests. Regulation designed to compensate for the resultant imbalance in the effectiveness of speech that is symptomatic of such a yawning disparity in resources runs counter to entrenched First Amendment principles. Nevertheless, the Court's recognition of governmental ability to regulate private economic interests still provides the answer. If a more level playing field in the public discourse pertaining to elections is desired, the answer lies in achieving a more equitable distribution of resources in society.

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sides in *Citizens United* are committed to free speech, but to two very different visions of free speech.").

329. *Citizens United*, 130 S. Ct. at 876.