HOW CONDUCT BECAME SPEECH AND SPEECH BECAME CONDUCT: A POLITICAL DEVELOPMENT CASE STUDY IN LABOR LAW AND THE FREEDOM OF SPEECH

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Legal scholars typically conceive of First Amendment free speech rights as either expanding or contracting. This is particularly true when they are writing about or alluding to the history of the freedom of speech. Narratives concerning that history are usually constructed around two dynamics that, while not mutually exclusive, are distinguishable. The first involves cycles of expansion and contraction. These narratives draw attention to periods of repression, in which otherwise prevailing free speech norms are transgressed in reaction to fears (commonly constructed as excessive) of threats posed by political opposition, foreign enemies, dangerous ideas or behaviors, or some combination of these. The most prominent cyclical turns concerning the freedom of speech are familiar: the Alien and Sedition Acts, the Red Scare, and the McCarthy era are touchstones.[1] The

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[1] Conservatives, who have had very little influence over the shape of academic narratives concerning the freedom of speech, may share these touchstones with liberals. However, many conservatives believe that the ostensible restrictions of the McCarthy era have been exaggerated, or that critics of McCarthyism radically underestimate the level of parallel hostility to the free speech of communists and fellow travelers. Disputes over the proper stance toward McCarthy and communism more generally were at the core of the political debates amongst the New York intellectuals at mid-twentieth century. *See, e.g.*, NEIL JUMONVILLE, CRITICAL CROSSINGS: THE NEW YORK INTELLECTUALS IN POSTWAR AMERICA, at xii (1991) (arguing that New York intellectuals underwent a critical political reorientation during the Cold War); RICHARD H. PELLS, THE LIBERAL MIND IN A CONSERVATIVE AGE: AMERICAN INTELLECTUALS IN THE 1940S AND 1950S 264–65 (2d ed. 1989) (suggesting that many of the intellectuals of the 1940s and 1950s either were complicit with, or did not take a strong enough stand against, McCarthyism); ALAN M. WALD, THE NEW YORK INTELLECTUALS: THE RISE AND DECLINE OF THE ANTI-STALINIST LEFT FROM THE 1930S TO THE 1980S 194–95 (1987) (arguing that "the pressure on intellectuals to conform during the postwar McCarthy period" caused many of the New York intellectuals to adopt pro-Cold War stances, creating a rift among the group). These debates have had no influence within contemporary academia, whose construction of the period is Manichaean. *See, e.g.*, ELLEN W. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES 340–41 (1986) (arguing that American academia universally accepted and con-

second dynamic is of secular, linear progression. This dynamic is chiefly—and perhaps exclusively—applied to free speech in the twentieth century. Similarly familiar, narratives premised on this dynamic start with the fledgling beginnings of the Holmes and Brandeis dissents,[2] proceed through the incorporation of free speech as a fundamental right, requiring protection against actions of the states,[3] and

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tributed to McCarthyism and its disastrous consequences); *see also* ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA, at x (1998) ("In order to eliminate the alleged threat of domestic Communism, a broad coalition of politicians, bureaucrats, and other anticommunist activists hounded an entire generation of radicals and their associates, destroying lives, careers, and all the institutions that offered a left-wing alternative to mainstream politics and culture.").

Conservatives, moreover, along with a few dissident liberals, would add to these touchstones the repressions caused by multiculturalist political correctness beginning in the late 1980s and continuing through the present. *See, e.g.*, DONALD ALEXANDER DOWNS, RESTORING FREE SPEECH AND LIBERTY ON CAMPUS 10–11 (2005) ("[I]nstitutions of higher learning have been busy since the later 1980s circumscribing and restricting the freedom of speech . . . in the name of promoting a variety of causes, including promoting civility and making the university a more hospitable place for minorities and other groups considered to be oppressed."); NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER 152 (1992) (arguing that speech codes are "antithetical . . . to the idea of a university" (quoting Benno Schmidt, President, Yale Univ., Speech broadcasted on PBS television's *Fred Friendly*: Safe Speech, Free Speech and the University (June 1980))); ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES 1–6 (1998) (arguing that political correctness and speech codes have stifled free speech on university campuses). Many believe that the increased willingness of young people to identify themselves as Republicans, and their resistance to identify themselves as feminists, are partly a reaction to this cycle of repression, which has been most pronounced in secondary and post-secondary education. *See, e.g.*, Brian C. Anderson, *We're Not Losing the Culture Wars Anymore*, CITY JOURNAL, Autumn 2003, *available at* http://www.city-journal.org/html/13_4_were_not_losing.html (arguing that the liberal stranglehold over popular media has been broken by the advent of Fox News, the creation of the internet, and the rise of conservative book publishers, and that these changes have most pronouncedly affected teenagers and young adults).

[2] These dissents begin with a key 1919 Red Scare case, *Abrams v. United States*, 250 U.S. 616, 624–31 (1919), in which Justice Holmes argued that several alien dissidents who published articles critical of the United States government's prosecution of World War I criminals were protected against charges of treason and espionage by the First Amendment. The dissents persist in several later cases: *Gilbert v. Minnesota*, 254 U.S. 325, 334–43 (1920), in which Justice Brandeis argued that a state statute prohibiting the teaching of certain applications of pacifism violates the First Amendment; *Gitlow v. New York*, 268 U.S. 652, 672–73 (1925), in which Justices Holmes and Brandeis argued that arrest for publishing a manifesto promoting the overthrow of government is in contravention of the First Amendment; and *Whitney v. California*, 274 U.S. 357, 379 (1927), in which Justices Brandeis and Holmes, in their concurrence, stated that "assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is . . . a right within the protection of the Fourteenth [and, therefore, First] Amendment[s]." *See also* Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.) (holding that inciting speech is prohibited only if it creates "a clear and present danger").

[3] Before the Fourteenth Amendment was passed, the Bill of Rights did not constrain the states. *See* Barron v. Mayor & City Council of Baltimore, 32 U.S. 243, 247 (1833) (holding that the Bill of Rights does not restrict the conduct of the States). However, once it was ratified, the Fourteenth Amendment was held, in time, to incorporate some of the Bill of Rights against the

then chart speech's progress as a "preferred freedom" through distinct substantive areas as ever more protective doctrine was developed by the Court. So, for example, protections for speech-plus-conduct were added, along with related speech-protective doctrine concerning the law of libel.[4] The spaces considered public forums, where constitutional free speech protections had to be honored, multiplied.[5] Moreover, constitutional protections were extended to types

states. *See, e.g., Gitlow*, 268 U.S. at 666 ("[F]reedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

[4] *See, e.g.*, Stromberg v. California, 283 U.S. 359, 369 (1931) (striking down as unconstitutional a California statute that criminalized the display of a red flag as a symbol of opposition to organized government because the statute "might be construed as embracing conduct which the State could not constitutionally prohibit[,] . . . includ[ing] [the] peaceful and orderly opposition to government by legal means and within constitutional limitations"); Lovell v. City of Griffin, 303 U.S. 444, 451–52 (1938) (holding that a municipal ordinance prohibiting the distribution of any textual materials within city limits was unconstitutional under the First Amendment); Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940) (holding that the right to conduct a peaceful picket at a place of business is protected by the First Amendment); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that the freedom of speech includes the right of public school students to refrain from pledging allegiance or saluting the flag); NAACP v. Alabama, 357 U.S. 449, 462–64 (1958) (holding that disclosure of the names of members of political groups can only be compelled by a court when there is substantial justification, as such disclosures operate to inhibit freedom of speech by dissuading association with the groups for fear of exposure and its subsequent consequences); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (holding that a newspaper that prints a false but constitutionally protected political advertisement cannot be held answerable for libel, as it "might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities"); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (holding that political expression that does not "materially and substantially disrupt" the school environment cannot be forbidden in a public school setting without violating the constitutional rights of the students); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that the State could not prohibit Ku Klux Klan members from advocating violence or law breaking unless such advocacy was intended to and likely would cause imminent lawlessness); Cohen v. California, 403 U.S. 15, 26 (1971) ("[T]he State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this four-letter expletive a criminal offense."); *see also* Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 625–26 (1994) (positing that the size and scope of the modern central state led the Supreme Court to ever more zealously protect individual freedoms, such as the freedom of speech); *cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that a law that appears on its face to impinge on a specific provision of the Constitution, restricts access to the political process, or discriminates against a "discrete and insular" minority should be reviewed under heightened scrutiny). *But see* Kovacs v. Cooper, 336 U.S. 77, 83 (1949) (holding that a municipality could prohibit the use of sound trucks to disseminate information so long as the prohibition was meant to prevent nuisances); Roth v. United States, 354 U.S. 476, 485 (1957) ("We hold that obscenity is not within the area of constitutionally protected speech or press.").

[5] *See, e.g., Thornhill*, 310 U.S. at 106 (outside of places of business); Niemotko v. Maryland, 340 U.S. 268, 273 (1951) (in public parks); Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (outside of state legislatures); *Sullivan*, 376 U.S. at 265–66 (in paid newspaper advertisements); *Tinker*, 393 U.S. at 506 (inside public schools); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 94 (1972) (within 150 feet of schools); Boos v. Barry, 485 U.S. 312, 334 (1988) (within 500 feet of

of speech, such as sexual speech and "hate" speech, that had long been assumed to be beyond the pale.[6] The dynamic of secular progression, as mentioned, does not exclude the possibility of cycles. In fact, the most familiar narrative of the freedom of speech amongst legal scholars nestles accounts of cycles within a larger story of long-term secular expansion.[7] While not rejecting the significance of these dynamics, this Article seeks to demonstrate to legal scholars that a reflexive resort to these templates will lead them either to minimize as arcane, or to overlook entirely, important aspects of the development of the constitutional law of free speech in the twentieth century.

This Article maps what I contend is an illustrative instance of the nearly simultaneous expansion and contraction of free speech rights. Such expansion and contraction was part of the process of forging and consolidating the modern, post-New Deal political regime. While traditional narratives see this regime as one characterized by a cresting solicitude for free speech (absent setbacks foisted upon it by regime opponents), my study demonstrates the distinctive ways in which regime supporters publicly committed to and identified with a

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foreign embassies). These cases stand in stark contrast to the Court's turn-of-the-century opinion in *Davis v. Massachusetts*, 167 U.S. 43 (1897), where the Court held that municipalities had an absolute right to regulate speech in public places. *See id.* at 48 ("The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of . . . .").

[6] *See, e.g.*, Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 688–90 (1959) (distribution of film containing sexual immorality and adultery); Jacobellis v. Ohio, 378 U.S. 184, 194–96 (1964) (possession and exhibition of a film containing a love scene); Stanley v. Georgia, 394 U.S. 557, 565–68 (1969) (private possession of obscene material); *Brandenburg*, 395 U.S. at 448–49 (Ku Klux Klan meeting); *Cohen*, 403 U.S. at 24–26 (display in a courthouse of the word "Fuck" on a jacket); Texas v. Johnson, 491 U.S. 397, 404–06 (1989) (flag burning). For prior historical context, see *Roth*, 354 U.S. at 481–85, where the Court upheld a conviction for the mailing of an obscene book and circulars. Justice Brennan stated, "this Court has always assumed that obscenity is not protected by the freedoms of speech and press." *Id.* at 481.

Even Robert Post, who is the most historically sensitive and pluralistic constitutional theorist writing about the First Amendment, tends toward following the model of secular linear expansion and views this development as progress toward democracy:

> American constitutional law is exceptional in the intensity of its commitment to the social order of democracy. This is most plainly visible in our First Amendment jurisprudence, which is demonstrably idiosyncratic among national legal systems because of its ambition to maintain public discourse free from the control of community norms.

ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 9 (1995) [hereinafter POST, CONSTITUTIONAL DOMAINS]; *see also* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 549 (2004) (arguing that in the twentieth century, the Court has continuously promulgated "more speech-protective constitutional standards" that have impeded government efforts to suppress dissent).

[7] For an important recent example, see STONE, *supra* note 6, at 532–38, as he highlights restrictions on American rights during the "Half War" with France, the American Civil War, World War I, World War II, the Cold War, and the Vietnam War, while maintaining that constitutional law has made "substantial progress" toward becoming increasingly protective of civil liberties.

program of civil liberties work to constrict freedoms which run counter to the substantive imperatives of the regime. Regime supporters do so less by assailing free speech rights generally, than by altering categories of the sorts of behaviors considered "speech" and those not—that is, by altering the definitions of what behaviors constitute free speech controversies in the first place.[8] I demonstrate this process at work by looking at the area of legal doctrine that was central to the new regime in its formative era: labor law.[9] I do this by mapping the way in which important aspects of labor union activity once considered "conduct" (such as picketing) were re-classified as speech, and, at the same time, employer utterances once considered "speech" were re-classified as "conduct." In a liberal polity such as the United States, in which a commitment to rights protection has been a defining imperative,[10] the re-classifications that are most successful are the ones least likely to be discussed.

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[8] *See generally* Ken I. Kersch, *The New Deal Triumph as the End of History?: The Judicial Negotiation of Labor Rights and Civil Rights, in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT (Ronald Kahn & Ken I. Kersch eds., forthcoming 2006) [hereinafter Kersch, *The New Deal Triumph as the End of History?*] (arguing that the institutionalization and assimilation of the ideas behind the labor movement required an inversion of previously-held beliefs about "speech" and "conduct").

[9] *See* Karen Orren, *The Primacy of Labor in American Constitutional Development*, 89 AM. POL. SCI. REV. 377, 377–81 (1995) (positing that "changes in labor relations . . . have . . . driven major constitutional change" in areas including judicial review, judicial authority and deference, civil rights, and substantive due process); *see also* VICTORIA C. HATTAM, LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES 30–208 (1993) (discussing how the expansion of labor has led to a "new social history [that has] reinvigorated studies of American politics" and caused scholarly research on politics to include a "much larger range of [labor] behavior" than before); KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW 136 (2004) [hereinafter KERSCH, CONSTRUCTING CIVIL LIBERTIES] (arguing that the Supreme Court's labor decisions in the early twentieth century caused a "radical shift in constitutional doctrine" by institutionalizing group labor rights, as opposed to following an individualist conception); DAVID PLOTKE, BUILDING A DEMOCRATIC POLITICAL ORDER: RESHAPING AMERICAN LIBERALISM IN THE 1930S AND 1940S, at 121–27 (1996) (arguing that the passage and upholding of the National Labor Relations Act produced "a new leading political force and an expanding state," which set the stage for the subsequent strengthening of labor unions); Steve Fraser, *The "Labor Question," in* THE RISE AND FALL OF THE NEW DEAL ORDER, 1930–1980, at 55, 68–69 (Steve Fraser & Gary Gerstle eds., 1989) (noting the shifts in the legal status of labor during the 1930s from a "grim" outlook following the *Schecter* decision to the positive developments of the "second New Deal," highlighted by the Wagner Act).

[10] *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 5–17 (1991) (discussing the American obsession with rights and freedoms, which are viewed as being "absolute, individual, and independent of any necessary relation to responsibilities"); J. DAVID GREENSTONE, THE LINCOLN PERSUASION: REMAKING AMERICAN LIBERALISM 35 (1993) (describing a theory of American cultural consensus consisting of "a belief in individual freedom, private enterprise, and republican institutions founded on popular consent"); LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION 285 (1955) ("[T]he psychic heritage of a nation 'born free' is . . . a colossal liberal absolutism . . . .").

In demonstrating how conduct became speech and how speech became conduct in post-New Deal labor law, I borrow from (and attempt to contribute to) the stock of insights of the growing group of historically-oriented political scientists associated with the study of American Political Development ("APD"). This group of APD scholars devotes its efforts to sharpening our understanding of the dynamics of institutional stability and change across time.[11] Drawing upon foundational APD models of institutional development, I argue here that the process of simultaneous expansion and contraction of constitutional rights is related to the process of building and consolidating a broader political regime.[12] I argue, in addition, that this process of simultaneous expansion and contraction is a part of the heavily *ideological* process of constructing the regime's substantive programs as

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[11] Both the empirical and theoretical insights of APD work should be of interest to legal scholars. APD differs from empirical work arising out of the behavioralist approach to political science in the 1950s, which prominent scholars have recently been pushing upon law professors. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 312–26 (2002) (presenting an attitudinal model, which "holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices," to explain how the Court makes its decisions); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 114–15 (2002) (providing a series of recommendations for law schools and the legal community to improve conducting empirical research). APD scholars take law and legal doctrine seriously, and view them as highly relevant to the decisions made by political actors, including—and perhaps especially—judges. They share with other political scientists the conviction that law is in some sense policy and politics, but not in the crude way that behavioralists tend to suppose (i.e., judges vote their policy preferences and use legal verbiage as a smokescreen).

Discovering the ways in which law and politics interact, and, indeed, are mutually constitutive of each other, is at the core of the public law APD project. *See, e.g.*, THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT, *supra* note 8 (manuscript at 26, on file with editors) (presenting a collection of essays by APD scholars, which contribute to the "understanding [of] the relationship between law and politics by refusing to isolate questions involving legal doctrines and judicial decisions and the special qualities of courts as decision-making units from the consideration of developments elsewhere in the political system"). For overviews of APD as a distinctive approach to the study of politics, see generally KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT (2004) [hereinafter ORREN & SKOWRONEK, SEARCH FOR AMERICAN POLITICAL DEVELOPMENT]; PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS (2004) [hereinafter PIERSON, POLITICS IN TIME]; and Karen Orren & Stephen Skowronek, *The Study of American Political Development*, *in* POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 722, 722–54 (Ira Katznelson & Helen V. Milner eds., 2002).

[12] *See, e.g.*, RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900, at 314–54 (2000) (arguing that the different stances taken on constitutional economic rights, such as the reach of the Commerce Clause and the Sherman Antitrust Act, by the various political parties of the late nineteenth century were caused by the parties' desires to attain post-Civil War political and economic dominance); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 521–22 (2002) (arguing that increased judicial power and conservatism in the late nineteenth century was not court-inspired but rather was a form of partisan entrenchment that arose out of Republican Party efforts to gain political control and to promote economic nationalism).

constitutionally authoritative and, hence, legitimate.[13] Moreover, again drawing from seminal theoretical work on the nature of political development, I argue that regimes and the processes of building and legitimating them are complex affairs characterized by "multiple orders" and patterns of intercurrence, which are thick with institutions and authoritative relationships of diverse temporal origins and solidity. Drawing upon the theoretical insights of both APD and comparative politics scholars on the relationship between social movements (such as the labor movement, the civil rights movement, and the women's movement) and the state, sequencing, and path dependency, I furthermore provide an account of the relationship between law and the regime that is not static but dynamic—a characteristic feature of developmental models. The result is not a study of simple "expansion" or "contraction" of free speech rights, but a moving picture of the free speech "configurations" that were developed in the process of building and consolidating the modern liberal, New Deal political, and constitutional order.[14]

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[13] *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 243–45 (1996) [hereinafter NOVAK, THE PEOPLE'S WELFARE] (describing how the new liberal ideology of the late nineteenth century—which emphasized legal centralization of state power, individual freedom, and personal autonomy—led to the creation of a "new American constitutionalism"); William J. Novak, *The Legal Origins of the Modern American State*, *in* LOOKING BACK AT LAW'S CENTURY 249, 249–83 (Austin Sarat et al. eds., 2002) (arguing for the need to study the role of law and legal ideology to understand how "the creation of a decidedly new liberal constitutional state" occurred). *See generally* THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 272–79 (2d ed. 1979) (arguing that interest-group liberalism, beginning in the Roosevelt-New Deal period and culminating in the 1960s, brought about a Second Republic that made "the strong national state a positive virtue" and embraced the shift from Congress-centered to executive-centered power); ORREN & SKOWRONEK, SEARCH FOR AMERICAN POLITICAL DEVELOPMENT, *supra* note 11, at 28 ("Liberal ideology has been offered up as an explanation of continuity and adaptability in political culture, in political institutions, and between the two; it has also served as a foil for highlighting evidence of disjunction, contradiction, and provincial foreclosure of other programs and worldviews."); Wayne D. Moore, *(Re)Construction of Constitutional Authority and Meaning: The Fourteenth Amendment and* Slaughter-House Cases, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT, *supra* note 8 (manuscript at 265, on file with editors) (arguing that the antebellum fight over the validity and construction of the Fourteenth Amendment was as much based on political constituency considerations as it was on legal considerations); Stephen Skowronek, *Order and Change*, 28 POLITY 91 (1995) (demonstrating the influential role of institutions, through their "capacity to congeal and organize, to infuse social life with durable norms and dependable structures," in shaping politics).

[14] *See* PIERSON, POLITICS IN TIME, *supra* note 11, at 1–2 ("Contemporary social scientists typically take a 'snapshot' view of political life, but there is often a strong case to be made for shifting from snapshots to moving pictures."). Robert C. Post also uses the term "configurations," albeit in a slightly different sense than I use it here. *See* POST, CONSTITUTIONAL DOMAINS, *supra* note 6, at 12 (referring to "the ways in which management, community, and democracy each imply distinct configurations of persons and of the social worlds those persons inhabit").

I. MOVING BEYOND "RIGHTS AS TRUMPS"

The developmental approach I adopt here cuts against the most prominent approach to First Amendment rights (and, for that matter, to constitutional rights generally) taken by late twentieth century liberal constitutional theorists. That approach, propagated most exhaustively by Ronald Dworkin, treats rights chiefly as "trumps," administered by countermajoritarian courts with the aim of restraining state power.[15] My approach, by contrast, which I have recently articulated at length as a general theory applicable to a broad array of doctrinal areas, understands rights in the modern American state to be just as commonly the handmaidens of state power as constitutional trumps which limit it.[16] I take rights declarations to be the building blocks of the modern American political regime.[17] Within that regime, it is certainly true that limitations on power will be articulated and justified in terms of rights. But—crucially—it is also true that expansions of state power will be similarly justified.[18] The task for developmentally inclined scholars will involve building a body of knowledge that fixes the precise ways in which rights talk is used to justify

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[15] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 193 (1977) ("There would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient."); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986) (discussing the "countermajoritarian" nature of the power of judicial review in evaluating and guarding constitutional values).

[16] *See* KERSCH, CONSTRUCTING CIVIL LIBERTIES, *supra* note 9, at 25 ("Rather than treating [the civil rights and civil liberties] jurisprudence [of the mid- to late-twentieth century] . . . as the triumph of principle . . . because it is suffused with rights talk . . . as a categorical limitation on the state, I consider the rights creation undertaken in the wake of the New Deal standoff to be heavily implicated in the process of building the New American State and in the process of consolidating and legitimizing its authority and its power."); Ken I. Kersch, *The Reconstruction of Constitutional Privacy Rights and the New American State*, 16 STUD. AM. POL. DEV. 61, 87 (2002) [hereinafter Kersch, *Reconstruction of Constitutional Privacy Rights*] (positing that "[c]onstitutional change involving the Fourth and Fifth Amendments in the late nineteenth and early twentieth centuries redefined traditional protections of privacy [rights] in the interest of progress, of the construction of the modern American liberal state").

[17] *See* SIDNEY M. MILKIS, THE PRESIDENT AND THE PARTIES: THE TRANSFORMATION OF THE AMERICAN PARTY SYSTEM SINCE THE NEW DEAL 305 (1993) ("[T]he concept of rights has become increasingly associated with the expansion of national administrative power . . . .").

[18] *See* STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 101–02 (1995) (explaining Jean Bodin's theory that limited government can paradoxically increase the capabilities of states, and that this "idea that state capacities can be sharply increased by strategic limitations on power turns out to be a fundamental premise of liberal-democratic thought"); NOVAK, THE PEOPLE'S WELFARE, *supra* note 13, at 245 ("One of the oddest things about the legal centralization of state power in late nineteenth-century America was . . . its heightened regard for *individual* rights and liberties. . . . [T]he law and language of individual rights were not antagonistic to state building."); Kersch, *Reconstruction of Constitutional Privacy Rights*, *supra* note 16, at 63 (explaining how reconstructing constitutional privacy rights led to the successful building of the "new American state").

particular configurations of state power that simultaneously work to empower and limit the state in the service of the regime's particular substantive goals.[19]

This developmental approach promises untapped synergies between a dynamic group of political scientists and the work of an influential cohort of historically oriented, post-monist, post-CLS constitutional theorists concerned with the political dynamics of the law, such as Robert Post, Jack Balkin, Reva Siegel, and Sanford Levinson.[20] Whereas the previous generation of critical students of the politics of law (and some of this generation, earlier in their careers) were inspired by an anti-capitalist political project of leftist law reform, these scholars pursue a more dispassionate intellectual agenda aimed at developing an empirical understanding of the relationship between the development of constitutional doctrine and the dynamics of historical change. Their greater detachment from a fixed reform agenda has freed them to look at the dynamics of constitutional change generally through a prism of a wider set of scholarly problems than their critical predecessors.[21] Their focus on "history as theory"

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[19] *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1279 (1995) [hereinafter Post, *Recuperating First Amendment Doctrine*] (arguing that "rights ought not to be regarded as the private attachments of persons or entities, but rather as the instruments by which the law locates, defines, and sustains desirable social practices").

[20] Monist constitutional theory (or, as Duncan Kennedy has dubbed it, "fancy theory") strives to derive a menu of constitutionally protected rights philosophically from a single foundational principle. Critical Legal Studies, or "CLS," mounted a radical challenge to this project with a critique of law as a thoroughly politicized instrument of power. Although CLS was potentially broad in its uses, in a reflection of its Marxist origins, it tended to focus heavily on critiques of capitalism, and did not challenge the presuppositions of liberal legalism across the full range of possible fronts. *See* Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* LEFT LEGALISM/LEFT CRITIQUE 178–228 (Wendy Brown & Janet Halley eds., 2002) (describing the Fancy Theory as "the project of the milieu of elite legal academic intellectuals self-consciously concerned with universalizing the interests of various oppressed or disadvantaged groups" and presenting the CLS Critique of Rights, which "operates at the uneasy juncture of two distinct . . . enterprises, which I call the left and the modernist/postmodernist projects," as an alternative account of the role of rights in American legal consciousness).

[21] *See, e.g.*, RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 5–12 (2001) (analyzing the effect of political theory on the Supreme Court's role in implementing the Constitution, and arguing that the Court performs a more multifaceted implementation—requiring collaboration, pragmatical analysis, "moral reading," and accommodation—rather than solely searching for the Constitution's "one true meaning"); J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 870–71 (1993) (putting forth the concept of "ideological drift": that "theories of jurisprudence[] and theories of constitutional interpretation do not have a fixed normative or political valence[, but that] . . . legal ideas and symbols will change their political valence as they are used over and over again in new contexts"); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1052–53, 1067–68 (2001) (evaluating the Rehnquist Court's constitutional revolution—"a systematic reappraisal of doctrines concerning federalism, racial equality, and civil rights"—to be the result of political entrenchment); Post, *Recuperating First Amendment Doctrine*, *supra* note 19, at 1255 (arguing that the Supreme Court does not, as it claims, arrive at its First Amendment decisions by balancing the individual's rights with those of the government, but rather that the Court determines its

(as opposed to the now well-worn territory, within the constitutional theory of rights, involving the identification and implications of bedrock philosophical principles) promises to make novel contributions to our understanding of American constitutional law.[22]

A. The Architecture of Modern Free Speech Law: The Traditional Architecture from a Developmental Perspective

When legal scholars think of the secular, linear expansion of the freedom of speech, they typically conceive of speech along three distinct dimensions. The first involves the content or substance of the ideas or messages being conveyed. Some types of content, for example political speech, are considered "core" content, with a special value in liberal democratic political systems.[23] Other types, such as artistic or commercial speech, though important in diverse ways, are often held to have less foundational value.[24] Some content has been held to have little or no value, or even be positively harmful, such as

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cases "by deciding what kind of social practice ought to obtain constitutionality in the circumstances of . . . speech"); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 444 (2000) (questioning "the court-centered model of constitutional interpretation that these decisions [on antidiscrimination legislation promulgated pursuant to the Commerce Clause] assume, examining the relationship between Court and Congress that actually shaped the meaning of the Equal Protection Clause in recent decades[, and] argu[ing] that this history justifies a continuing role for democratic vindication of equality values").

[22] *See* POST, CONSTITUTIONAL DOMAINS, *supra* note 6, at 16 ("[W]e will comprehend a good deal more about the shape of our actual First Amendment jurisprudence by understanding the connection of speech to the specific social orders of democracy, community, and management than by searching for any general free speech principle."); *see also* PIERSON, POLITICS IN TIME, *supra* note 11, at 2 (emphasizing the importance of temporal analysis to understanding political and social outcomes, while arguing that studying politics from an "ahistorical vantage point" fails to provide a complete "understanding of complex social dynamics").

[23] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (citing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24–25 (1948) (asserting that freedom of discussion over matters of public policy is essential in a self-governing society); *see also* KEN I. KERSCH, FREEDOM OF SPEECH: RIGHTS AND LIBERTIES UNDER THE LAW 21–22 (2003) [hereinafter KERSCH, FREEDOM OF SPEECH] (arguing that effective self-government needs free speech for the purpose of political debate because open debate "prevent[s] powerful interests from imposing intellectual and institutional stagnation on the community, . . . [allows] dissenters of all sorts [to be] free to challenge the status quo and make the case for social change[,] . . . force[s] us to better understand why some old ideas and institutions are worth preserving[, and] . . . serves as a check on the arbitrary exercise or abuse of power").

[24] *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) ("Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific [or] literary . . . .").

"fighting words," obscenity, or libel.[25] The second dimension of speech that informs discussions of its secular expansion involves the form of the speech. Whereas the substantive dimension is focused on the message of the speech, the form involves the manner in which that message is delivered. Traditionally, the core delivery mechanism in free speech law has been "pure speech" or verbal utterances.[26] However, as other delivery mechanisms were held to fall within the ambit of free speech law, freedom of speech was increasingly understood to involve a broader "freedom of expression," and categories such as speech-plus-conduct, expressive conduct, and symbolic expression were developed.[27] The third dimension involves the institu-

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[25] *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–49 (1986) (holding that a city ordinance prohibiting adult movie theaters was constitutional under the First Amendment because there was a substantial government interest in preventing the secondary effects of such a business); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973) (incorporating the depiction of sexual conduct at "adult" theaters into the scope of obscene material that states may regulate, as long as it is within the limits designed to prevent First Amendment infringement); Miller v. California, 413 U.S. 15, 36–37 (1973) (holding that obscene material, as defined by contemporary community standards and not national standards, is not protected by the First Amendment and can be regulated by the states); Roth v. United States, 354 U.S. 476, 493 (1957) (upholding the federal obscenity statute which prohibits mailing obscene material); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (upholding the constitutionality of a state statute forbidding the public use of "fighting words," those words likely to cause violence or a breach of the peace); KERSCH, FREEDOM OF SPEECH, *supra* note 23, at 127 ("[T]he Court has long distinguished unprotected low-value speech from protected high-value speech. 'Obscenity,' for example, is speech, but the Court nonetheless has deemed obscenity to be low-value speech, having so little worth as to fall outside constitutional protections. The Court has similarly declared 'fighting words' a form of unprotected speech . . . ."). *But see Sullivan*, 376 U.S. at 283 (requiring proof of actual malice to award damages for libel against public officials about their official conduct); DONALD ALEXANDER DOWNS, THE NEW POLITICS OF PORNOGRAPHY 20 (1989) (noting that, although the Supreme Court has ruled that sexual expression is generally not protected by the First Amendment, enforcement in that area has been a low priority); ROCHELLE GURSTEIN, THE REPEAL OF RETICENCE: A HISTORY OF AMERICA'S CULTURAL AND LEGAL STRUGGLES OVER FREE SPEECH, OBSCENITY, SEXUAL LIBERATION, AND MODERN ART 281–87 (1996) (surveying Supreme Court pornography jurisprudence and finding that pornography is protected under the First Amendment as long as there is some redeeming social value to the material); KERSCH, FREEDOM OF SPEECH, *supra* note 23, at 147 (arguing that the *Sullivan* decision "fundamentally transformed the entire orientation of the courts toward free speech" by forcing the courts to compromise its categorical protected versus unprotected speech approach in favor of a "policy of openness," which analyzed the circumstances of each case to determine what "concrete effects a pro-speech ruling would have on openness, both in that area and in the wider culture").

[26] *See* KERSCH, FREEDOM OF SPEECH, *supra* note 23, at 144 (contrasting "'pure speech,' or solely verbal expression" with activities such as sit-ins that constitute "speech plus, or the conveying of a message through either conduct or the display of symbols").

[27] *E.g.*, Thornhill v. Alabama, 310 U.S. 88, 102–04 (1940) (holding that the right to conduct a peaceful picket at a place of business is protected under the First Amendment); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (holding that political expression that does not materially disrupt the school environment cannot be forbidden in a public school setting); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (affirming a Ku Klux Klan leader's right to advocate crime as a political tool as long as it does not incite imminent lawless action); Texas v. Johnson, 491 U.S. 397, 406–07 (1989) (finding that flag burning constitutes expressive con-

tion or body against which constitutional free speech protections apply. As is widely remarked upon, the First Amendment applies by its plain language to laws passed by Congress only. Strictly speaking, this leaves open the question of whether it would also apply to regulations promulgated by administrative and executive agencies, or to discretionary executive actions. Moreover, by its plain language, at least, the First Amendment does not seem to apply to the conduct of the states. It also does not apply to restrain the action of private actors and institutions. Over the course of the twentieth century, however, free speech protections, as measured along these dimensions, have expanded. Whereas the First Amendment's scope was once limited to actions by the federal government, those protections now apply to a wide variety of actions by both the federal and state governments. In addition, under certain conditions and where connected to government, First Amendment protections are applicable to some private individuals and administrative bodies.[28]

When scholars, and even the general public, think of the secular expansion of the freedom of speech, they may think of the way in which the number of types, forms, and institutions to which the First Amendment now applies has augmented over the course of the twentieth century. So, for example, whereas free speech protections were largely focused on core political speech in the early twentieth century, they were expanded to protect other forms of speech, such as (anti) religious (blasphemy), sexual (indecency), artistic, commercial, and other forms of speech. In this regard, we can say that free speech protections expanded: more types of substantive utterances became constitutionally protected. A similarly additive understanding of expansion applies to the speech's form. Whereas protections along this dimension tended initially to focus on pure speech, over the century's course additional means of delivery (like symbolic speech) were added. Similar dynamics took place concerning the actors and institutions covered by constitutional free speech law.

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duct protected by the First Amendment, absent a compelling state interest in regulating the non-speech element that is unrelated to the suppression of expression); *see also* KERSCH, FREEDOM OF SPEECH, *supra* note 23, at 144–51 ("Many people now interpreted stirring up trouble, making unpopular arguments, shocking the complacent, and fomenting disorder as acts of courage and as engines of progress [that were protected under the First Amendment] . . . . It was in this context that many people came to prefer the phrase 'freedom of expression' to the phrase 'freedom of speech.' 'Speech,' they thought, was too limiting. 'Expression,' after all, encompassed not just the spoken word but also conduct that conveyed both ideas and emotions.").

[28] *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 177–78 (1991) (conducting a free speech analysis on the Department of Health and Human Services' regulations, which limit the ability of Title X grant recipients to discuss abortion-related family planning, but ultimately holding that the Secretary's construction of Title X did not violate the First Amendment).

Given this conceptual structure, it is clear whence the predominant narratives of the history of the freedom of speech derive. The origins of the narrative of secular, linear progression are patent: the number of substantive categories and forms protected multiplied, and the number of governments and institutions restrained grew. Somewhat less self-evident are the ways in which this conceptual structure interacts with cycles of expansion and contraction. In the context of long-term secular, linear progression, hesitance or refusal to continue the momentum by adding new categories of speech protection in substance or form may be seen as a form of contraction. Actual contractions, of course, are theoretically possible. Some ideas advocated by conservatives can be conceived of as contractions of the freedom of speech. In particular, in the context of the additive proliferation of free speech protections, conservatives who are committed to anchoring constitutional interpretation in either original intent or original understandings of the First Amendment and/or readings of free speech rights emphasizing the collective public good have advocated ideas that can only be conceived of as contractions of the freedom of speech.[29] It is significant, however, that, at least in the form they have been advocated, efforts to cut the number of free speech categories seem to have been political non-starters. This resistance is a testament to the degree to which the categories (what Howard Gillman has called "rubrics")[30] that comprise the architecture

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[29] *See, e.g.*, Bork, *supra* note 24, at 28 (arguing that only explicitly political speech—"speech about how we are governed, . . . includ[ing] a wide range of evaluation, criticism, electioneering and propaganda"—deserves First Amendment protection, while constitutional protection should not extend to "scientific, educational, commercial or literary expressions"); *cf.* IRVING KRISTOL, *Pornography, Obscenity, and the Case for Censorship*, *in* REFLECTIONS OF A NEOCONSERVATIVE: LOOKING BACK, LOOKING AHEAD 43, 44–45 (1983) ("We all believe that there is some point at which the public authorities ought to step in to limit the 'self-expression' of an individual or a group, even where this might be seriously intended as a form of artistic expression, and even where the artistic transaction is between consenting adults. . . . No society can be utterly indifferent to the ways its citizenry publicly entertain themselves. . . . And the question we face with regard to pornography and obscenity is whether, now that they have such strong protection from the Supreme Court, they can or will brutalize and debase our citizenry."). *See generally* WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (1976) (suggesting that the Court has, in the past century, expanded the scope of the First Amendment to bounds never intended by the Founding Fathers).

[30] Howard Gillman, Professor of Political Sci. & Law, Univ. of S. Cal., Preferred Freedoms: Supreme Court Politics and the Rise of Modern Civil Liberties Jurisprudence, Paper presented at the University of Maryland/Georgetown Constitutionalism Discussion Group (Apr. 2002) (manuscript at 5, on file with author) ("I use the term constitutional 'rubrics' to refer to the concepts, doctrines, or tests that justices or advocates recommend as ways of directing decision-making over certain issues."); *see also* Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 315–16 (2002) (arguing that the decision making of justices, while influenced by ideological attitudes, remain strongly affected by jurisprudential regimes, and testing this approach through using the free speech content-neutrality jurisprudence to prove that even as the Court has consistently become more con-

of modern free speech law have become institutionalized. Law professors may attribute this resistance to the power of precedent. Political development scholars would frame the issue more broadly and speak of path dependency: the dynamics by which deviation from the path (at least in the naked manner advocated by Bork, Berns, and Kristol[31]) would be perceived by judges as increasingly costly no matter what the judge's political stripe.[32] Since the days of the abstract and undifferentiated "bad tendency" test of the late nineteenth and early twentieth centuries, the doctrinal architecture of free speech law has become more complex and the costs of abandoning it increase. In significant part, this is because it provides a framework that has proven useful in the resolution of problems. The framework "worked" in some sense because it reflected pragmatic wisdom: it arrived in the spirit of the fact-focused, problem-solving common law development which considers a stream of concrete cases over time. Many have argued that the fashioning of rules in this incremental way is likely to be efficient, and may even be predisposed to wisdom.[33] On a larger scale, a political development approach would note that, in its conceptual leaps, the modern architecture of constitutional free speech was constructed under the impetus of the broader develop-

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servative since the liberal doctrine's establishment, the justices continue to "take seriously the . . . content-neutrality jurisprudential regime").

[31] *See supra* note 29.

[32] *See* PIERSON, POLITICS IN TIME, *supra* note 11, at 43 (arguing that political public policies and political formal institutions are difficult to upend because they are created by politicians who want to demonstrate a "credible commitment[]" to party initiatives while preventing the "political uncertainty" of leaving options for future, possibly hostile, politicians); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 252 (2000) ("This conception of path dependence, in which preceding steps in a particular direction induce further movement in the same direction, is well captured by the idea of increasing returns. In an increasing returns process, the probability of further steps along the same path increases with each move down that path. . . . [T]he costs of exit—of switching to some previously plausible alternative—rise."); Paul Pierson, *Not Just What, but When: Timing and Sequence in Political Processes*, 14 STUD. AM. POL. DEV. 72, 78–79 (2000) ("There are . . . strong grounds for believing that self-reinforcing processes are in fact very widespread in political life. . . . [Path dependency] arguments have been applied to demonstrate the role of timing and sequencing in important political processes. . . . When a path dependent process is at work, early developments get deeply embedded in a particular environment, modifying the incentive structures and hence behaviors of social actors, and thereby changing the social significance or pattern of unfolding events or processes occurring later in the sequence.").

[33] *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 259 (1999) (arguing that judicial minimalism—the practice of promulgating narrow holdings—is a rational response to "the sheer practical problem of obtaining consensus amid pluralism" and upholds pluralistic ideals "by allowing opinion to coalesce over time and by spurring processes of democratic deliberation"). *See generally* F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960) (describing the subtle processes affecting the development of law over time); JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM (2003) (arguing that the incremental process of common law has ultimately had a positive and profound effect on the development of constitutional law).

mental events that built the modern state. A significant amount of modern free speech doctrine was forged by the Court in cases involving the labor movement, the civil rights movement, and increased protection for religious minorities and political dissenters.[34] To challenge currently settled categories of free speech doctrine is, in some sense, to publicly challenge each of these substantive political achievements. Indeed, it is quite possible that allegations in legal briefs and oral arguments and, more generally, allegations within political discourse of "turning back the clock" to the days of the Red Scare, the McCarthy era, and putting blacks in the back of the bus signal the sorts of political arguments that are likely to make retrenchment especially costly. To dismantle the rubrics would not only be to take on particular policies, but to take on a collective memory of historical constitutional progress that, in many respects, forms the core of the "constitutive story" of the modern American nation.[35]

It is always possible, of course, that the regime will change. Some argue that since 1980 it has. But until the Republican Party takes on not only particular doctrines, but the very memory of the achievements of twentieth century constitutionalism itself, it is unlikely that even the Court's conservatives will do so. This memory itself has an

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[34] *See generally* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 6 (1965) (giving a broad overview of how the African American civil rights movement spurred the development of First Amendment rights related to group defamation, control of political groups, and speech-plus-conduct actions); KERSCH, FREEDOM OF SPEECH, *supra* note 23, at 97–160 (giving a historical perspective of advances in the freedom of speech made during the twentieth century); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 303–57 (2000) (outlining the development of free speech during the Warren Court in the areas of libel, political protest, and obscenity); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 39–42 (1996) (arguing that the development of free speech rights relating to the labor movement and the civil rights movement were the result of the increasingly popular support for the underlying goals of those movements).

[35] *See* KERSCH, CONSTRUCTING CIVIL LIBERTIES, *supra* note 9, at 16 ("To a significant extent, the story of modern American constitutionalism is one of the choices [made by] reformers aligned with the cause of 'progress' . . . ."); ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 6 (1997) (arguing that political leaders must offer civic ideologies, or myths of civic identity, "and support citizenship laws that express those ideologies symbolically" in order to mobilize public support); *see also* POST, CONSTITUTIONAL DOMAINS, *supra* note 6, at 17 ("[Courts] simply follow *stare decisis*, which ensures that the border between social domains will remain relatively stable. *Stare decisis* makes it probable that given aspects of social life will be analyzed according to generally consistent forms of judicial logic, and . . . helps provide constitutional adjudication with the appearance of 'normal science.' But *stare decisis* can be broken, and the boundary between social domains can always be contested."); ROGERS M. SMITH, STORIES OF PEOPLEHOOD: THE POLITICS AND MORALS OF POLITICAL MEMBERSHIP 34 (2003) ("In the last two centuries, many modern nationalist leaders have advanced . . . 'horizontal, unified' visions of peoplehood as justifications for their authority, especially but not exclusively democratic ones.").

institutionalizing effect.[36] For these reasons, the current doctrinal architecture for free speech law is likely to remain relatively stable and path dependent. Even conservatives will tend to work within it. Of course, this does not mean that cycles will no longer occur. What it does mean, however, is that they are likely to appear under the guise of interpretive controversies within the pre-existing categories or over further categorical expansion. Put otherwise, debates over free speech doctrine will tend to appear less in the guise of normative debates over the justifiability of various doctrinal categories than the applicability of them to concrete situations.[37] This history and this context, which reinforce these tendencies, make it difficult for scholars to think about free speech in new ways, or even to "see" distinctive free speech configurations. In such an order, the important changes will often take place via sub-rosa shifts within the pre-existing categories themselves.

B. How Conduct Became Speech

In the constitutional law of the late nineteenth and early twentieth centuries, the conceptual categories providing the architecture for contemporary law of the freedom of speech did not exist. As far as substance was concerned, speech was not analyzed according to a rigid taxonomy that affected hermetic analytical separations between, for example, political, artistic, and commercial speech. As for form, the emphasis was squarely on what today is known as "pure speech," with actions, however expressive, treated as fully regulable by law. The prevailing constitutional standard was set by the amorphous "bad tendency" test, according to which the government, pursuant to its police powers to protect the public health, safety, and morals, was granted full authority to restrict speech having a "bad tendency"—that is, speech that was harmful to the public interest.[38] Needless to say, given its approach to free speech substance and form and the

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[36] *See generally* KERSCH, CONSTRUCTING CIVIL LIBERTIES, *supra* note 9 (outlining the manner in which trends in constitutional history can become part of current constitutional thought).

[37] These debates are likely to take place, that is, within the domain of law directed at establishing community, which, as Post notes, is only one of law's domains. *See* POST, CONSTITUTIONAL DOMAINS, *supra* note 6, at 3 (arguing that "constitutional law divides social life into the discrete domains of community, management, and democracy").

[38] *See* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 132–47 (1997) (discussing the judicial practice between the Civil War and World War I that permitted "the punishment of publications for their tendency to harm the public welfare"); Gillman, *supra* note 4, at 639–40 (recognizing that, from the mid 1800s to the early 1900s, judicial inquiry into a statute's constitutionality focused on whether the statute promoted the general good, rather than the statute's effect on specific individual liberties).

doctrinal test it applied, the constitutional law of this era was, by contemporary standards, highly deferential to government power.[39]

This is not to say, though, that the conceptual categories of substance and form, which eventually came to structure constitutional free speech law in the aftermath of the 1937 "Constitutional Revolution," did not exist in the broader political culture. As many scholars have noted, the American Constitution, from its inception, has played a unique role in the nation's public life, serving as a touchstone (and, indeed, a framework) for political arguments and a rallying cry for political causes, political resistance, and social and reform movements.[40] This was certainly true for the First Amendment's free

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[39] *See* KERSCH, FREEDOM OF SPEECH, *supra* note 23, at 90 ("[In the early twentieth century,] First Amendment arguments used against . . . legal restrictions on obscenity had almost no legal purchase in U.S. courts. The practice of the time was to allow legislatures considerable latitude to ban materials that had 'a bad tendency.' And the Bad Tendency test, as it was called, was not at all difficult to meet."); RABBAN, *supra* note 38, at 47 (noting that the courts gave "great deference to the 'police power' of the legislators and administrators to determine the tendency of speech [to harm the public interest]"); Gillman, *supra* note 4, at 639–40 (arguing that because the Court viewed free speech cases during World War I as involving the "promotion[] of community health, safety, and morality," the Court conferred great latitude to Congress to suppress dissent). *See generally* MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 84 (1991) (recounting how "many early twentieth-century jurists" believed that "congressional decisions limiting political dissent 'should be respected by the courts unless palpably unreasonable'") (internal citation omitted); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 17–25 (3d ed., New York, E. B. Clayton & James Van Norden 1836) (discussing how the states may prohibit the publication of truthful news articles if the press was acting with malicious intent, or if such articles would disturb the peace, inflame passions, or excite revenge); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 732–33 (Fred B. Rothman & Co. 1991) (1833) ("[The First] [A]mendment imports no more, than that every man shall have a right to speak, write, and print his opinions . . . so always, that he does not injure any other person . . . and . . . does not thereby disturb the public peace, or attempt to subvert the government. . . . [T]his reasonable limitation is not only right in itself, but it is an inestimable privilege in a free government.").

[40] *See, e.g.*, MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 19 (2000) ("The tradition emphasized that free speech is crucial for individual transformation and progressive social change. [For example,] [a]bolitionists claimed free speech even though many of them thought of themselves as discussing slavery as a matter of religion and morals, not as a political question."); NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 192 (2004) ("During th[e] period [from the 1798 Alien and Sedition Acts through the McCarthy era], the only meaningful check on government overreaching was the desire of the American people to be able to speak out—and hear others speak out—on controversial issues. Politically unpopular prosecutions of prominent Republicans under the Alien and Sedition Acts contributed to Thomas Jefferson's victory over John Adams and, with it, the repudiation of the Sedition Act. Likewise, post World War I fears of totalitarianism helped fuel what has become the modern civil liberties movement."); KERSCH, FREEDOM OF SPEECH, *supra* note 23, at 77–81, 122–25 (presenting the concept of free speech as a rallying point and a powerful weapon in such American social movements as abolitionism and the labor movement); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8–9 (2004) ("The Constitution . . . is a species of law—special only inasmuch as it sets the boundaries within which politics takes place. . . . [W]e are inclined today 'to see politics as working within a constitutional order rather than working out that constitutional order.'" (quoting GERALD LEONARD, THE INVENTION OF PARTY POLITICS

speech protection, which has had a life outside the courts every bit as significant (and, until recently, probably more so) than it had within them. Indeed, the attention of many legal historians and political development scholars is directed toward tracing when and in what ways constitutional thought in the broader social and political culture outside the courts came to influence the shape and trajectory of constitutional development within them.[41] For example, the relatively amorphous shape of free speech doctrine in the late nineteenth and early twentieth century meant that many individuals at different times argued prominently for some sort of special value for political speech,[42] artistic or sexual expression,[43] blasphemy,[44] or that con-

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15 (2002)); CHRISTINE STANSELL, AMERICAN MODERNS: BOHEMIAN NEW YORK AND THE CREATION OF A NEW CENTURY 73–119 (2000) (detailing how free speech fueled an ambition among New York bohemians to engage in focused conversations on such topics as women's rights, political liberty, and free love, which in turn strongly impacted both politics and culture); SANDRA F. VANBURKLEO, "BELONGING TO THE WORLD": WOMEN'S RIGHTS AND AMERICAN CONSTITUTIONAL CULTURE 164, 172–73, 195, 284 (2001) (documenting how rights protected by the Constitution were offered to justify or oppose feminist movements as varied as the anti-polygamy crusades, and campaigns for universal suffrage and co-educational institutions of learning).

[41] *See, e.g.*, PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 252–67 (2002) (contending that the American populace came to construe the Constitution's guarantee of religious liberty as mandating the separation of church and state and segregating religion from other activities, and noting that this viewpoint ultimately had an impact on judicial decisions); THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 13 (2004) (attributing the "mixed pattern of conservative success on the Rehnquist Court . . . to the interaction between relatively autonomous legal ideas and partisan developments in national politics"); KERSCH, FREEDOM OF SPEECH, *supra* note 23, at 84–85 (connecting the post-Civil War rise of a group of conservative libertarians, who wrote "vigorous theoretical defense[s] of free speech rights" based on the belief in limited government, to the Supreme Court's subsequent limitations on the government's power to regulate speech activities); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY AND THE POLITICS OF LEGAL MOBILIZATION 13–14 (1994) (arguing that pay equity activists achieve advancements in wage discrimination by engaging in legal mobilization, a process of achieving legal change through "effective uses of litigation to publicize the equity issue, . . . nurtur[ing] a growing 'rights of consciousness' among working women, . . . organiz[ing] them in defiant action for change," mobilizing legal resources, and using legal tactics to pressure employers); James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 942, 944 (1997) (highlighting the experiences of labor activists in the early twentieth century, whose interpretations of the Constitution eventually brought about the judicial view that picketing is a form of protected speech, as an example of how communities have successfully advanced their own interpretations of the Constitution even after the Supreme Court has ruled to the contrary).

[42] *See, e.g.*, CURTIS, *supra* note 40, at 371–72 (citing the examples of Republican Senator Dixon and the *New York Post* for their particularly outspoken belief that the Civil Rights Act of 1866 protected the right to free speech for all citizens); H.D. VA., THE VIRGINIA REPORT OF 1799–1800, TOUCHING THE ALIEN AND SEDITION LAWS; TOGETHER WITH THE VIRGINIA RESOLUTIONS OF DECEMBER 21, 1798, at 202 (1850) (reporting that Virginia's General Assembly passed a resolution finding the Alien and Sedition Acts of 1798 to be unconstitutional because the Act "exercises a power . . . expressly and positively forbidden by one of the amendments . . . [and] because it is leveled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right").

duct—such as marches and boycotts—was a form of protected speech.[45] Nonetheless, despite pressures and influences on this score, the core conceptual organizing principles used by judges up to this time were different.

In the constitutional law of the late nineteenth and early twentieth centuries, labor boycotts, strikes, and pickets were simply understood not as speech but rather as conduct.[46] At the beginning of the nineteenth century, labor unions seeking what would today be considered routine objectives would have been considered criminal conspirators. Business owners were understood to have private property rights in their enterprises. A demand by an individual employee for better pay

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[43] *See* EMMA GOLDMAN, *The Social Importance of the Modern School, in* RED EMMA SPEAKS: AN EMMA GOLDMAN READER, 140, 146–49 (Alix Kates Schulman ed., 1983) (arguing for women and schools to be free to discuss sex and sexuality openly without the imposition of "[p]uritanic tyranny" that "repudiates, as something vile and sinful, our deepest feelings . . . [and] the real functions of human emotions"); EMMA GOLDMAN, *The Hypocrisy of Puritanism, in* RED EMMA SPEAKS, *supra*, at 150, 150–57 (charging Puritanism with causing government censorship, under the guise of safeguarding against immorality, in such personal areas as "our views, feelings, . . . conduct[,] . . . [a]rt, literature, the drama, the privacy of the mails, . . . [and] our most intimate tastes"); GURSTEIN, *supra* note 25, at 32, 63–65 (describing prominent sex reformers, like Reverend Dr. Boynton, Ezra Heywood, and Stephen Pearl Andrews, as forces who promoted sexual free speech when they "demand[ed] that the private mysteries of sex be made public through lectures and pamphlets about sexual hygiene and morality"); THEODORE SCHROEDER, A MUCH NEEDED DEFENCE FOR LIBERTY OF CONSCIENCE, SPEECH AND PRESS 22 (1906) (arguing that free speech extends to all forms of expression, including sexual speech, as "'[t]he public interest requires that every difficult question [even questions of the hygiene, the psychology and the ethics of sex] should be patiently and deliberately examined on all sides'").

[44] *See* SCHROEDER, *supra* note 43, at 3, 10 (criticizing the prosecution of blasphemy as destroying a "proper liberty of thought and conduct" and arguing that the prosecutors are "more damaged than those whom they deter from expressing and defending unpopular opinions, since . . . only the former are depriving themselves of the chief means of correcting their own errors"); *see also* LEONARD W. LEVY, BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE 400–23 (1993) (tracing the nineteenth century arguments concerning why blasphemy should not be an offense, including the separation of church and state, the freedom of speech, and the fact that Christianity does not determine America's laws).

[45] *See, e.g.*, Pope, *supra* note 41, at 945 (discussing the 10,000 Kansas coal miners in the early twentieth century who protested against the Kansas Industrial Court Act, which prohibited strikes, and sought to classify boycotts and strikes as a form of protected speech).

[46] Both opponents and proponents of categorizing these behaviors as speech agree that these behaviors were historically deemed "conduct." *See* E. Merrick Dodd, *Picketing and Free Speech: A Dissent*, 56 HARV. L. REV. 513, 520 n.19 (1943) (noting that the concept of picketing as constitutionally-protected free speech is relatively new and was only first suggested by Justice Brandeis in his *Senn v. Tile Layers Protective Union, Local No. 5* decision in 1937); Ludwig Teller, *Picketing and Free Speech*, 56 HARV. L. REV. 180, 204 (1943) ("As recently as a decade ago, neither the judiciary nor students of labor law had yet conceived of the practice of picketing as an exercise of the right to free speech. It was generally agreed . . . that picketing was a tort; and the bone of contention was whether it was a tort per se without hope of legality, or whether it was but a prima facie tort which, like any other form of labor activity, could be justified in a given case."); *see also* GRABER, *supra* note 39, at 253 n.4 (acknowledging that progressive thinkers between 1911 and 1915 occasionally discussed the free speech issues raised by a labor injunction and the right to speak on public property). The *Senn* decision is discussed in detail below. *See infra* notes 60–68 and accompanying text.

or working conditions was considered unambiguously legal. But once that employee worked collectively with others to pressure the business owner, he was understood to be "conspiring" to coerce the owner with the threat of injuring him. This was considered by the law—and by many besides—as a form of blackmail. Just as the law today would never consider a threat to break someone's arm if a certain sum were not paid to be constitutionally protected speech, threats by groups of employees acting in concert to strike, boycott, and ruin businesses if their demands were not met were not considered free speech.[47] It is important to note that this is not simply a case of conservative, pro-business judges, overly solicitous of property rights, buying into the blackmail framework as against union claims that their activities were a form of constitutionally protected speech. Arguing that strikes, boycotts, and pickets might be a form of speech was not a widely-used aspect of the *labor* argument itself until the 1930s. Understanding this conduct as speech was a constitutional construction and a politically constructed developmental phenomenon.

Many liberal reformers did not approve of assertions of economic power by labor unions when they were justified as such—that is, of the collective power of labor asserted as leverage in the fight against the collective power of capital. Liberal reformers, as much as the pro-business judges, were content with seeing such conduct (as with, for example, secondary boycotts) punished by law. In a highly significant strategic decision made during the test case of *Gompers v. Buck's Stove & Range Co.*,[48] Samuel Gompers (despite some resistance by labor radicals who disdained rights claims over a resort to power) laid the groundwork for a political alliance with these reformers by anchoring his argument in claims on behalf of free press and free speech and, in turn, anchoring those arguments in an appeal to natural rights. Indeed, Gompers' strategic decision, which Daniel Ernst describes as "a crucible of interest-group formation,"[49] represented a countermove to that of James Wallace Van Cleave, the head of the Buck's Stove and

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[47] *See* DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM 2, 132–40 (1995) (explaining how lawmakers sought to distinguish legitimate from illegitimate assertions of collective labor bargaining power, and categorized threats to strike and boycott as illegitimate); HATTAM, *supra* note 9, at 146–47 (recounting the decision in *People v. Wilzig* that, while admitting that some forms of collective action were permitted, held that workers boycotting their employers were guilty of intimidation, using the vague rationale that the workers' actions during the dispute were intimidating "because of the size of the protest and the workers' attitude of menace"); KERSCH, FREEDOM OF SPEECH, *supra* note 23, at 107 (describing how "[s]triking workers and their supporters were routinely charged with conspiracy, criminal libel, vagrancy, and disturbing the peace").

[48] 221 U.S. 418, 439 (1911) (concerning the legality of a judicial injunction involving a secondary boycott).

[49] ERNST, *supra* note 47, at 111.

Range Company and an industry leader who had just been named the President of the National Association of Manufacturers. Van Cleave had taken an aggressive anti-union stance not simply, or even mainly, on behalf of his company but rather, as Ernst reports, "as part of a broad strategy to unite proprietary capitalists into a politically effective force."[50] The *Buck's Stove* case, far from being an arcane doctrinal byway, Ernst reports, became "a household name."[51] It was a prominent point of reference in the 1908 presidential campaign between William Howard Taft (himself a former pro-injunction judge) and William Jennings Bryan (to whose campaign Gompers and the AFL signed on).[52] And soon after the election, Gompers' sentencing

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[50] *Id.* Ernst notes that the historical significance of *Buck's Stove* lies outside the courts and the immediate legal controversy:

> From the start, neither [side] valued the case solely or even primarily for the chance it presented to break new doctrinal ground on the legality of the secondary boycott or the labor injunction. Each side was far more concerned with using the litigation to cement their constituencies behind their leadership and to win allies who would prove useful when the battleground shifted to Congress. These concerns . . . help explain the litigants' preference for an a priori, natural-rights jurisprudence when that position had been abandoned by leading legal academics and the younger and more scholarly members of the judiciary. Mixing the language of the courtroom with the language of the stump, natural-rights jurisprudence served the litigants' dual purpose, and it was the native tongue of the lawyer-politicians arrayed on either side of the dispute.

Id. at 145. Ernst further argues that *Loewe v. Lawlor* (*Danbury Hatters*), 208 U.S. 274 (1908), which unanimously held that an AFL effort to unionize hatters through using a secondary boycott was unlawful, and *Buck's Stove*

> were significant less for their contribution to legal doctrine than for their impact on leading political figures and public debate. The lawsuits put the law of industrial disputes high on the national agenda for the first time since the *Debs* litigation of 1894–95. With each step in their long progress through the courts they unleashed waves of public comment, with significant consequences for congressional and presidential elections between 1906 and 1912 and on federal legislation between 1908 and 1914.

Id. at 110; *see also* RABBAN, *supra* note 38, at 171 (pointing out Samuel Gompers' decision to invoke the First Amendment and retain a prominent attorney and former Democratic presidential candidate as evidence that the *Buck's Stove* decision was intended to, and did, have a much greater impact than simply resolving the labor dispute directly before the court); Ken I. Kersch, *The Gompers v. Buck's Stove Saga: A Constitutional Case Study in Dialogue, Resistance, and the Freedom of Speech*, 31 J. SUP. CT. HIST. (forthcoming Apr. 2006) (manuscript at 1–2, on file with author) [hereinafter Kersch, *The Gompers v. Buck's Stove Saga*] (arguing that, although the *Buck's Stove* ruling was not decided on the grounds of free speech doctrine, it was arguably the "first great decision regarding freedom of speech").

[51] ERNST, *supra* note 47, at 147. Ernst, by contrast, describes the now more famous *Danbury Hatters'* case as "a quieter drama with humbler participants." *Id. But see See End of Boycott in $222,000 Verdict*, N.Y. TIMES, Feb. 6, 1910, at 2 (describing the "famous Danbury hat case" as "of equal importance with the Buck's Stove case" in that both "established the most important principles affecting the boycott ever laid down").

[52] *See Gompers Indorsed on Bryan*, N.Y. TIMES, Nov. 20, 1908, at 13 (reporting the American Federation of Labor's endorsement of Gompers' support for Bryan in the presidential election); *Gompers Begs Labor to Work for Bryan*, N.Y. TIMES, Nov. 2, 1908, at 2 ("Gompers called upon organized abor [sic] to . . . vote for . . . [and] use its influence for Bryan."); *Gompers Anxious to be Put in Jail*, N.Y. TIMES, Oct. 30, 1908, at 16 (reporting Gompers' desire to receive a verdict in the contempt case against him before the presidential election); *Gompers Worries Unions*, N.Y. TIMES, July 21, 1908, at 3 (reporting alarm of union leaders over Gompers' pledge to support Bryan).

also captured the nation's attention—leading, on occasion, to mass protests.[53] In his courtroom speech immediately prior to sentencing, Gompers made an emotional appeal to the freedom of speech and of the press.[54] With his wife and daughter in attendance, he wept as the

[53] *See, e.g., Big Boston Labor Protest*, N.Y. TIMES, Mar. 15, 1909, at 3 ("As a demonstration against the sentences of imprisonment imposed by Judge Wright . . . upon . . . Samuel Gompers . . . in the Buck's Stove case, more than 5,000 members of labor unions paraded through the streets of [Boston], and a large meeting was held in Faneuil Hall, while several overflow meetings in the surrounding streets attracted large crowds."); *Gompers Drops Boycott*, N.Y. TIMES, Dec. 28, 1908, at 4 (reporting the Central Federated Union's adoption of resolutions declaring Gompers guiltless, "denouncing the use of the injunction in labor cases as destructive of liberty[, and] . . . arrang[ing] mass meetings all over the city for action on the matter"); *Labor Decision Denounced*, N.Y. TIMES, Nov. 7, 1909, at 1 (reporting the Dallas Trades Assembly's passage of a resolution denouncing Gompers' sentence); *Protest from Porto [sic] Rico*, N.Y. TIMES, Jan. 3, 1909, at C4 ("The Porto [sic] Ricans protest against the sentencing of Samuel Gompers . . . ."); *Seek Gompers' Pardon*, N.Y. TIMES, Dec. 30, 1908, at 18 (reporting the Central Labor Union of Pittston's petition signed by 20,000 union workers asking President Theodore Roosevelt to pardon Gompers). *But see Van Cleave Reopens Injunction Fight*, N.Y. TIMES, Dec. 28, 1908, at 4 (describing Van Cleave's declaration "for a continuation of the warfare" against Gompers and other labor leaders as they attempt to change the injunction laws).

[54] *See* 2 SAMUEL GOMPERS, SEVENTY YEARS OF LIFE AND LABOR: AN AUTOBIOGRAPHY 213–15 (1925) (reprinting full text of Gompers' speech); *see also* WILL CHASAN, SAMUEL GOMPERS: LEADER OF AMERICAN LABOR 111–12 (1971) (describing Gompers' pre-sentencing speech as "an eloquent defense of the right to dissent"); ROWLAND HILL HARVEY, SAMUEL GOMPERS: CHAMPION OF THE TOILING MASSES 160 (Octagon Books 1975) (1935) ("When what he believed to be human rights were threatened, Gompers flamed forth unquenchable."); *cf.* Letter from Samuel Gompers to the Executive Council of the AFL (Dec. 31, 1907), *in* 7 THE SAMUEL GOMPERS PAPERS 290 (Stuart B. Kaufman et al. eds., 1999) (characterizing *Buck's Stove* as "a question of personal liberty, personal rights"); LOUIS S. REED, THE LABOR PHILOSOPHY OF SAMUEL GOMPERS 125 (1930) ("So unjust did Gompers deem this injunction, so flagrant a violation was it of the right of free speech, that he decided the only possible course was to disobey it, which he did."); Samuel Gompers, *Free Speech and the Injunction Order*, 36 ANNALS AM. ACAD. POL. & SOC. SCI. 255, 262 (1910) ("On account of the fundamental issues of free press and free speech . . . we preferred to stand upon the *unconstitutionality of the injunction* . . . ."); *Affirms Jail Terms for Labor Leaders*, N.Y. TIMES, Nov. 3, 1909, at 7 (reporting Gompers' statement that "I can not surrender constitutionally guaranteed rights because a judge will issue an injunction invading and denying these rights," and that "if I must go to jail I shall bear the prison sentence with fortitude, conscious that I have nothing to regret in any actions or utterances of mine which some of the Judges . . . have construed into a breach of the law"); *Gompers Defies Court*, N.Y. TIMES, Jan. 25, 1908, at 1 (reporting that Gompers, in an editorial in *The American Federationist*, announced his intention to disobey the injunction because it violated free speech rights); *Gompers Defies the Courts Again*, N.Y. TIMES, Jan. 29, 1909, at 2 (reporting that in Gompers' speech to 500 laborers, he declared that the injunction "invades the guarantees of the Constitution"); *Gompers Denies Contempt*, N.Y. TIMES, Feb. 7, 1912, at 2 (reporting Gompers' testimony that "his speeches were based on his understanding of the American right of free speech"); *Gompers Raps the Courts*, N.Y. TIMES, Apr. 6, 1909, at 18 (reporting Gompers' statement that "[t]he right of the suppression of the freedom of speech and the prevention of the peaceable assemblage of people is exercised by a nation only when the Government is threatened, yet what the United States exercises only under such circumstances is used forever and a day for the benefit of a stove and range"); *Gompers Speaks for Labor*, 38 MCCLURE'S MAGAZINE, Feb. 1912, at 371, *reprinted in* 8 THE SAMUEL GOMPERS PAPERS 348 (Peter J. Albert & Grace Palladino eds., 2001) (describing the right to boycott as a fundamental right of labor organizations "without which freedom, free economic society, cannot exist"); *Gompers Stirs Up Civic Federation*, N.Y. TIMES, Apr. 3, 1909, at 6 (reporting that Gompers, in an unannounced speech at the National Civic Federation meeting,

judge pronounced a sentence upon him of one year in jail.[55] The case was argued in such a way as to win the maximum number of political allies, primarily through anchoring a free speech argument in an appeal to natural rights (despite the ostensible rejection of natural rights claims in the progressive academy and by liberals and the left).[56]

Several years later, in one of its most significant free speech decisions, *Schenck v. United States*, Justice Holmes, writing for the Court, cited the *Buck's Stove* case immediately following his famous formulation that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic" for the proposition that "it does not even protect a man from an injunction against uttering words that may have all the effect of force."[57] Nevertheless, several treatise writers subsequently picked up

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"opened verbal fire" against the lawyers and political economists who previously spoke against boycotts and strikes and stated that "free speech and free press were enjoined perpetually" by the *Buck's Stove* decision); *Jail for Gompers*, N.Y. TIMES, Nov. 3, 1909, at 10 (reporting Gompers' statement that "[i]n case of a dispute with employers a Judge can now permanently rivet your jaws and lips[, which forces you to] not utter the very thoughts that God has put into your mind"); *Labor Appeal Ready for Supreme Court*, N.Y. TIMES, Nov. 28, 1909, at 4 (reporting that Gompers' petition to the Supreme Court for writ of certiorari alleged that the lower court's holding violated the freedom of speech); *Labor Condemns Language of Judges*, N.Y. TIMES, Nov. 20, 1909, at 6 (reporting the American Federation of Labor's adoption of the position taken by Gompers, and denunciation of the *Buck's Stove* decision as infringing the rights of speech, press, and assembly); *Unions in Europe Firm, Says Gompers*, N.Y. TIMES, Oct. 10, 1909, at 7 (reporting Gompers' statement that he was "ready to go to prison . . . in defense of the right of American speech"). *But see Gompers Gratified*, N.Y. TIMES, May 16, 1911, at 6 (reporting that Gompers, while gratified that the Supreme Court had set aside the jail sentences, was disappointed that the Court did not hold that the First Amendment protects boycotts); *Lucky Mr. Gompers*, N.Y. TIMES, May 16, 1911, at 12 (portraying the Buck's Stove company as "harassed by the abuse of freedom of speech and press" and noting that the Supreme Court's opinion, while reversing Gompers' sentence, was a victory for the public in that it failed to "leave room for the inference that the Federation is at liberty to boycott at will"). *See generally* BERNARD MANDEL, SAMUEL GOMPERS: A BIOGRAPHY 264–83 (1963) (providing a history of the *Buck's Stove* saga from the acts leading up to the issuing of the injunction through the Supreme Court's reversal of Gompers' sentence).

[55] *See Jail for Gompers in Contempt Case*, N.Y. TIMES, Dec. 24, 1908, at 1 (reporting that Judge Wright issued a one-year prison sentence to Gompers and his co-defendants for disregarding the injunction); *Reduced Sentences for Labor Leaders*, N.Y. TIMES, Dec. 26, 1908, at 2 (reporting the likelihood of President Roosevelt reducing the sentences of Gompers and his co-defendants); *Roosevelt Holds Labor Leaders' Fate*, N.Y. TIMES, Dec. 25, 1908, at 1 (reporting the possibility of President Theodore Roosevelt pardoning one or more of the defendants in *Buck's Stove*).

[56] *See* Kersch, *The Gompers v. Buck's Stove Saga*, *supra* note 50 (manuscript at 48, on file with author) ("From the very beginning, Gompers recognized that the best way to galvanize public attention, and win public and labor movement sympathy, in service of these ends, was to frame the case as a twilight battle over the God-given and constitutional right of the freedom of speech."). *See generally* WILLIAM H. RIKER, THE ART OF POLITICAL MANIPULATION (1986) (discussing the strategic use of distinct rhetorics to unite political supporters and divide political opponents).

[57] 249 U.S. 47, 52 (1919) (citing Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 439 (1911)).

the identification of behavior that had heretofore been understood as action, such as boycotting and picketing, with speech. These included Henry Schofield's *Essays on Constitutional Law and Equity and Other Subjects*, which examines whether calls for strikes made in "peacefully persuasive" publications that characterize the employer as "unfair to labor" and add the employer to a "do not patronize" list amount to "unlawful acts" or are more appropriately considered speech constitutionally protected by liberty of the press.[58]

At the time of the *Buck's Stove* case, boycotts, strikes, and (our chief focus here) picketing were considered tortious conduct that was fully regulable under state law. However, an extended reformist campaign led by the labor movement, progressives, and those soon to be known as liberals successfully challenged "government by injunction" and statutorily altered these common law rules. The Norris-LaGuardia Act of 1932[59] (along with the "little Norris-LaGuardia Acts" passed by many states) continued to conceptualize labor picketing as conduct, but nevertheless sanctioned it when it was directed at a lawful purpose in a labor dispute. In other words, picketing was conduct that as a default rule was generally forbidden, but could be permitted if justified. At the height of the Constitutional Revolution of 1937, both the little Norris-LaGuardia Acts and the federal Act faced constitutional challenges on Fifth and Fourteenth Amendment property rights grounds. Challengers argued that the laws licensed picketers to destroy private businesses through conduct in a way that violated the business owners' rights. The Supreme Court, however, rejected these claims and upheld the constitutionality of these anti-injunction acts.[60]

It was in *Senn v. Tile Layers Protective Union*, a decision involving the constitutionality of Wisconsin's little Norris-LaGuardia law, that the Court, in dicta, first referred to picketing as a form of speech, not

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[58] 2 HENRY SCHOFIELD, ESSAYS ON CONSTITUTIONAL LAW AND EQUITY AND OTHER SUBJECTS 557 (Nw. Law Sch. Faculty ed., 1921).

[59] 29 U.S.C. §§ 101–15 (2000).

[60] *See* Senn v. Tile Layers Protective Union, Local No. 5, 301 U.S. 468, 481–82 (1937) ("There is nothing in the Federal Constitution which forbids unions from competing with non-union concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisements in the press, by circulars, or by his window display."); *see also* KERSCH, CONSTRUCTING CIVIL LIBERTIES, *supra* note 9, at 180–86 (describing the *Senn* decision as holding that the "little Norris-LaGuardia Acts" had a legitimate purpose in that they were advancing workers' collective interest, but that this was a matter of state policy, rather than a concern for the Supreme Court, as "'[a] hoped-for job is not property guaranteed by the Constitution'" (quoting *Senn*, 301 U.S. at 481–82)); *cf.* Lauf v. E. G. Shinner & Co., 303 U.S. 323, 330 (1938) (upholding the Norris-LaGuardia Act and the Wisconsin Labor Code's schemes for regulating labor disputes because the conflict at issue did not constitute a "labor dispute" within the meaning of the Act, and an injunction would be overly broad, but failing to address the case on constitutional grounds).

conduct. The Court did this by asserting that "[m]embers of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."[61] Justice Brandeis's invocation of the freedom of speech had significant consequences. Both the terms of the ruling itself and Justice Brandeis's free speech dictum guaranteed that labor pickets would be legal in a way that they were not prior to the passage of the anti-injunction acts. However, conceiving of pickets as speech promised to significantly alter the default rule. Under the ruling itself, pickets were generally forbidden, but could be permitted if justified. Under a free speech standard, however, as that law was being developed, the rule was exactly the opposite: speech was assumed to be permitted and could be restricted only if it could be shown to present a "clear and present danger."[62] Inquiry into the *objective* of the picketing (the key inquiry under the Norris-LaGuardia-type standards) would be inappropriate if picketing were a form of free speech.[63] Moreover, a free speech standard would shift the venue in which such issues were decided: it would make all of these cases, once considered state law questions for state courts, into federal law questions for federal courts, nationalizing the issue in the process.[64]

Brandeis's dictum in *Senn* clearly stirred the pot: some state court decisions adopted it as controlling law;[65] others gave it a verbal nod

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[61] *Senn*, 301 U.S. at 478.

[62] *See* Teller, *supra* note 46, at 195–96 ("If picketing is a form of free speech, it may not be enjoined although carried on for an improper objective. Only a clear and imminently present danger of substantial magnitude to the security of the government . . . justifies the restraint of free and peaceful expressions."); *see also* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. . . . That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger . . . ." (citation omitted)).

[63] *See* Teller, *supra* note 46, at 182 ("[T]he Supreme Court apparently meant [in *Senn*] that the practice of picketing was thereby removed from the category of a prima facie tort burdened with the task of proving justification. Instead its basis became the constitutional right to free expression—with all the breadth and feeling which the right involves, and the immunity in which it imports."); *see also* Dodd, *supra* note 46, at 514 (arguing that picketing is purposive speech and that since the Constitution protects purposive speech the Constitution protects picketing).

[64] *See* Teller, *supra* note 46, at 182 (explaining that if picketing were considered free speech "the propriety of limitations upon picketing . . . becomes a federal question, and therefore the Supreme Court, rather than the many state courts, [is] vested with final jurisdiction over picketing cases").

[65] *See, e.g.*, Denver Local Union No. 13 of Int'l Bhd. of Teamsters v. Perry Truck Lines, 101 P.2d 436, 441, 448 (Colo. 1940) (quoting at length from *Senn*, and placing "great weight" on it in determining that laborers "could not legally be enjoined from peaceful picketing"); People v. Harris, 91 P.2d 989, 993 (Colo. 1939) (quoting *Senn* to uphold acquittal of picketer on the grounds that his conduct was protected by the First Amendment); City of Reno v. Second Judicial Dist. Court, 95 P.2d 994, 1004 (Nev. 1939) (stating that *Senn*'s "intimation that such picket-

while nonetheless appearing not to give it too much weight by upholding the legality of banning the pickets or by distinguishing the absolute right of property from the qualified privilege of speech;[66] and still others ignored the dictum (and even the *Senn* opinion) altogether.[67] A contemporaneous commentator, however, rightly predicted that "[f]uture resort to freedom of speech doctrines seems likely in these cases."[68] This proved prescient. In *Hague v. Committee for Industrial Organization*,[69] the Court decided to afford protection to picketing (and other labor union activities, such as the distribution of leaflets) on free speech grounds.[70] In this case, the Court upheld an injunction preventing Jersey City Mayor Frank Hague from enforcing a permit system that had been used repeatedly to deny the union's use of public halls and parks as part of an organizing campaign.[71] This was a major step for the Court, which translated Brandeis's *Senn* dictum into law. This step was not taken lightly, however, as can be seen in the doctrinally significant fragmentation of the *Hague* opinion, with three opinions concurring in the result: the first (for the Court) by Justices Owen Roberts and Black; the second by Justices

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ing is protected by the constitutional guaranty of free speech, is too plain to be misunderstood"); San Angelo v. Amalgamated Meat Cutters & Butchers Workmen, Local 103, 139 S.W.2d 843, 847 (Tex. Civ. App. 1940) (citing *Senn* in support of the proposition that peaceful picketing enjoys constitutional immunity); *see also* Teller, *supra* note 46, at 183 n.9 (listing state court decisions that incorporated the *Senn* dictum and concluded that picketing is a form of free speech).

[66] *See, e.g.*, Ellingsen v. Milk Wagon Drivers' Union, Local 753, 35 N.E.2d 349, 354 (Ill. 1941) (noting that peaceful picketing was a protected form of speech but nonetheless upholding a statute that limited picketing insofar as it was threatening or intimidating); Roth v. Local Union No. 1460 of Retail Clerks Union, 24 N.E.2d 280, 283 (Ind. 1939) (recognizing that picketing is a protected form of speech but nonetheless permitting an injunction against picketing that has a coercive purpose); Mitnick v. Furniture Workers Union, Local No. 66, 200 A. 553, 555–56 (N.J. Ch. 1938), *appeal dismissed*, 4 A.2d 277 (N.J. 1939) (holding that "the so-called right of free speech," and thus picketing, was only a qualified constitutional right and that acts in question constituted a public nuisance that was destructive of the absolute property rights of the employer and his customers); Crosby v. Rath, 25 N.E.2d 934, 935 (Ohio 1940) (holding that picketing is permitted only as part of a "legitimate trade dispute"); *see also* Teller, *supra* note 46, at 183 nn.10–11 (referencing decisions that "paid [*Senn*'s dictum] no more than verbal homage" or limited its reach).

[67] *See, e.g.*, Brickley Dairy Co. v. United Dairy Workers, 2 Lab. Cas. (CCH) 526, 528 (Mich. Cir. Ct. 1940) (neglecting *Senn* and enjoining union from picketing); Euclid Candy Co. v. Summa, 19 N.Y.S.2d 382 (N.Y. Sup. Ct. 1940) (same); Feldman v. Weiner, 17 N.Y.S.2d 730 (N.Y. Sup. Ct. 1940) (same); Lyle v. Local No. 452, Amalgamated Meat Cutters & Butchers Workmen, 124 S.W.2d 701 (Tenn. 1939) (same); Carter v. Bradshaw, 138 S.W.2d 187 (Tex. Civ. App. 1940) (same); *see also* Teller, *supra* note 46, at 183 n.13 (citing decisions that failed to refer to Brandeis's *Senn* dictum).

[68] Erwin B. Ellmann, Comment, *Labor Law—When a "Labor Dispute" Exists Within Meaning of the Norris-LaGuardia Act*, 36 MICH. L. REV. 1146, 1166 n.71 (1938).

[69] 307 U.S. 496 (1939).

[70] *See id.* at 516 (describing the potential for the city's ordinance to "be made the instrument of arbitrary suppression of free expression of views on national affairs").

[71] *Id.* at 502.

Stone and Reed; and the third by Justice Hughes (who, in relevant substance, joined Roberts and Black). Justices Frankfurter and Douglas did not participate in the decision, and Justices Butler and McReynolds dissented.

Justice Roberts' opinion for the Court frames the question presented by the *Hague* case as:

> [W]hether freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against state abridgement by § 1 of the Fourteenth Amendment . . . .[72]

Justice Stone's concurrence, however, calls into question and rejects two seemingly conservative aspects of this framing. The first is that while Justice Roberts anchors the decision in free speech concerns, he simultaneously maintains a commitment to weighing the objective or purpose of the conduct at issue[73] (a consideration, as we have seen, central to the initial stage of the pro-labor turn in the labor statutes of the early 1930s). The second is that, in anchoring the First Amendment's free speech protection against the state via the Privileges and Immunities Clause of the Fourteenth Amendment, Justice Roberts' framing limits the reach of the protection to citizens rather than all "persons."[74] Justice Stone notes that although the findings of the lower court and the evidence demonstrate that the purpose of the CIO was "to organize labor unions in various industries in order to secure to workers the benefits of collective bargaining with respect to betterment of wages, hours of work and other terms and conditions of employment,"[75] there were no findings or evidence as to whether the industries at issue were subject to the National Labor Relations Act or the jurisdiction of the National Labor Relations Board. Nor was there evidence as to whether the Act was discussed.[76] In contrast to the limiting language of the Roberts opinion, Justice Stone points out that the initial lower court injunction:

> is not restricted to the protection of the right, said to pertain to United States citizenship, to disseminate information about the Wagner Act. On

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[72] *Id.* at 512. Justice Roberts adds emphatically that, "[t]his is the narrow question presented by the record, and we confine our decision to it." *Id.*

[73] *Id.* at 521–23 (Stone, J., concurring) (finding that "the freedom of respondents with which the petitioners have interfered is the 'freedom to disseminate information . . . [and] to assemble peaceably,'" while also noting the purpose behind holding public meetings without the requisite permits (citation omitted)).

[74] *See id.* at 522 ("[T]he right to assemble to discuss the advantages of the National Labor Relations Act is likewise a privilege secured by the privileges and immunities clause to citizens of the United States, but not to others . . . .").

[75] *Id.* at 523.

[76] *Id.* ("Neither court below made any finding that the meetings were called to discuss, or that they ever did in fact discuss, the National Labor Relations Act.").

> the contrary it extends and applies in the broadest terms to interferences with respondents in holding any lawful meeting and disseminating any lawful information by circular, leaflet, handbill and placard.[77]

Justice Stone would make the right a due process right guaranteed to all persons to hold meetings and disseminate information for any "lawful purpose."[78]

The Court took its definitive step in classifying picketing as speech in *Thornhill v. Alabama*,[79] a case involving a peaceful picket by AFL members pursuant to a strike against the Brown Wood Preserving Company in contravention of an Alabama law banning such pickets.[80] In *Thornhill*, arguments concerning "the right of peaceful assemblage," "the right to petition for redress," and, most prominently, "the right of freedom of speech," were at the center of the decision.[81] The *Thornhill* opinion, written by Justice Frank Murphy, the former pro-labor governor of Michigan, was thick with a discussion of labor picketing as a free speech right.[82] It placed heavy emphasis on the foundational nature of free speech, and the special role that that freedom plays in the correction of error, the search for truth, and, in turn, the successful conduct of democratic government.[83] Citing a modern context characterized by a broad, interconnected economic system, Justice Murphy argued that freedom of speech concerning labor relations was, under such conditions, of undeniable public importance.[84] At the same time, he avoided resting the decision on the

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[77] *Id.* at 524.

[78] *Id.* at 525.

[79] 310 U.S. 88 (1940). Only Justice McReynolds dissented from the decision.

[80] *Id.* at 91–92.

[81] *Id.* at 93.

[82] *Id.* at 94–95.

[83] Justice Murphy emphasized that freedom of speech and of the press are among the "fundamental personal rights and liberties" that are protected by the Fourteenth Amendment against abridgment by the states:

> The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. . . . Abridgment of freedom of speech and of the press . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. . . . [T]he effective exercise of [these] rights [is] necessary to the maintenance of democratic institutions.

Id. at 95–96 (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938)).

[84] *Id.* at 102 ("In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."). In coming to such conclusion, Justice Murphy noted:

> It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these mat-

ground that these pickets, because they were part of a labor dispute, were permitted pursuant to a valid public purpose (the approach sanctioned by the Court as recently as Justice Owen Roberts's opinion in *Hague*). Following Justice Stone's *Hague* concurrence, Justice Murphy held that the pickets were protected on the broad ground that there existed a constitutionally protected "liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."[85] As for the initial (post-Norris-LaGuardia) liberal legal doctrine concerning picketing and labor injunction rights, which exempted labor disputes from the general rule against pickets as tortious conduct, Murphy, citing John Milton, rejected the doctrine outright by characterizing it as a form of prior restraint involving a licensing system.[86] Such systems had long been considered anathema under Anglo-American common law because they were viewed as striking at the heart of personal freedom.[87] Might

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ters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.

Id. at 103 (citations omitted). This ethos of interconnectivity was a pillar of the New Deal constitutional thought. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42 (1937) (recognizing that the right of employees to unionize and engage in collective bargaining helps maintain industrial peace and affects interstate commerce); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 393–94 (1937) (arguing that since the community is burdened when workers' "health, safety and welfare are sacrificed or neglected," due to their unequal bargaining position with employers, the state has the power to interfere to ensure that workers stand on more equal footing); Kersch, *The New Deal Triumph as the End of History?*, *supra* note 8 (manuscript at 216–17, on file with editors) (arguing that the New Deal-era Supreme Court focused on the harmful effects of unequal bargaining power on society as a whole, rather than solely focusing on the well-being of individual workers, and noting that "[s]o long as the legislation in question was reasonably aimed at alleviating the harms to labor as a class and served a broader, systemic regulatory purpose that legislation would be presumed constitutional"). *See generally* THOMAS L. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY (1977) (describing how interconnectivity permeated social scientific thought in the late nineteenth century).

[85] *Thornhill*, 310 U.S. at 101–02.

[86] *Id.* at 97–98.

[87] The following rationale was provided for requiring the Alabama law to be tested for constitutionality on its face, free from any labor dispute requirement:

Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. . . . [T]he rule is not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations. Rather it derives from an appreciation of the character of the evil inherent in a licensing system. The power of the licensor against which John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing" is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of dis-

picketing, even if conceived of as speech, lead others to action? Yes, Murphy argued (echoing an argument that had been made by Holmes in his famous *Abrams* dissent[88]), but he dismissed the concern because "[e]very expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society."[89] The relevant test for picketing, Murphy concluded, was whether it posed a clear and present danger.[90]

With this, the Court's ideological reconstruction was complete. Henceforth, conduct was re-imagined as speech, and the liberal approach which granted labor pickets a privilege in the face of a general presumption against (tortious) pickets was dead. Picketing was no longer presumed coercive conduct but was instead a constitutionally-protected individual right.[91]

C. How Speech Became Conduct

If understood in the terms set out in this Article, the Supreme Court's conceptualization of labor picketing as constitutionally protected speech was a major expansion in the law of free speech. As such, this line of labor decisions is fully consistent with familiar, linear narratives of progressive constitutional development of the freedom of speech. Not part of that narrative, however, is the simultaneous negotiation by administrative agencies and federal courts of the "laboratory conditions" doctrine, which denied constitutional protection of the "pure speech" of employers critical of labor unions. This

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> cussion. . . . [The statute] is not any less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship.

Id. at 97–98 (citations omitted).

[88] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that, based upon the theory of the Constitution, having one's ideas accepted in the competitive market is the best test of truth and that an individual's wishes may best be carried out through grounding his argument in truth).

[89] *Thornhill*, 310 U.S. at 104. He added "[T]he group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interest." *Id.*

[90] *See id.* at 104–05 ("Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.").

[91] *See, e.g.*, Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293, 295 (1943) (holding that a broad order preventing picketing violated the constitutional right to free speech on the basis that peaceful picketing is a critical mechanism for union members to expose a labor dispute to the public); Bakery & Pastry Drivers & Helpers Local 802 of Int'l Bhd. of Teamsters v. Wohl, 315 U.S. 769, 774 (1942) (deciding that a state injunction against picketing was a violation of the right to free speech regardless of whether the parties were in a "labor dispute"); Am. Fed'n of Labor v. Swing, 312 U.S. 321, 325 (1941) (concluding that a case involving picketing presented a substantial claim to the right of free speech).

doctrine, which is speech restrictive in many respects, seems (to borrow from Robert Post's terminology) largely "managerial." This is especially the case given that Post describes the logic of the managerial domain as aimed at "organiz[ing] social life instrumentally to achieve specific objectives,"[92] an orientation he characterizes as "fundamentally incompatible with what are ordinarily regarded as the most basic principles of general First Amendment doctrine."[93] But to assign it to this domain to the exclusion of others seems overly schematic.[94]

If such employers' speech were broadly protected, federal courts and administrative agencies feared, it might have the effect of persuading a large number of workers not to join labor unions. In light of the substantive goals of the Wagner Act, which had rested major parts of the modern New Deal political order on the pillar of organized labor, this possibility was simply unacceptable.[95] In the service of the new order, it was necessary to restrict pure speech in this context. Willard Wirtz, the post-war labor lawyer and Secretary of Labor in the Kennedy and Johnson administrations, called this "the regulation of persuasion."[96] One commentator concluded that, "Until the enactment of the Wagner Act in 1935 the issue of what an employer might lawfully say to his employees in the course of a labor dispute was no issue at all; neither statute nor common law rule stayed his . . . tongue."[97] That Act, however, as the foundation of the new order, declared that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the[ir] [collective bargaining] rights" guaranteed elsewhere in the Act.[98] Such a provision, of course, did not act directly as a restraint on free speech. But it was not long before the National Labor Relations Board ("NLRB"), as part of its project of consolidating the

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[92] POST, CONSTITUTIONAL DOMAINS, *supra* note 6, at 2.

[93] *Id.* at 15.

[94] Post describes his domains as "democracy, which seeks to embody the purpose of self-determination; management, which seeks to attain the benefits of instrumental reason; and community, which seeks to sustain the identity implicit in common cultural norms." *Id.* The laboratory conditions doctrine, as described below, can be plausibly described as falling within any one of these domains. The secret of its success, it seems to me, is that it gestures at all three simultaneously.

[95] *See* KERSCH, CONSTRUCTING CIVIL LIBERTIES, *supra* note 9, at 228–30 (discussing how the Wagner Act was enacted, in part, to prevent employers from making coercive anti-union statements that would stop their employees from joining unions, and how the pursuit of this goal often conflicted with the employers' constitutional rights to free speech).

[96] *See* W. Willard Wirtz, *The New National Labor Relations Board; Herein of "Employer Persuasion,"* 49 NW. U. L. REV. 594, 610 (1954) (noting the difficulties inherent in the regulation of persuasive speech in both the context of labor and political campaigns, which arise out of the governmental interest in mitigating imbalance of power between parties).

[97] Thomas G. S. Christensen, *Free Speech, Propaganda and the National Labor Relations Act*, 38 N.Y.U. L. REV. 243, 255 (1963).

[98] National Labor Relations Act (Wagner Act), 29 U.S.C. § 158(a)(1) (2000).

power of the new regulatory order, began insisting on absolute neutrality of any employer's statement regarding the prospect of unionization.[99] The Board interpreted this provision as rendering anti-union statements made by employers as "unfair labor practices." In the 1930s and early 1940s, for example, statements by employers accusing unions of "causing trouble," of being "outside agitators," "shyster outfits," or "a bunch of Bolsheviks" all subjected employers to NLRB sanctions.[100] These decisions are particularly striking in light of the Supreme Court's unanimous and simultaneous decision, in one of its post-*Thornhill* picketing cases, to summarily brush aside employer complaints that pickets were hurling epithets "like 'unfair' or 'fascist,'" by noting that "loose language [and] undefined slogans . . . are part of the conventional give-and-take in our economic and political controversies."[101]

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[99] *E.g.*, Am. Tube Bending Co., 44 N.L.R.B. 121, 129 (1942) (requiring employers to remain neutral toward any election concerning unionization and to refrain from expressing views that have the purpose of influencing the result of the election, notwithstanding the employers' right to freedom of speech); *see* Allen Sinsheimer, Jr., *Employer Free Speech: A Comparative Analysis*, 14 U. CHI. L. REV. 617, 619 (1947) ("When the National Labor Relations Board first commenced enforcement of the act it took the position that an employer had to be completely neutral."); Note, *Limitations upon an Employer's Right of Noncoercive Free Speech*, 38 VA. L. REV. 1037, 1037–38 (1952) ("The Wagner Act contained no specific reference to the employer's right to address assembled employees on organizational matters. However, [the Act was] early interpreted by the National Labor Relations Board to preclude such conduct. Since employees were protected from interference, restraint, and coercion, the Board's position was that the employer must maintain absolute neutrality while plant organizational activities were under way.").

[100] *See, e.g.*, Leitz Carpet Corp., 27 N.L.R.B. 235, 237–38 (1940) (finding that it was "coercive" for an employer to refer to union representatives as "shyster outfits"); Huch Leather Co., 11 N.L.R.B. 394, 401–02 (1939) (holding that an employer statement that the CIO amounted to "a bunch of Bolsheviks" was an unfair labor practice); Am. Mfg. Concern, 7 N.L.R.B. 753, 762 (1938) (stating that it was "improper" for an employer to refer to union organizers as "outside agitators"); Indianapolis Glove Co., 5 N.L.R.B. 231, 239, 250 (1938) (citing an employer's allegations to his workers that a union's activities were "causing trouble" as support for the court's finding that the employer engaged in unfair labor practices). These cases are cited in Ian M. Adams & Richard L. Wyatt, Jr., *Free Speech and Administrative Agency Deference: Section 8(c) and the National Labor Relations Board—An Expostulation on Preserving the First Amendment*, 22 J. CONTEMP. L. 19, 22 n.19 (1996). Along the same lines, the ACLU in 1937 (in a memo written by Nathan Greene, the progressive co-author with Felix Frankfurter of *The Labor Injunction*, and an ACLU board member in the 1930s) backed the NLRB in this endeavor, ostensible devotion to the freedom of speech and the press notwithstanding, and supported the NLRB's efforts to locate the author of an unsigned anti-union editorial in a Pennsylvania newspaper. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 101–02 (2d ed. 1990).

[101] Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293, 295 (1943); *see* Note, *supra* note 99, at 1038 (noting apparent conflict between the NLRB's theory, which the "Supreme Court seemed to indorse," that an employer must maintain absolute neutrality and the Court's statements in *Thornhill* that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution").

Immediately following the passage of the Wagner Act, its effects on free speech proved highly contentious.[102] In perhaps the most famous dispute involving these free speech consequences, the Ford Motor Company was censured by the NLRB for distributing anti-union literature to its employees during a United Automobile Workers of America ("UAW") organizing campaign.[103] Included in this literature were pamphlets entitled "Ford Gives Viewpoint on Labor" and cards labeled "Fordisms," with such sayings as "A monopoly of JOBS in this country is just as bad as a monopoly of BREAD."[104]

In a world of ostensibly "expanded" protections for the freedom of speech, the federal government's contention that it could ban the dissemination of this literature would seem highly questionable. Regardless, the *Ford* case completely divided the ACLU in deciding which group it should side with—Ford or the NLRB:

> When employers approached the ACLU seeking their support and asked the civil liberties group whether or not the Constitution's right to free speech applied to them, too, Roger Baldwin reported that the group's governing board told them: "No, you have no rights of free speech against unions now because the right to form a union is now a fundamental one under the National Labor Relations Act." When the employers then asked if they at least had the right to talk, the ACLU responded by saying, no, they no longer had a right to talk.[105]

While the ACLU ultimately decided to support Ford, they only agreed to oppose the NLRB to the extent that the Board's actions restricted "non-coercive" employer speech.[106]

After the Ford case, the NLRB "evinced a sustained and decided preference for the tight regulation of employer speech concerning labor unions."[107] Like the free speech doctrine re-conceptualizing

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[102] *See* WILLIAM A. DONOHUE, THE POLITICS OF THE AMERICAN CIVIL LIBERTIES UNION 47 (1985) (discussing the ACLU's internal struggle between remaining faithful to its primary purpose of defending First Amendment rights while continuing to support labor unions, and noting that "[t]he debate became the most acute test between those who valued free speech as an end in itself and those who used it as a weapon for reform"); *see also* WALKER, *supra* note 100, at 103 (discussing the conflict within the ACLU between the ACLU leftists, who supported the NLRB because they viewed the anti-union comments as coercive acts that present a clear and present danger, and the moderates, who viewed the ACLU as "always [seeking] the 'freeing of speech' and . . . never endors[ing] any restriction").

[103] KERSCH, CONSTRUCTING CIVIL LIBERTIES, *supra* note 9, at 229.

[104] *Id.* (citing DONOHUE, *supra* note 102, at 47).

[105] *Id.* (quoting DOHOHUE, *supra* note 102, at 48).

[106] *Id.* (citing DOHOHUE, *supra* note 102, at 48); *see also* WALKER, *supra* note 100, at 103 ("The Ford case . . . was not an either-or proposition. Instead, the ACLU should support the main thrust of the NLRB's cease-and-desist order but oppose those sections restricting noncoercive speech."). *See generally* NLRB v. Ford Motor Co., 114 F.2d 905 (6th Cir. 1940) (describing the circumstances surrounding and legal issues involved in the dispute).

[107] KERSCH, CONSTRUCTING CIVIL LIBERTIES, *supra* note 9, at 229; *cf.* Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4, 19–22 (1984) (criticizing the Supreme Court for its change from protecting the marketplace of ideas to its gradual ap-

conduct as speech, the free speech doctrine re-conceptualizing speech as conduct was not pronounced as diktat. It was, rather, negotiated over time in an interplay between the Board, Congress, and the Supreme Court.[108] While the NLRB's initial position was to entirely forbid employers from communicating about unions (the "strict neutrality" approach), the Board, after some prodding by the Supreme Court, changed its policy to distinguish between coercive and non-coercive speech—the same distinction that the ACLU had drawn in its dealings with Ford.[109] However, this distinction only led the Board to construe the category of "coercion" broadly.[110] In response to this, Congress, as part of the Taft-Hartley Act of 1947, amended the Wagner Act to clarify that:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.[111]

Following (and in partial resistance to) this amendment, the NLRB adopted the "laboratory conditions" standard, which gave it broad leeway to regulate employer speech during a union election campaign.[112] "The Board justified its assertion of this regulatory au-

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proval of the NLRB's laboratory conditions doctrine and assumption that an employer's speech about unions is nearly always coercive). *See generally* Adams & Wyatt, *supra* note 100, at 22–34 (discussing the NLRB's policies of restricting employer speech in the context of union organization, and its views that any employer statement was generally coercive and constituted unfair labor practices).

[108] *See* DEVINS & FISHER, *supra* note 40, at 3–4 (arguing that dynamics between the Supreme Court, Congress, and the public are a routine part of the American constitutional practice in defining the right to freedom of speech).

[109] KERSCH, CONSTRUCTING CIVIL LIBERTIES, *supra* note 9, at 229; *see* NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 479 (1941) (holding that employer utterances alone, without threat of retaliation, are "difficult to sustain a finding of coercion" and do not amount to prohibited speech); NLRB v. Am. Tube Bending Co., 134 F.2d 993, 995 (2d Cir. 1943) (holding that where "there was no intimation of reprisal," an employer's statements regarding the feasibility of unionization were protected speech). *See generally* HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 174–89 (1950) (analyzing a number of employer-speech cases to demonstrate the NLRB's gradual change, as a result of Supreme Court guidance, from requiring strict neutrality to only prohibiting coercive conduct, to following a theory of "separability" between true speech and unfair labor practices).

[110] KERSCH, CONSTRUCTING CIVIL LIBERTIES, *supra* note 9, at 229–30.

[111] Taft-Hartley Act of 1947, 29 U.S.C. § 158(c) (2000); *see* Note, *supra* note 99, at 1047–50 (discussing the motivation behind and legislative history of the Taft-Hartley Act, which freed "[a]n employer . . . to address his employees upon union matters under any and all circumstances, so long as the language he used was not coercive").

[112] *See* Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948) (asserting that the function of the National Labor Relations Board in overseeing a union election campaign is "to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees"); *see, e.g.*, P.D. Gwaltney, Jr. & Co., 74

thority by asserting a federal interest in maintaining a 'pure' dialogue, untainted by (employer) overstatement."[113] This approach clearly strayed far from Justice Holmes' marketplace of ideas model of First Amendment liberties.[114] In the era of Alexander Meikeljohn,

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N.L.R.B 371, 379–80 (1947) (setting aside a union board election because it was not held in a manner conducive to free, unintimidated choice of the representatives); Maywood Hosiery Mills, Inc., 64 N.L.R.B. 146, 150 (1945) (stating that an election will be set aside if it appears that the employees were precluded from exercising free choice by coercive conduct that was related to the election in such a manner as to affect the employees' decision); *see also* Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 793–94 (1994) (asserting that the laboratory conditions standard provides safeguards against management influence over their employees' voting choices and ensures "the proper conditions for communication among workers, union organizers, and employers"); Comment, *Employee Choice and Some Problems of Race and Remedies in Representation Campaigns*, 72 YALE L.J. 1243, 1247 (1963) (noting that the NLRB used the laboratory conditions standard to invalidate elections in situations where employers threatened, pressured, or intimidated their workers).

[113] KERSCH, CONSTRUCTING CIVIL LIBERTIES, *supra* note 9, at 230; *see Gen. Shoe Corp.*, 77 N.L.R.B. at 126 (justifying intervention in the election by asserting that an election serves its true purpose only when "surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative").

[114] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that, based upon the theory of the Constitution, having one's ideas accepted in the competitive market is the best test of truth and that an individual's wishes may best be carried out through grounding their argument in truth); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (citing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). *But see* Barenberg, *supra* note 112, at 796–97 ("By emphasizing the accessibility of relevant information about the empirical effects of unionization, the laboratory-conditions standard resembles the 'marketplace of ideas' justification for constitutional free speech rights. The key desideratum is to encourage the discovery of truth by ensuring a sufficiently robust market in information. . . . The ideal deliberative procedure is designed to neutralize the effect of relations of power and subordination on deliberative procedure and outcomes."). Writing in the mid-1950s, W. Willard Wirtz insisted upon a rejection of the term "employer free speech," which in these cases he dubbed a form of "semantical fraud," and opined that "[i]t is both too broad and too narrow, and it conceals a serious problem in the camouflage of a pleasant set of words." Wirtz, *supra* note 96, at 595–96. Wirtz then continued:

> Everyone is in favor of "speech," especially "free" speech, and there is no question about an employer's right to it. But this phrase blurs and conceals the very real issue of how far an employer should, as a policy question, be permitted to exert certain economic power he may have, or, even more precisely, to exert that economic power through the medium of speech. There is no better reason for identifying this problem as one of "employer free speech" than there would be for calling it the problem of "employer pressure tactics," or of "employee freedom to vote."

Id. at 596. Wirtz criticized such inappropriate references in recent Board decisions to "broader legal doctrines" (i.e., the First Amendment). *Id.* at 613. He added:

> This presents neither more nor less a "free speech" issue than does employee picketing. Yet the Board appears to be making now in the employer persuasion cases the same hollow, conceptualistic use of the phrase the Supreme Court did when it reached the temporary decision [*Thornhill v. Alabama*]—necessarily revised later [in *Hughes v. Superior Court*]—that picketing, *employee* persuasion, was constitutionally protected free speech.

Id. (citations omitted). In the same article, Wirtz argued that the "new NLRB" of the Eisenhower administration, of which appointments to the Board were considered "offensive to many

Thomas Emerson, and William Brennan, First Amendment protections ostensibly broadened. But rather than falling by the wayside, federal regulatory efforts requiring pure dialogue, free of overstatement, were accepted without challenge from civil libertarians right through the Warren Era rights revolution.[115] Indeed, in 1969, at the ostensible height of constitutional free speech latitudinarianism, the Supreme Court in *NLRB v. Gissel Packing Co.* expressly approved of the NLRB's "laboratory conditions" doctrine.[116] The negotiation of the laboratory conditions doctrine might appear to be an interesting oddity in free speech law—a minor, if notable, step backwards in a regime broadly characterized by secular, linear progression. To see it this way, however, is to miss its much broader significance. In developing the laboratory conditions doctrine, administrative agencies and the courts fashioned a powerful alternative model for understanding freedom of speech, a model that has significantly influenced constitutional law. In many contemporary contexts, the Court (often implicitly) chooses between the marketplace and the laboratory conditions models when resolving free speech questions. When it chooses the marketplace model, the decision broadcasts itself as implicating classic freedom of speech questions. When the Court chooses the laboratory conditions model, however, its decision typically declares that the case is not one of free speech at all, but rather about "intimidation" and "coercion"—in the same way that labor pickets were once not considered speech at all, but a form of intimidation and coer-

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people," retreated from the laboratory conditions doctrine. *Id.* at 611. If such proposition were true even then (which is far from clear), then the retreat was shallow and short-lived.

[115] *See* Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 67 (1964) (asserting that "the law has inevitably been inserted into the process of communication to regulate the terms on which [such communication] is conducted," and that while the imposition of these rules restricts speech content, it also guarantees both sides "a reasonable opportunity . . . to convey their views to the voters").

[116] 395 U.S. 575, 612 (1969) (reasoning that if an employer has effectively destroyed the laboratory conditions necessary for a fair election, the "only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign"). In *Gissel*, the employer warned, during a union organizing drive, that the Teamsters Union was a "strike happy" outfit and that another strike at the company could drive them out of business, at the cost of the employees' jobs. *Id.* at 588. The Court held that the employer had no right to mention the possibility of a plant closing and stated that, to be allowed, such prediction "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *Id.* at 618. Quoting the appellate decision below, the Court stated that "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless . . . the eventuality of closing is capable of proof." *Id.* at 618–19. The Court's *Gissel* decision restricting employer speech is even more noteworthy in that it occurred in the same year as *Brandenburg v. Ohio*, 395 U.S. 444 (1969), a cross-burning decision that is commonly taken as the high point in free speech latitudinarianism for all other speech areas.

cion. Thus, as free speech law moved "forward," it also moved "backward."

The laboratory conditions doctrine—which (outside of the setting in which it was formulated) is no longer named when practiced—is the primary doctrine applied in cases involving racial and sexual harassment (including campus speech codes appearing under the guise of harassment standards) and the regulation of speech during electoral campaigns outside the labor context.[117]

The implications of the laboratory conditions doctrine for speech involving racial issues were apparent from the beginning for those willing to examine the arcane area of labor law dealing with the NLRB's regulation of union election campaigns. The statist, managerial impulse behind the laboratory conditions doctrine was characterized by a robust understanding of the fragile nature of rationality. The NLRB saw its role in supervising these campaigns as one of engineering maximum rationality in union elections.[118] One problem that immediately arose, however, was that it quickly became apparent to the Board that "[t]here are certain appeals which stimulate the emotional processes in such a way as to make dispassionate deliberation impossible."[119] Employer speech regarding the racial implications of unionization was soon spotlighted as a recurrent and significant threat to dispassionate deliberation. The Board, in response, set down the path of distinguishing "inflammatory race propaganda" from "factual, germane, and temperate" utterances regarding race.[120] A contemporaneous commentator in the *Yale Law Journal* held this approach "not workable," noting that in reality "the results are likely to turn on such 'emotional' factors as the trial examiners' or Board's feelings toward the statements made by an employer during a representation campaign."[121] In many cases, this approach would simply

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[117] *See* Wirtz, *supra* note 96, at 610 (arguing for analogy between attempts to regulate coercive employer speech and speech in political campaigns, where in both situations "it is exceedingly difficult, if not impossible, to establish by law a freedom for voters to make up their own minds without intruding further than seems advisable upon other related freedoms").

[118] *See* Comment, *supra* note 112, at 1246–47 ("Since Taft-Hartley the Board's role has apparently become that of a disinterested umpire of the contest between labor and management for the workers' votes[.] . . . [The Board now works to] insure that employees were free 'from all elements which prevent or impede a reasoned choice.'") (internal citation omitted).

[119] *Id.* at 1250.

[120] *Id.* at 1252; *see* Allen-Morrison Sign Co., 138 N.L.R.B. 73, 75 (1962) (upholding the results of an election to reject a union in which the employer made factual statements about the union's involvement in desegregation but did not resort to "inflammatory propaganda on matters in no way related to the choice before the voters"); Sewell Mfg. Co., 138 N.L.R.B. 66, 71–72 (1962) (distinguishing between a propaganda campaign "calculatedly embarked on . . . so to inflame racial prejudice," and other political campaigns where a party "*truthfully* set[s] forth another party's position on matters of racial interest [but] does not deliberately seek to . . . exacerbate racial feelings by irrelevant, inflammatory appeals").

[121] Comment, *supra* note 112, at 1254.

"deny employees an adequate opportunity to consider the issue of race in deciding to accept or reject the union. Indeed it would be tantamount to asserting that racial prejudice was an improper reason for rejecting a union."[122] "Such an assertion," the commentator wrote, "desirable as it may be, seems inconsistent with the proper role of an administrative agency and more specifically with the statutory obligations of the Board."[123] As such, the purported "freedom of employee choice" would amount to a freedom "to choose only those ends the Board or some other institution deems 'rational.'"[124] The commentator noted that if the policy of furthering racial integration could be found in any statutory command, and if it was not presumptively forbidden by the Constitution ("[c]onstitutional commands forbid governmental discrimination on the basis of race; they in no way require affirmative governmental action to integrate the races"), the Board might be able to forbid the mention of race in organizational campaigns.[125] Moreover—and especially significant for our purposes here—even if this goal was commanded by statute and was not plainly unconstitutional,

> any promotion of racial integration by the Board [in this way] necessarily involves a cost in terms of other values—those embodied in the specific legislation which the agency is charged with enforcing (freedom of choice) and those rooted in historic cultural experience (freedom of speech and association). Basic principles of representative government dictate that the official resolution of such major value conflicts does not reside in administrative agencies.[126]

In interpreting Title VII of the 1964 Civil Rights Act, courts have held that employers have an affirmative obligation to "prevent . . . bigots from expressing their opinions in a way that abuses or offends their co-workers."[127] Along these lines, employers may be subjected to potential liability not only by ill-intentioned remarks but also "[w]ell-intentioned compliments."[128] Acting pursuant to gov-

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[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* at 1255. Of course, in the next few years, constitutional understandings of the duty to integrate were radically reconstructed. *See* KERSCH, CONSTRUCTING CIVIL LIBERTIES, *supra* note 9, at 333–35 (discussing cases during the 1960s in which the U.S. Supreme Court expressed the belief that it had "an affirmative duty to integrate" schools in order to eliminate racial discrimination).

[126] Comment, *supra* note 112, at 1256.

[127] Davis v. Monsanto Chem. Co., 858 F.2d 345, 350 (6th Cir. 1988).

[128] Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991) ("We note that the reasonable victim standard we adopt today classifies conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment. Well-intentioned compliments by co-workers or supervisors can form the basis of a sexual harassment cause of action if a reasonable victim of the same sex as the plaintiff would consider the comments sufficiently severe or pervasive to alter a condition of employment and create an abusive working environ-

ernmental policies set by the courts and the EEOC at the behest of women's groups, employers today commonly ban sexist speech (typically defined broadly as any remarks that might make some women feel uncomfortable), the use of sexual metaphors, and dirty jokes.[129] Despite frequent professions of concern for the "chilling effect" of overbroad or vague regulation concerning speech in other contexts, the Supreme Court has never invalidated "hostile environment" regulations under the First Amendment.

Sex-related workplace speech restrictions were directly derived from existing prohibitions on racially-harassing speech in the workplace. Beginning in the early 1970s with the Fifth Circuit's *Rogers v. EEOC* decision, federal courts have held that race-related remarks may constitute an illegally hostile workplace environment.[130] This re-

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ment."). *See* Kingsley R. Browne, *Workplace Censorship: A Response to Professor Sangree*, 47 RUTGERS L. REV. 579, 579 (1995) ("Even '(w)ell-intentioned compliments' may result in liability." (quoting *Ellison*, 924 F.2d at 880)). Title VII provides specifically that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2000). EEOC guidelines make sexual harassment a violation of Title VII. *See* 29 C.F.R. § 1604.11(a) (2005).

[129] *See* WALTER OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE 5 (1997) ("*Harassment* law . . . began with cases where bosses had pressured women for sexual favors but soon grew to encompass a sweeping new right to be free of a *hostile working environment* as conveyed by co-workers' jokes, political and religious discussions, or artwork or photos posted on the wall."). *See generally* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 513 (1991) (asserting that potentially offensive speech, which is generally protected under the First Amendment, is impermissibly subjected to a greater degree of regulation in the workplace setting); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995) (claiming that employees are overly censored by employers because employers seek to limit their potential liability under existing unconstitutionally vague hostile-environment standards); Jonathan Rauch, *Offices and Gentlemen*, THE NEW REPUBLIC, June 23, 1997, at 22, 23 (discussing how employers are now required to "police 'discriminatory' speech" in the workplace, despite free-speech principles, in response to a growing social and legal trend that recognizes "bigoted or offensive speech [as] a form of illegal discrimination").

[130] Rogers v. EEOC, 454 F.2d 234, 237 (5th Cir. 1971). *Rogers* has been cited as an important case for its recognition of a congressionally delegated power to alleviate race discrimination. *See* Firefighters Inst. for Racial Equal. v. City of St. Louis, 549 F.2d 506, 514 (8th Cir. 1977) (citing *Rogers* for the proposition that the language of Title VII "evinces a Congressional intention to define discrimination in the broadest possible terms" (quoting *Rogers*, 454 F.2d at 238)). The court in *Rogers* did assert, though, that it did "not wish to be interpreted as holding that an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in the employee" triggers Title VII protection. *Rogers*, 454 F.2d at 238. *See generally* DAVID E. BERNSTEIN, YOU CAN'T SAY THAT! THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTI-DISCRIMINATION LAWS 23–34 (2003) (noting that feminist legal scholars in the late 1970s successfully argued that employment discrimination laws should encompass sexual harassment, while criticizing anti-discrimination laws as a threat to civil liberties); Lillian R. BeVier, *Intersection and Divergence: Some Reflections on the Warren Court, Civil Rights, and the First Amendment*, 59 WASH. & LEE L. REV. 1075 (2002) (noting that the Warren Court protected free speech to pro-

striction on workplace speech is traceable to the NLRB's restrictions on workplace speech concerning labor unions during the post-New Deal era. These restrictions came to be justified by the Board, and were ratified by the Supreme Court, by the laboratory conditions doctrine. Indeed, this lineage has been made explicit by contemporary feminist legal scholars who have cited *Gissel* and other NLRB decisions from the 1940s as support for their arguments for the curtailment of sex-related workplace speech. One such scholar, in arguing for such restrictions, asserted that:

> Even employers have limited rights of expression on the job. For example, an employer cannot engage in speech that could unfairly interfere with a union election. This restriction on employer expression is justified by the state's interest in ensuring the adequate protection of workers' rights. A similar logic may be applied to sexual harassment law . . . .[131]

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mote racial equality and analyzing Warren Court decisions in an attempt to understand the repercussions of rooting First Amendment decisions in a civil rights era context).

[131] Deborah Epstein, *Free Speech at Work: Verbal Harassment as Gender-Based Discriminatory (Mis)Treatment*, 85 GEO. L.J. 649, 657 (1997) (citing NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)), *quoted in* KERSCH, CONSTRUCTING CIVIL LIBERTIES, *supra* note 9, at 232. The field is replete with scholarly work examining the different contexts in which speech can be regulated in different ways. *See, e.g.*, Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2354–55 (1989) (discussing limitations placed on free speech in such contexts as commerce and industrial relations, including employer speech during union elections; political activity by government employees; speech by children and prisoners; privacy and defamation; and public order infringement, including "[b]omb threats, incitements to riot, 'fighting words,' and obscene phone calls"); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 289 (1991) (arguing that racist speech is necessarily treated differently in public and private contexts); Robert C. Post, *The Perils of Conceptualism: A Response to Professor Fallon*, 103 HARV. L. REV. 1744, 1746 (1990) ("There are circumstances in which speech ought to be regulated according to principles quite distinct from those that underlie public discourse. To offer an obvious example, speech that is appropriately protected when it occurs within the public discourse is also appropriately regulated as racial or sexual harassment when it occurs within the context of an employment relationship."); James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 WAYNE L. REV. 163, 173–74, 247 (1992) (arguing that while completely outlawing hate speech on campuses would violate basic free speech principles, campus administrators have considerable leeway, consistent with the First Amendment, to "prohibit certain types of hate speech inimical to the purposes of the various campus forums," as long as such speech is not prohibited for symbolic reasons); Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403, 408–09 (1991) (contending that workplace sexual harassment laws may restrict employers' speech without violating the First Amendment). *But see* Browne, *supra* note 129, at 484 (arguing that offensive speech and coworker harassment may not be regulated on the basis of content without violating the First Amendment, as such speech does not fall entirely into any of the recognized exceptions to First Amendment protection, such as defamation, obscenity, or "fighting words"); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 19–20 ("[T]he regulation of workplace speech that creates a sexually hostile environment seems to presuppose some new category of regulable speech under the First Amendment . . . . [However,] [n]o opinion of the Supreme Court has explicitly recognized a 'workplace speech doctrine' permitting the government to engage in content-based regulation of employee speech in private workplaces."); Jessica M. Karner, Comment, *Political Speech, Sexual*

As labor law scholar Mark Barenberg has noted, this approach, which he explicitly links to "early interpreters of the Wagner Act," is today

> central to [the] ideal of 'egalitarian deliberation' that informs an array of current views about collective choice in social and political theory, ranging from civic republicanism, to radical or socialist democracy, to leading liberal (e.g., John Rawls's) accounts of democratic process in a just society, to a 'discourse ethics' of ideal communication.[132]

The statist, bureaucratic, and managerial laboratory conditions model of free speech, in other words, has become central to the ideology and discourse of power in the modern American state.

CONCLUSION

Most legal scholarship concerning the freedom of speech tells a story of short-term cycles of expansion and contraction together with long-term secular, linear development. This narrative captures important elements of the trajectory of constitutional free speech doctrine over the course of the twentieth century. However, it tends to obfuscate other dynamics within speech law, many of which are of special political salience because they involve debates over whether a particular controversy involves a free speech issue or not. A historically-informed political development approach to the freedom of speech can help illuminate these important developmental dynamics.

The approach I have taken in this Article begins with what seems to be the unremarkable acknowledgment that the freedom of speech at a particular political moment and within a particular political order might simultaneously be expanding and contracting. It maps a single instance of this simultaneous expansion and contraction—what I have called a free speech configuration—in a highly significant area of law. Characteristically for a developmental study, it avoids a snapshot approach (a feature of much normative work in this area) that tries to ascertain, on its merits, whether a particular political action or utterance is properly conceptualized as constitutionally protected "speech." Instead, it presents the configuration as a historically-situated constitutional settlement that is not arrived at in an instant, but rather negotiated over time. I have demonstrated here,

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Harassment, and a Captive Workforce, 83 CAL. L. REV. 637, 639–40 (1995) (arguing that since "[w]orkplace harassment law has developed with little attention . . . to First Amendment concerns," a standard is needed to "allow[] for regulation of most workplace harassment, without eroding all protection of workplace speech"); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1820–21 (1992) (arguing that the Supreme Court "has never carved out any 'workplace speech' exception broad enough to justify harassment law").

[132] Barenberg, *supra* note 112, at 795 (citations omitted).

in this regard, how conduct became speech and speech became conduct.

Although I share with legal scholars a strong, animating interest in the Supreme Court and the intricacies of legal doctrine (something many "attitudinalist" political scientists do not), I, also characteristic of political development scholars, refuse to treat the Court's negotiation of legal doctrine in isolation from other political events and institutions.[133] For example, I have spotlighted parts of the negotiation of new legal doctrine, and the decision of political actors to use constitutional rhetoric to build and advance political coalitions. I have also spotlighted the way in which moves and counter-moves amongst the Court, Congress, and an administrative agency were at the core of doctrinal development. At the broadest, "big picture" level, I have argued that all of these developments took place within an ongoing project involving the construction and consolidation of the New Deal constitutional regime.

Like many critical scholars, I view the Court's role in this negotiation as highly ideological and political. Unlike many attitudinal political scientists, I believe that understanding the politics of these developments is a much more interesting and complex endeavor than simply charting the way the Court follows election returns or reflects the appointment process. This less nuanced approach would lead us to conclude that in the cases we have examined here, the Court voted "with organized labor" and "for expanding civil liberties." The Court certainly seems to have voted with organized labor—though, as I have written elsewhere, it has become less protective of the speech rights of *individual* workers in key contexts.[134] But as for "expanding" free speech, the attitudinalists here simply borrow their categories from traditional narratives.

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[133] Certainly, some legal scholars—particularly legal historians—have also discussed legal doctrine in its political context. *See, e.g.*, CURTIS, *supra* note 40, at 3 ("The[] free speech struggles were not only about free speech. Fundamentally they were also struggles for democratic government."); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 12 (2d ed. 1985) (explaining that his book "is a *social* history of American Law . . . [that] takes nothing as historical accident, nothing as autonomous, everything as relative and molded by economy and society"); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY vii (1992) ("[T]he development of law cannot be understood independently of social context.").

[134] *See, e.g.*, KERSCH, CONSTRUCTING CIVIL LIBERTIES, *supra* note 9, at 180–86 (discussing the *Senn* and *Lauf* cases in which the Supreme Court sided with the labor unions at the expense of individual workers because the unions were acting to advance workers' collective interests, a "thoroughly legitimate purpose," while "there was no employee associational right"). *But see* Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 1–2 (1999) (arguing that in the 1960s, courts began protecting the rights of individual workers at the expense of organized labor and started adopting specific labor rules that "were profoundly disadvantageous to unions and brought about a weakening of the American labor movement").

While the political development approach I take does not preclude normative approaches to the same questions, it emphasizes that normative arguments are often undertaken according to salient frameworks or models, such as the marketplace model and the laboratory conditions model of free speech. The conclusion will often be biased (if not determined) by the model deemed most appropriate by the judge or the constitutional theorist, and the choice of model will often be influenced (if not determined) by a reading of social facts and the ambient social context that cannot be determined on legal grounds, although it can be translated into legal doctrine. For this reason, I have argued that changing conceptions of what types of utterances and behaviors are considered coercive is crucial to this area.

Political development approaches to civil liberties law promise new insights into constitutional history and practice in the twentieth century. In particular, these approaches reveal the way that rights-claims, rather than simply serving as trumps, help to structure and empower the dominant political regime.

Configurations of the sort I have identified here are pervasive. Moreover, a focus on them may lead scholars not only to explore configurations within a single area of civil liberties law—such as the freedom of speech—but across them.[135] In time, this may lead us to broadly re-think the nature of the development of civil liberties doctrine over the course of the twentieth century. At a minimum, however, it will illuminate some under-discussed, yet highly significant, areas of American constitutional law.

[135] Elsewhere, for example, I have explored the ways in which shifting understandings of coercion in the Supreme Court's Establishment Clause decisions (taking place simultaneously and in direct engagement with developments in free speech law) affected configurations in that area and beyond. *See* KERSCH, CONSTRUCTING CIVIL LIBERTIES, *supra* note 9, at 303–36.