2018

Can Free Speech Be Progressive?

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Louis Michael Seidman, *Can Free Speech Be Progressive?* Colum. L. Rev. (forthcoming)

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The answer is no. At least the answer is no if we are talking about free speech in the American context, with all the historical, sociological, and philosophical baggage that comes with the modern, American free speech right. But explaining why the answer is no will require some work.

I. Some Clarifications, Caveats, and Throat Clearing

I start with two important clarifications.

First, by "progressivism," I mean the modern political stance favoring an activist government that strives to achieve the public good, including the correction of unjust distributions produced by the market and the dismantling of power hierarchies based on traits like race, nationality, gender, class, and sexual orientation.[1] Although this stance has important points of contact with the progressive movement at the beginning of the twentieth century, there are also important differences.[2]

Second, saying that the free speech right is not progressive, as so defined, is different from denying that it might be an important side constraint on the effort to achieve progressive goals. Most progressives do not favor violence, authoritarianism, or deception even if these techniques might be used to advance progressive ends. Similarly, for all their problems, free speech theories premised on

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[1] For representative defenses, see ROBERT B. REICH, SAVING CAPITALISM: FOR THE MANY, NOT THE FEW (2016); PAUL KRUGMAN, THE CONSCIENCE OF A LIBERAL (2007).

[2] Modern progressives have jettisoned some of the faith in expertise as means of transcending social conflict and the racism and sexism that marred progressivism's earlier manifestation. It is nonetheless true that many of the criticisms of the speech right that I advance here have antecedents or roots in earlier versions of progressivism. *See generally*, David M. Rabbin, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951 (1996). For a less sympathetic version that also has fewer points of contact with the argument I advance here, see MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 78-86 (1991).

search for truth,[3] development of moral community,[4] dignity,[5] popular sovereignty,[6] intellectual humility,[7] or tolerance[8] might be convincing on their own terms. I am agnostic about the value of free speech as so conceived, but nothing prevents progressives from endorsing the speech right on these or other grounds. That endorsement is fully consistent with the proposition that the answer to the question that this essay addresses is "no."

Before exploring the reasons why the answer is no, we need to dispose of some obvious reasons why someone might think that the answer has to be "yes." This someone might say that we don't need to speculate about whether free speech can be progressive. It *has been* progressive. The first amendment prevented suppression of labor picketing in the 1930's and 1940's[9] and suppression of civil rights demonstrations in the 1960's.[10] It protected the New York Times when it published an advertisement defending Martin Luther King, Jr.,[11] and when it published a report discrediting the Vietnam War.[12] Constitutional protection for freedom of speech shielded antiwar protesters who wanted to "fuck the draft,"[13] artists who challenged conventional morality,[14] and school children who resisted compelled, "patriotic" indoctrination.[15] What's not progressive about that?

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3 *See, e.g,* JOHN STUART MILL, ON LIBERTY 88 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859); Abrams v. United States, 250 U.S. 616, 630 (Holmes, J., dissenting).

4 *See* SEANA SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW (2014).

5 *See, e.g.,* David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment,* 123 U. PA. L. REV. 45 (1974).

6 *See, e.g.,* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

7 *See, e.g.,* Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present,* in LEE BOLLINGER & GEOFFREY STONE, ETERNAL VIGILANCE: FREE SPEECH IN THE MODERN ERA (2002).

8 *See* LEE BOLLINGER, TOLERANCE AND THE FIRST AMENDMENT (1986).

9 *See,e.g.,* Hague v. CIO, 307 U.S. 496 (1939); Thornhill v. Alabama, 310 U.S. 88 (1940).

10 *See,e.g.,* Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965).

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

12 *See* New York Times v. United States, 403 U.S. 713 (1971).

13 *See* Cohen v. California, 403 U.S. 15 (1971).

14 *See, e.g.,* A book Named "John Cleland's Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413 (1966); Jacobellis v. Ohio, 378 U.S. 184 (1964).

15 *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist, 393 US. 503 (1969).

There's no doubt that the assertion of free speech rights can advance progressive goals in particular times and places. I offer no reasons here why left-wing lawyers should not take advantage of speech rights so long as they exist, and nothing I say here is meant to begrudge them their victories.[16]

It might even be true that progressives who weigh the downside risks more strongly than the possibilities of upside gains will think that they are better off with a free speech right than without it. On the one hand, without the right, some states might outlaw progressive speech on topics like Islam, abortion, gay rights, and police abuse. On the other, it is doubtful that even without the right, legislatures would enact measures like serious campaign finance reform that are currently blocked by the Supreme Court's interpretation of the first amendment.

These facts, however, do not make free speech progressive. The working class might be slightly better off because of the few crumbs cast their way by the Trump tax law. That does not make the law redistributive. Similarly, the fact that free speech protects the left from the most extreme threats to it does not make the speech right progressive. The question that I address here is not whether the speech right has instrumental utility in isolated cases or whether it is necessary to minimize extreme downside risks. Instead, I address the claim that the amendment has significant upside potential. Can progressives weaponized free speech by tinkering with constitutional doctrine? Can they convert the first amendment from a sporadically effective shield against annihilation to a powerful sword that would actually promote progressive goals?[17] To answer that question, we need to think hard not just about isolated cases, but about the theory behind the right and the right's basic structure.

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[16] *But cf.* pp xx, *infra.*

[17] The question might be understood in two slightly different ways. First, might free speech law be reformulated so as to constitutionally mandate aspects of the positive program favored by progressives? For reasons that I explain below, see pp xx, *infra*, I think that this outcome is very unlikely. At its core, free speech law is much more conducive to constitutionally required libertarianism.

A second, less ambitious version of the question asks whether free speech law could be reformulated so as to promote the flourishing of progressivism, even if it did not directly dictate progressive outcomes. If the question is formulated in this way, the possibilities are arrayed along a continuum, from protection against the total annihilation of progressivism at one extreme to establishing the preconditions for a total progressive triumph on the other. I am ready to concede that a speech right might provide some assurance against catastrophic

This formulation, in turn, leads to a second sort of objection to my thesis. It might be said that I am assuming that the structure of and theory behind the speech right is static and inevitable. In making that assumption, the argument goes, I am guilty of false necessitarianism.[18] In fact, progressives can make free speech into anything they want it to be if only we have the will and skill to do so. Denying that fact exhibits a loss of nerve, an absence of imagination, or both. Even if it is true that conservatives have been more successful in defining, using, and justifying the right in the past, that is no argument for ceding this ground to them in the future.

There is a kernel of truth to this objection. Of course, progressives can reconcile free speech with progressive ideals if they fundamentally redefined free speech. For that matter, they could also effect a reconciliation if they fundamentally redefined progressivism. In some sense, the meanings assigned to words are always arbitrary, so, in principle, the meanings might be changed.

If my argument is to have purchase, then, we have to take "free speech" as currently defined by American constitutional practice, rather than as we might wish to define it. Pigs can fly if we define "fly" as walking on four legs or "pigs" as small animals with wings. Still, pigs, as currently defined, just can't get off the ground. That's a useful fact to know, and it's also useful to know that the speech right, as currently defined, just can't be progressive. If we tried to stipulate a definition for free speech that made it progressive, doing so would be no more convincing than a stipulated definition for pigs that made them airborne.

A more sophisticated version of the counterargument requires a more sophisticated response. Suppose we stipulate a definition of and justification for "free speech" that matches our current conceptions. Still, it might be argued, the existing definition and justification are sufficiently open

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outcomes at one end of the continuum, although, for reasons I discuss below, I think the risk of those outcomes is often overstated. *See* p xx, *infra.* As one moves toward the other end of the continuum, my skepticism about the upside potential for free speech law becomes more intense.

[18] *Cf.* ROBERTO MANGUBEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (2004).

textured and contradictory that progressives could turn it into a right that benefitted them without running afoul of the stipulation. We have hints of how this might be done in the smattering of free speech cases where the Court has conceived of the right as providing a platform for resistance to private power.[19]

For a generation, practitioners of Critical Legal Studies have made careers out of doing just this kind of work in a wide variety of doctrinal domains.[20] Since I've done some of it myself, I'm hardly in a position to insist that the work can't be done. What I want to emphasize here is Mark Tushnet's recent reminder that this legerdemain requires work.[21] With sufficient effort and cleverness, one can (always?) show that the underlying materials will yield unexpected outcomes without violating the conventional forms of legal argument. Given current background conditions, however, doing so necessitates a great deal of effort.

Moreover, even with this effort, given current background conditions, outcomes that are logically possible will nonetheless seem "off the wall" to the relevant audience.[22] With much thought and effort, I suppose I could produce a legal argument that the very existence of Fox News violates the first amendment. But even if the argument was logically sound and formally consistent with the legal materials, it would nonetheless violate free speech "common sense." For the very reason that free speech doctrine is open textured and contradictory, opponents of the argument will be able to marshal legal doctrine supporting the "common sense" outcome. Moreover, they can do so without much work – indeed, without breaking a sweat.

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[19] Justice Black was responsible for the most eloquent examples. *See* Marsh v. Alabama, 326 U.S. 501 (1946); Kovacs v. Cooper, 366 U.S. 77, 103 (1949) (Black, J., dissenting).

[20] For a classic example of the technique, all the more powerful because it supports a familiar conclusion, see Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles,* 96 HARV. L. REV. 781, 800-02 (1983).

[21] *See* Mark V. Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech – An Essay on Meta-Doctrine in Constitutional Law*, 25 WM. & MARY BILL OF RTS. J. 1073, 1075-77, 1117-20 (2017).

[22] *Cf.* Jack M. Balkin, *How Social Movements Change (or Fail To Change) the Constitution: the Case of the New Departure,* 39 SUFF. L. REV. 27, 28 (2005).

Of course, the qualification "given current background conditions" is important. If we changed the background conditions, then it would require much less work to get to the "right" result, and outcomes that currently seem "off the wall" would be "on the wall."[23] The question, then, is which projects promise the best results with the least work? Is it really worth it to do legal summersaults to show that the legal material can support progressive ends when, even if we succeed as a matter of pure logic, the outcome will be dismissed as violating common sense? Why not instead work to change the background conditions so that the outcome no longer violates common sense? Instead of fighting an uphill legal battle, why not put our efforts into changing the cultural and political landscape?

A possible response to this objection is that a reformulation of the free speech right might be part of a broader strategy to change the cultural and political landscape. If the reformulation could be readily accomplished, this approach might make sense. But the argument I make below is that it cannot be readily accomplished. The theory, structure, and tradition of American free speech law make it a particularly unpromising entry point for a progressive transformation. Or, at least, so I will argue.

In the next Part, I briefly explore the historical record, which provides little support for the hope that the right can be consistently utilized for progressive purposes. Although suggestive, history by itself does not rigidly foreordain future outcomes. Part III demonstrates that the history is not contingent or accidental, but reflects deep conceptual truths about the free speech right.

II. The Historical Record

Because this ground has already been well trod by others,[24] I provide no more than a brief sketch here.

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[23] *See, e.g.,* id.

[24] *See, e.g.,* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE" (2000); MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (2004); LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE (2016); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolution*, 82 VA. L. REV. 1 (1996); Robert F. Nagel, *How Useful Is Judicial Review in Free Speech Cases,* 69 COLUM. L. REV. 302 (1984).

For roughly the first century and a quarter after the adoption of the first amendment, a judicially enforced free speech right barely existed.[25] That is not to say that there were no conflicts over freedom of speech. For example, the Alien and Sedition Acts at the end of the eighteenth century[26] and the suppression of anti-slavery petitions to Congress at the middle of the nineteenth century[27] generated robust debates about free speech. There were free speech arguments about the Comstock Act, which regulated obscene material,[28] the Alien Immigration Act of 1903, which excluded aliens who advocated anarchism,[29] and about local laws that restricted access to streets and parks for public protest.[30] In all of these instances, free speech arguments advanced causes that we might today identify as "progressive."

But these arguments mostly fell on deaf ears. Of course, the historical record is complicated[31] and, here as elsewhere, it is a mistake to confuse judicial enforcement of constitutional rights with the rights themselves. We cannot know how many statutes were not enacted and executive actions not undertaken because political actors had internalized free speech norms. But, as Mark Graber has demonstrated, the support there was for free speech was premised on conservative, libertarian ideology at war with progressive ideals.[32] Moreover, as the preceding paragraph details, there were plenty of instances where political actors impinged on what we think of as free speech rights, and, for the most part, no court was available to check these invasions.

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25 *See generally,* DAVID RABBIN, note 24, *supra.*

26 *See* GEOFFREY R. STONE, note 24, *supra,* at 16-66.

27 *See* MICHAEL KENT CURTIS, note 24, *supra,* at 155-181

28 *See* DAVID RABBIN, note 24, *supra,* at 130.

29 *See* id.

30 *See* id., at 110-116.

31 For example, state courts occasionally vindicated free speech claims, see DAVID M. RABBAN, note 24, *supra*, at 119-20, 175-76 (1997), or reversed convictions without relying on the First Amendment in situations where it seems clear that free speech concerns nonetheless influenced the decision. *See, e.g.,* LAURA WEINRIB, note 24, *supra* at 111 (2016).

32 *See* MARK GRABER, note 24, *supra,* at 17-49.

For most of the period in question, judges thought that the first amendment was inapplicable on the state and local level, where most of the quotidian infringements on speech occurred. And even where the first amendment did apply, the prevailing view was that it prohibited only prior restraints and permitted criminal punishment for speech that had already occurred. As David Rabban summarizes the evidence

> Throughout the period from the Civil War to World War I, the overwhelming majority of decisions in all jurisdictions rejected free speech claims, often by ignoring their existence. . . . No court was more unsympathetic to freedom of expression than the Supreme Court, which rarely produced even a dissenting opinion in a First Amendment case. Most decisions by lower federal courts and state courts were also restrictive. Radicals fared particularly poorly, but the widespread judicial hostility to free speech claims transcended any individual issue or litigant.[33]

According to the conventional account, all this changed with the Espionage Act prosecutions during World War I, the eloquent opinions by Holmes and Brandeis, and the birth of modern free speech doctrine.[34] These changes on the Court were accompanied by changes in the underlying rational for speech protection from a libertarian theory, in obvious tension with progressive ends, to a theory based on democratic engagement that was much more friendly to progressivism.[35]

But revisionist accounts, which by now are, themselves, conventional, suggest that there is much less here than meets the eye.[36] Despite Holmes and Brandeis, the Court affirmed the conviction and lengthy sentences of World War I dissenters.[37] It was only after the war fever subsided, at a moment when speech rights were much less important to radicals, that the Court began reversing

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33 DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 131 (1997).

34 *See, e.g.,* LAURA WEINRIB, note 24, *supra, at* 4-5 (noting conventional accounts).

35 *See* MARK A. GRABER, note 24, *supra*, at 122-164.

36 *See, e.g.,* GEOFFREY R. STONE, note 24, *supra,* at 192-98*;* Michael J. Klarman, note 24, *supra* at 9.

37 *See* Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919).

convictions of individuals jailed because of their speech.[38] Decisions during this period were of some aid to labor unions[39] and to political radicals,[40] but many of the cases involved groups like the Jehovah's Witnesses,[41] which were in no sense progressive.

The same pattern repeated itself during the post-World War II red scare. When free speech protection was most needed, it was least available. The Court acceded to criminal convictions and firings of scores of people because of their political affiliations.[42] It was only after the panic abated that the Court reinvigorated free speech law.[43]

During the brief Warren Court interregnum, free speech doctrine provided some real protection for progressive causes. Most notably, Warren Court decisions aided civil rights protestors,[44] and opponents of the Vietnam War.[45] Yet even at high tide, the Warren Court provided only intermittent and uncertain protection. For example, the Court upheld the criminal convictions of draft card burners,[46] some civil rights demonstrators,[47] and publishers of otherwise constitutionally protected speech who engaged in what the Court called "pandering."[48]

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38 *See* Fiske v. Kansas, 274 U.S. 380 (1927); De Jonge v. Oregon, 299 U.S. 353 (1937); Herndon v. Lowry, 301 U.S. 242 (1937).

39 *See, e.g.,* Thornhill v. Alabama, 310 U.S. 88 (1940); Carlson v. California, 310 U.S. 106 (1940).

40 *See, e.g.,* Herndon v. Lowry, 301 U.S. 242 (1937); Stromberg v. California, 283 U.S. 359 (1931).

41 *See, e.g.,* Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939). For an account of the role that Jehovah's Witnesses played in the development of free speech law and of the way in which conservatives used cases involving the Witnesses to attack progressive constitutionalism, see Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism,* 116 COLUM. L. REV. 1915 (2016).

42 *See,e.g.,* Dennis v. United States, 341 U.S. 494 (1951); Garner v. Bd. of Pub. Works, 341 U.S. 716 (1951); Adler v. Bd. of Educ., 342 U.S. 580 (1952).

43 *See.e.g.,* Yates v. United States, 354 U.S. 298 (1957); Scales v. United States, 367 U.S. 203 (1961); Brandenberg v. Ohio, 395 U.S. 444 (1969).

44 *See, e.g.,* Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965).

45 *See* Cohen v. California, 403 U.S. 15 (1971); Tinker v. Des Moines Indep. Cmty. Sch. Dist, 393 US. 503 (1969).

46 United States v. O'Brien, 391 U.S. 367 (1968).

47 *See, e.g.,* Adderley v. Florida, 385 U.S. 39 (1966); Walker v. City of Birmingham, 388 U.S. 307 (1967).

48 Ginzburg v. United States, 390 U.S. 629 (1968).

With the receding of Warren Court liberalism, free speech law took a sharp right turn. Instead of providing a shield for the powerless, the first amendment became a sword used by people at the apex of the American hierarchy of power. Among its victims: proponents of campaign finance reform,[49] opponents of cigarette addiction,[50] the LBGTQ community,[51] labor unions,[52] animal rights advocates,[53] environmentalists,[54] targets of hate speech,[55] and abortion providers.[56] While striking down laws that protected all of these groups, the Court upheld a statute that cut off all funding to colleges and universities that refused to allow the military to recruit on campus[57] and a statute that criminalized purely political speech that constituted neither incitement nor a clear and present danger when the speech "materially support[ed]" a group that the State Department labelled as a "foreign terrorist organization."[58]

No one should confuse this quick-and-dirty summary with a serious analysis of the history of free expression in the United States. It goes without saying that I have elided many details and complications. But the summary is sufficient to demonstrate that over the course of our history, free speech law has only occasionally been of much help to progressive causes and that during the modern period, it has been an important impediment.

Despite this, advocates of free speech progressivism want to claim that the modern period is aberrational and that it is possible to return to or create a new golden age during which the speech right, properly understood, would mandate progressive outcomes. They are at least partially right.

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49 *See, e.g.,* Citizens United v. Federal Election Commn., 558 U.S. 310 (2010).
50 *See, e.g.,* Lorillard Tobacco C. v. Reilly, 533 U.S. 525 (2001).
51 *See, e.g.,* Boy Scouts of America v. Dale, 530 U.S. 640 (2000).
52 *See* Harris v. Quinn, 134 S. Ct. 2618 (2014).
53 *See* United States v. Stevens, 559 U.S. 460 (2010).
54 *See* Central Hudson Gas v. Public Service Commn., 447 U.S. 557 (1980).
55 *See* R.A.V. v. St. Paul, 505 U.S. 377 (1992).
56 *See* McCullen v. Coakley, 134 S. Ct. 2518 (2014).
57 *See* Rumsfeld v. Forum for Academic and Institutional Rights, 547 U.S. 47 (2006). In the interest of full disclosure, I note that I served on the Board of Directors of the Forum for Academic and Institutional Rights.
58 *See* Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

Modern free speech doctrine breaks from the recent past because it has gone beyond authorizing political suppression of the left; courts have affirmatively intervened to reverse the left's occasional political victories.[59]

In a deeper sense, though, the modern period is far from aberrational. At its core, free speech law entrenches a social view at war with key progressive objectives. For that reason, it is not surprising that throughout American history, the speech right has, at best, provided uncertain protection for the left. The modern, anti-progressive first amendment amounts to the delayed presentation of traits built into the genetic material of the speech right.[60]

The next Section explores that genetic material.

III. Four Reasons Why Free Speech Cannot be Progressive

A. Free Speech and Property Entitlements

There is an intrinsic relationship between the right to speak and the ownership of places and things. Speech must occur somewhere and, under modern conditions, must use some things for purposes of amplification. In any capitalist economy, most of these places and things are privately owned,[61] and in our capitalist economy, they are distributed in dramatically inegalitarian fashion.

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[59] *See, e.g.,* Amanda Shanor, *The New* Lochner, 2016 WISC. L. REV.133. *But cf.* Jeremy K Kessler, *The Early Years of First Amendment Lochnerism,* 116 COLUM. L. REV. 1915 (2016) (cautioning against "treating First Amendment Lochnerism as a recent corruption of an otherwise progressive project of judicial civil libertarianism.")

[60] *See* id.

Many of the arguments I offer below might be extended to attack liberal constitutional rights more generally. There is an extensive literature, some of it with roots in the progressive tradition, that is skeptical of rights rhetoric. *See, e.g.,* Duncan Kennedy, *A Critique of Rights, in Critical Legal Studies,* in LEFT LEGALISM/LEFT CRITIQUE (WENDY BROWN & JANET HALLEY, EDS. 2002); Mark V. Tushnet, *An Essay on Rights,* 62 TEX. L. REV. 1363 (1984); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 464 (1909). But the argument against rights plays out in different ways and with different force in different settings. In this essay, I confine my discussion to the speech right.

[61] Most, but not all. The right to a public forum provides a partial corrective, but, under modern conditions, marches and demonstrations in public streets and parks matter little unless they are covered by privately owned media.

Even before the recent, radical right turn in free speech law, the connection between property and speech posed a problem for a progressive version of the speech right. Because speech opportunities reflect current property distributions, free speech inherently favors people at the top of the power hierarchy.

Consider, for example, Citizens United v. Federal Election Commission,[62] where the Court invalidated restrictions on independent corporate campaign speech. The case is the bete noir of free speech progressives, and for obvious reasons. The holding, and closely related holdings restricting regulation of independent political action committees[63] and of aggregate contribution limits,[64] more or less doom the effort to break the chain between money and politics. That link, in turn makes progressive political victories much more difficult and, often, impossible.

These grim facts should not distract us from the reality that the holding was also more or less inevitable. The case was effectively lost when, at oral argument, the Justices began asking questions about media corporations.[65] No one thinks that the government can prohibit the Washington Post from endorsing a Hillary Clinton for president or Penguin Books from publishing a book during election season criticizing Donald Trump. The government struggled to distinguish media corporations from other corporations wishing to spend money on political speech, but the Court proved unwilling to accept the distinction, and it is hard to see how it could have been operationalized.

Suppose, though, that the Court had somehow fashioned a carve-out for media companies. Such an exception hardly solves the problem from a progressive point of view. No progressive should be surprised by the fact that that media companies are disproportionately owned by very wealthy people.

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62 558 U.S. 310 (2010).

63 *See* SpeechNow.org v. Federal Election Commn., 599 F. 3d 686 (D.C. Cir. 2010).

64 *See* McCutcheon v. Federal Election Commn., 134 S. Ct. 1434 (2014).

65 *See* Transcript of Oral Argument in Citizens United v. Federal Election Commn. at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/08-205.pdf pp26-40; Transcript of Oral Argument in Citizens United v. Federal Election Commn, at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/08-205[Reargued].pdf, pp 64-68.

In every other sphere, progressives reject the idea that markets and willingness to pay necessarily produce just distributions of assets. Why should distribution of media assets be any different? So long as there is a link between wealth and the means of speech amplification, the first amendment cannot be progressive.[66]

It bears emphasis that this outcome is not the result of conservative distortion of free speech theory that might easily be remedied if progressives controlled the Supreme Court. The immunity of newspapers and book publishers from government control is a bedrock free speech principle. That immunity favors people who are wealthy enough to acquire these assets.

Understanding the connection between property and speech unmasks progressive support for the speech right for what it is: a kind of "trickle down" theory of civil liberties. Yes, the big victors are the rich and powerful, but the rather pathetic hope is that just enough protection will trickle down to prevent the government from entirely annihilating the left.

There is, of course, something to this argument. The first amendment might protect the left from the most serious sorts of attack even if it stands in the way of affirmatively advancing the left's agenda. The defense nonetheless understates the extent to which the speech game is competitive and the extent to which doctrinal manipulation can support politically discriminatory application of legal rules. More importantly, though, it misunderstands the most serious danger to effective progressive speech.

In the modern era, the danger is not mass imprisonment of leftists. It is not even milder forms of intimidation like blacklists or exclusion from government jobs. Of course, this state of affairs might,

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[66] Of course, there is always the possibility that government regulation of media would make things worse rather than better. Both thoroughgoing Marxists and thoroughgoing libertarians believe that this result is inevitable, at least under current conditions. But progressives occupy the uneasy space between Marxists and libertarians. They think that government offers the best hope of regulating market outcomes to make them more just. Giving up that hope is giving up on progressivism itself, and, so long as the hope remains alive, no progressive should favor media immunity from government regulation designed to redistribute speech opportunities. For further discussion, see pp xx, *infra.*

itself, be the result of our free speech culture. If that culture were destroyed, there is some risk that these tactics would reappear. But the risk is relatively small because conservatives have come to understand that heavy handed repression often backfires and is unnecessary. Ironically, what works much better is the proliferation and splintering of speech opportunities. These trends are greatly enhanced by technological changes in the means of speech production. As Tim Wu has forcefully argued,[67] the modern free speech problem is not government suppression, but speech clutter, trolling, and speech siloing. "Fake news" is everywhere, and because views are constantly reinforced by exposure to ideologically driven media, there is too little prospect of correction.

One might suppose that this democratization of speech breaks the link between wealth and speech opportunities. In fact though, the change exacerbates, rather than diminishes, the difficulty for progressives. In a world where there is too much speech, people need a filter. Anyone can use Twitter but that very fact means that Twitter produces an undifferentiated and useless swamp of information and opinion. The real control is therefore exercised not by speech producers, but by speech aggregators and amplifiers, who are themselves protected by the first amendment. While it may be cheap to produce speech, aggregation and amplification -- speech management -- still requires capital. Moreover, the managers regularly shield speech consumers from ideas that are unfamiliar, upsetting, or inconsistent with a preconceived narrative. To the extent that progressive views are all of these things, they are regularly filtered out.

Deeply engrained first amendment doctrine makes it very difficult to deal with this state of affairs. The doctrine is dominated by obsession with government restrictions on speech and with government interference with listener autonomy. It is ill-equipped to deal with a world where there is too much speech and where listener autonomy makes real conversation impossible.

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67 Tim Wu, *Is the First Amendment Obsolete, at* SSRN-id3096337%20(1).pdf.

The problem of too much speech also provides reason for skepticism about some of progressivism's favorite solutions to the free speech problem. Many progressives favor leveling the playing field without running afoul of first amendment principles by government subvention of speech. Why not give every citizen a campaign contribution voucher to use to support the candidate of her choice? Why not have government sponsored newspapers, web sites, and publishers open to all? Why not greatly expand funding for investigative reporting or the National Endowment for the Arts the National Endowment for the Humanities, and the Public Broadcasting Network?

I don't want to deny that some of these proposals might make things marginally better. Still, even apart from speech clutter, they have obvious problems and limitations. Providing campaign contribution vouchers adds to the total volume of campaign speech, but it does relatively little to remedy the disproportion.[68] Government sponsorship of the means by which speech is produced introduces inevitable problems about government choices about which speech to subsidize. But the more fundamental difficulty is that in a world where there is already too much speech, and where people are shielded from speech they disagree with, government programs to encourage more speech is unlikely to make things better and might actually make them worse.

In theory, many of these problems might be solved by wealth redistribution that made our society more egalitarian. In a world where there was more economic equality, control of speech production and management would be more economically diverse. Put differently, if the progressive program were already enacted, free speech might be more progressive. And that, of course, is the problem. The impact of money on politics makes it much harder to assemble legislative majorities to enact the progressive program. Worse yet, the modern right turn in first amendment law demonstrates that the speech right has the potential to make redistribution unconstitutional.

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[68] The problem is made worse by the Court's insistence that the government may not peg subsidies to the amounts spent by a candidate's opponent. *See* Davis v. Federal Election Commn., 128 S. t. 2759 (2008); Arizona free Entgerprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011).

To understand this last point, we need to examine the contradiction at the heart of the New Deal constitutional settlement. Beginning with the famous footnote 4 in United States v. Carolene Products,[69] the Court sought to distinguish between the protection of economic and political rights. On this view, property entitlements were discretionary and subject to redistribution if political majorities can be assembled to support redistributive programs. In contrast, civil liberties, like freedom of speech, were fixed and immune from majoritarian erosion. The contradiction is obvious: because speech rights depend upon property entitlements, free speech cannot remain fixed while property entitlements are redistributed.

The tension might be resolved in one of two ways. First, the discretionary character of property rights might bleed over into speech law, thereby making speech opportunities discretionary rather than mandatory. Some examples illustrate how this might be accomplished. At this writing, the Supreme Court seems poised to hold that "agency fees" charged to nonunion members working for public employees violate the first amendment.[70] Opponents of the fees argue that public employee unions are engaged in inherently political activity and that forced payment of the fees that support that activity therefore constitutes unconstitutional compelled speech.

As Benjamin Sachs has pointed out,[71] the argument depends on the money in question being the property of the employees. One might instead think of the money as being the property of the state employer. Suppose that instead of deducting the agency fee from the workers' paychecks, the government simply paid its workers lower wages and donated the surplus to the union. No employee would be forced to endorse a cause she opposed, so the compelled speech claim would evaporate. Because property rights are discretionary, it would seem that there is no constitutional obstacle to this recharacterization of the property right.

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69 United States v. Carolene Products Co., 304 U.S. 144, 153 n. 4 (1938).

70 *See* Janus v. AFSCME (cert. granted, Sept. 28, 2017).

71 Benjamin I. Sachs, *Agency Fees and the First Amendment*, ___ HARV. L. REV. ___ (2018) (forthcoming).

A similar argument was available in another compelled speech case, Dale v. Boy Scouts of America.[72] State antidiscrimination law prohibited the Boy Scouts from excluding individuals from the organization because of their sexual orientation. The Boy Scouts claimed that the law violated their right to "expressive association" by requiring them to endorse a life style they opposed. But this argument depended on the unstated assumption that the "Boy Scouts" were owned by an organization called The Boy Scouts of America. Suppose, though, that one treated the antidiscrimination statute as adjusting this property claim. Although the Boy Scouts of America retained most of the sticks in the bundle, the statute created a kind of nondiscrimination "easement" and vested that property right in people like Dale. If Dale had the entitlement in the first place, then the free speech right cuts the other way. The Boy Scouts would be violating Dale's speech rights by utilizing his property to advance their ideological objectives.

Of course, *Dale* lost his case, and public employee unions are likely to lose theirs. These results entail resolving the tension between property and speech entitlements in a second way: allowing speech law to bleed over into property law, thereby making property entitlements fixed rather than discretionary. Just because speech is immune from government redistribution, therefore the property rights necessary to support speech must be fixed as well. If this resolution is chosen, then the state *may not* treat the agency fees as state property, and the state *must* treat Boy Scout membership decisions as belonging to the Boy Scouts of America.

In principle, the Court might use this technique to constitutionally entrench a libertarian utopia. Because all property has the potential to fund speech, any property redistribution affects speech opportunities and, therefore, in some sense gives government control over speech. The Justices have not yet gone that far, and are unlikely to do so.

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[72] 530 U.S. 640 (2000).

Still, when confronted with direct conflict between a fixed first amendment and a fluid property regime, the modern Court has often resolved the contradiction by fixing property rights, thereby producing what commentators have called "the new Lochnerism."[73] The political branches must simply accept the fact that consumer tastes for harmful products are deformed by commercial advertising.[74] If publishers sell books or newspapers that harm those they defame, the state is often precluded from redistributing the economic loss.[75] The government is sharply constrained if it tries to intervene in the economic market for political candidates.[76] It may not regulate a pharmacy's decision to sell confidential information about drug prescriptions[77] and is substantially constrained from regulating the manner in which merchants state the price for the goods they sell.[78]

Once again, these results do not result from a deformation of the free speech right. They are the consequence of shielding the speech power from political redistribution. For a period it may have seemed that speech rights could be protected from the political branches while subjecting economic entitlements to political adjustment. But because speech opportunity depends upon property distributions, this compromise was always doomed to failure. The Court might have eviscerated the speech right by allowing the political branches to manipulate its economic substrate. In recent years, it has chosen instead to invigorate the right by imposing *Lochner*-like restrictions on the property entitlements that make speech possible. The results have been disastrous for progressives, but the disaster is a necessary consequence of taking free speech seriously.

B. Free Speech and the Feasance-Nonfeasance Distinction

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73 *See, e.g.,* Amanda Shanor, *The New* Lochner, 2016 WISC. L. REV.133.
74 *See, e.g.,* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).
75 *See, e.g.,* New York Times v. Sullivan, 376 U.S. 254 (1964).
76 *See, e.g.,* McCutcheon v. Federal Election Commission, 572 U.S. ___ (2014).
77 *See* Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).
78 *See* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017).

Speech causes harm. It can coerce, humiliate, mislead, embarrass, and destroy. Of course, the suppression of speech also causes harm. So, as a first cut, the public policy question is how to balance the two potential harms against each other.

Actually, though, the question is more complicated than this. For reasons I outline below,[79] the speech game is often zero sum. Granting speech opportunities to some often denies speech opportunities to others. For that reason, the speech right harms speech, as well as nonspeech, interests. Solving the policy question therefore requires balancing along two different dimensions: We need to balance between competing speech so as to maximize overall speech opportunities, and then we need to balance those speech opportunities against nonspeech costs so as produce the most speech at the least cost.

Needless to say, operationalizing all this poses a complicated problem. Conservatives have a simple solution to it. Much of the work is done by presumptively favoring government nonfeasance over government feasance. Government intervention is appropriate when private individuals harm others, but the harm must be clearly and narrowly defined. Absent such harm, the private sphere will magically produce optimal outcomes.

American free speech law adheres to this approach. Like the rest of the Constitution, the first amendment links freedom to government nonfeasance and oppression to government action. It assumes that speech is "free" when government "makes no laws," and that it is laws that have the potential to "abridge" the freedom of speech. If homophobic, religious fanatics add to the pain of grieving friends and relatives at a military funeral, the mourners have no legal recourse. But if the

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[79] *See* P. xx, *infra.*

government tries to prevent infliction of this harm, the fanatics can invoke judicial process to enforce their speech rights.[80]

The dichotomy is starker still when speech rights are on both sides of the ledger. If Facebook takes down posts expressing political views it dislikes, that action is a manifestation of freedom, and the government's decision to do nothing about it raises no free speech concerns. But if the government intervenes to force Facebook to provide fair speech opportunities to all, that action is coercive and there is at least a first amendment problem and maybe a first amendment violation.[81]

This general orientation violates core progressive commitments. Progressives think that the government has a duty to act affirmatively to counterbalance private power and correct for the unfairness of market allocations. When the government "does nothing" – when it acts like a "night watchman state" or endorses laissez faire economics – it is failing to meet its responsibilities.

Progressives are not unaware of the risk of government capture. There is always the possibility that government intervention will make things worse rather than better. Progressives have two responses to this risk. First, they emphasize the "compared to what" problem. Governments can be arbitrary and autocratic, but markets also have problems. Most progressives favor a mixed system that leaves many matters in the private sphere but also provides for more or less government intervention to enforce public values.

Second, many progressives point out that nonintervention is not a real possibility. Background property and contract rules as well as our tax and spending regime, regulation of the money supply, and countless other government interventions give particular people the power to control resources. If the rules were different, other people would be in control. One way or the other, the government is

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[80] *See* Snyder v. Phelps, 562 U.S. 443 (2011).

[81] *Cf.* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). *But cf.* Turner Broadcasting System Inc. v. FCC, 520 U.S. 180 (1997).

implicated in supposedly private decisions. Given the inevitability of government involvement, the state should be obligated to promote, rather than retard the broad distribution of power and opportunity.

How might this general stance toward market allocations be reconciled with free speech law? Progressives might treat speech as different from other sorts of entitlements. They might, in other words, argue that a laissez faire state with respect to speech serves progressive interests even as laissez faire endangers progressive goals with respect to everything else. Alternatively, they might try to refashion free speech law so as to mandate government action rather than inaction.

It is hard to see what sort of argument would support the first resolution. One might think that speech is especially valuable or especially vulnerable to state suppression. As noted above, one can be a progressive and still favor freedom of speech on nonprogressive grounds. But how does a laissez faire speech regime promote *progressive* ends? If progressives think that the risk of unfair market allocations is less than the risk of plutocratic government, then why don't they trust government to allocate speech opportunities. If they think that government is inevitably implicated in market decisions, how can the government avoid implication in speech decisions?

Despite these difficulties, a progressive might support free speech if she thought that the political branches would most often be controlled by the enemies of progressivism and that the maintenance of a constitutionally protected private sphere was necessary to protect progressives from these enemies.

There is something to this argument. As noted above, it is at least possible that the speech right has protected progressives from truly catastrophic outcomes. But there is a big gap between acknowledging this possibility and believing that the speech right could be refashioned so as to actually mandate progressive outcomes.

Moreover, if we take seriously the argument that the political branches are likely to be controlled by the enemies of progressives, we risk impeaching the progressive position more generally. If the enemies of progressivism are more likely to win elections, then progressives should also want to shield property entitlements from political interference. A reactionary state that suppresses progressive speech will also redistribute property in the wrong direction. As flawed as markets are, they are better than this alternative. To be clear, the worry about reactionary government may be justified, but if it is, then progressivism itself should be rejected. Free speech would then be reconciled with the progressive ideal, but only because the ideal has been transformed beyond recognition.

The other alternative is to reconceive speech law so as to break the link between freedom and government nonfeasance. As argued above, there is nothing in principle that stands in the way of accomplishing this goal, and there are fragile and neglected strands of first amendment doctrine that support it. For example, long ago, the Supreme Court held that the government had an affirmative obligation to regulate privately owned "company towns" that were restricting speech.[82] But cases like this are isolated and aberrational. We need to understand how deep a transformation would be required to turn them into central parts of free speech doctrine.

The problem becomes apparent as soon as one sees that opening speech opportunities for some means limiting speech opportunities for others. A statute that required best-selling books to publish "balanced" accounts of controversial issues impinges on the speech right of authors. A law that requires TV stations to offer "equal time" discourages stations from editorializing. Equalizing campaign expenditures entails reducing the power of the wealthy to communicate their messages.

All of this would have to be in service of creating some target "fair" distribution of speech opportunities. But what distribution is "fair"? As currently distributed, flat earthers and advocates for

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[82] Marsh v. Alabama, 326 U.S. 501 (1946).

burning witches have very limited speech opportunities. Is that really a bad state of affairs? If overt racists are currently underrepresented in our speech market place, should progressives really favor government subsidies so they can more effectively get their message out? The alternative is for the government to decide that some distributions are appropriate because the underrepresented speech is just "wrong." But once the government is given that power, there is no guarantee that it will not put progressive speech in the "just wrong" category.

In any event, a systematic effort by the government to determine which speech to promote and which to suppress based on official determinations of the correctness of contested positions is the antithesis of the speech right rather than its apotheosis. Even if it would promote progressive values, it would be unrecognizable as a realization of first amendment ideals.

C. Free Speech and Government Neutrality

The problem posed by government determinations about the appropriate distribution of speech opportunities points toward a third obstacle to a progressive speech right. American speech law is dominated by a concern about equality and neutrality. Free speech law's core commitment is to the proposition that the government may never suppress speech simply because of disagreement with the message that it expresses.[83] Although the government itself can express controversial opinions,[84] only the secondary effects of speech can justify government restrictions on the speech of others.[85]

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[83] *See ,e.g.,* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.")

[84] *See, e.g.,* Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009) (when government engages in its own expressive conduct, free speech clause has no application).

[85] *See, e.g.,* United States v. O'Brien, 391 U.S. 367 (1968) (justifying "incidental" limits on free speech).

Much of the first amendment's doctrinal apparatus concerning matters like content,[86] viewpoint,[87] and speaker[88] neutrality reinforce this basic idea. Because free speech is the means by which our political disputes are resolved, our free speech regime must, itself, be neutral as between those disputes. That is why content and viewpoint restrictions are especially suspect and why even regulation that only indirectly affects speech must be justified on grounds other than disagreement with the views being expressed.

This stance, in turn, reflects a broader theoretical view about the overall purpose of constitutional law. On standard liberal premises, the Constitution is supposed to provide the mechanism by which people with opposing views can settle their disagreements through law rather than power. To accomplish this goal, the Constitution must be acceptable to people of differing political beliefs. It is designed to enforce a regime of fair political competition, and the competition can be fair only if the Constitution is neutral regarding the outcome.[89]

But progressivism is not neutral. It is a fighting faith committed to a particular and controversial outcome. It follows that a progressive first amendment necessarily violates the ground level premises of American constitutionalism. Reasonable conservatives would be no more bound in conscience to accept a progressive first amendment than reasonable progressives would be bound to accept a conservative version. So long as we imagine that the Constitution is the common ground that people of all political persuasions can adhere to, it cannot be progressive.

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86 *See, e.g.,* Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (holding that content regulation of outdoor signs is unconstitutional).

87 *See, e.g.* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down "Bias-Motivated Crime Ordinance" on the ground that it embodied viewpoint discrimination.)

88 *See, e.g.,* Perry Educators' Association v. Perry Local Educators' Association, 460 U.S. 37 (1983) (upholding speaker based restriction in context of nonpublic forum).

89 Anything like a full defense of this position would far exceed the scope, and mandated word limits, of this comment. For present purposes, it is enough to say that rational individuals are unlikely to commit themselves to a government structure that systematically and deliberately biased outcomes against their values, norms, and life choices.

A fair response to this argument is that constitutional neutrality is a sham. As any serious student of constitutional history knows, the Framers were interested in producing some outcomes and avoiding others. Living constitutionalists don't think that we should be bound by the Framers' views, but it is deeply implausible that they are indifferent to the outcomes their interpretations produce. More particularly, for reasons I have already detailed, free speech law is hardly neutral. It systematically favors status quo distributions and, so, the rich and powerful. Indeed, the claim that free speech law is "just there" or is fair to everyone is an important part of the mystification that stymies progressive programs. If speech law is inevitably going to be biased one way or the other, then why not bias it toward progressives?

The underlying observation is fair enough, but the conclusion does not follow. If the Constitution is not, and cannot be, a fair and neutral framework that everyone is bound to accept, that is a reason for abandoning rather than embracing constitutional law. If progressives are harmed by first amendment mystification, then they should favor repealing the amendment instead of embracing it.

There are, again, two escape routes from this conclusion. First, one might claim that progressivism itself is neutral. On the highest level of generality, progressives not only can, but must make this claim. What it means to be a progressive is to believe that the progressive platform best advances human flourishing. For the very reason that progressives, like everyone else, are not neutral with regard to their own beliefs, they are likely to believe that their own beliefs are neutral. They are bound to think that adoption of their program will promote human flourishing and, therefore, that all sensible and humane people should favor that program.

But this sort of neutrality provides no basis for political union. Even though proponents of particular points of view think of them as neutral, that claim alone does not provide ground to share with proponents of conflicting points of view. Of course, progressives are convinced of the merits of

their own arguments – otherwise they would not be progressives -- but they must also acknowledge the brute fact that many reasonable people reject those arguments and that they do so on reasonable grounds. To serve its unifying function, Constitutions must abstract from this reasonable disagreement.

One might think that this point is obvious but for the fact that many conservatives don't seem to understand it. They regularly defend the Constitution and a particular method of interpreting the Constitution as transcending political differences because, as they read it, the Constitution embodies the libertarian, free market principles that all reasonable people are bound to accept.[90] That claim is plausible only if we are prepared to treat conflicting political and economic theories as illegitimate. But they are not, and because they are not, the conservative argument is inconsistent with claims of constitutional neutrality. And just as conservatives must come to grips with the unfortunate fact that there are progressives in the world, so too, progressives must recognize the existence of conservatives. The Constitution cannot settle our political arguments if it is read to take one side of them.

If that is so, then all we are left with is the possibility of mystification – that is, with unjustified claims to neutrality that trick people into thinking that their own positions are illegitimate. That possibility, in turn, leads to the second escape hatch: Perhaps progressives should be left-Straussians. Perhaps the realization of progressive ends is sufficiently important to justify mystification as the means of achieving them.

There are many grounds for skepticism about this conclusion, and I will only briefly rehearse them here. There is little reason to think that the mystification will work or that progressives will be better at this game than their opponents. On some versions of progressivism, mystification might, itself,

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[90] For a representative example, see RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016).

be inconsistent with the progressive program. Even if it is not, a prohibition on deliberately misleading our fellow citizens might be an important side constraint.

Suppose, though, that one is unpersuaded by any of these arguments. Even if progressives decide to engage in mystification, that decision does not entail an embrace of free speech. On the contrary, mystification is the negation of speech freedom. Fooling people into believing that they must accept a regime under which speech that they favor is systematically disadvantaged is fundamentally inconsistent with virtually any version of the speech right. It subverts rather than promotes speaker autonomy, undermines rather than encourages a free and fair exchange of views, and denies rather than affirms the obligation to allow the expression of views that we hate. In short, if progressives end up endorsing a mystification strategy, that will be because they have given up on freedom of speech.

D. Free Speech and Free Thought

The mystification dilemma is closely related to the final argument against free speech progressivism: At its root, the assertion of a constitutional right to freedom of speech is dictatorial.

This claim will seem paradoxical to many, if not completely implausible. On widely accepted accounts, free speech provides protection against dictatorship, and limitations on the speech right are often the first measures that dictators take when they assume control.

Despite all this, however, *constitutionalizing* the right to freedom of speech leads to an anti-liberal mindset. An assertion that the Constitution requires a certain state of affairs is a way of avoiding the necessity for producing actual reasons for why that state of affairs is desirable and just. If the Constitution requires something, then that is the end of the argument, at least in American constitutional culture. Short of constitutional amendment, a constitutional requirement that a thing must be done just means that it must be done. Once the requirement is established, there is nothing left to talk about.

Of course, it remains open to argue that the Constitution, properly understood, *does not* require a particular state of affairs. But making that move merely diverts discussion from the desirability and justice of particular outcomes to an often arcane and irrelevant dispute about constitutional interpretation. We can talk until we are blue in the face about what kind of free speech regime the Constitution establishes. We can disagree about the intent of the framers, the meaning of the words they wrote, or the extent to which the words should be read in light of our traditions and modern conditions. But once constitutional meaning is established, the argument ends. There can be no truly free speech about the desirability of free speech.

This fact about contemporary constitutional culture produces another and deeper paradox: the constitutional right to free speech is actually at war with free thought. Here as elsewhere, the assertion of constitutional rights shuts down and sidetracks serious conversation, rather than facilitating it. It provides an excuse for avoiding the first duty that citizens owe to each other: the duty to explain and justify the positions that they take on questions that matter. It provides an excuse for not speaking, for not listening, and for not thinking.

Of course, none of this, by itself, demonstrates that this state of affairs harms progressives. There are nonetheless good reasons why the dictatorial character of constitutional argument should trouble them. First, for the reasons I have already given, the free speech right tends to obstruct the realization of progressive objectives. Progressives might respond to this state of affairs by attacking the right. But constitutionalizing the right makes the attack pointless and, thereby, further weakens the political position of progressives.

The second reason is more speculative but also more powerful. Many progressives would like to believe that they could convince others if only they had a fair chance to do so. They think that their position would be endorsed by people who participated in a robust, unfettered and equal dialogue

about what is necessary for human flourishing. Thought, reason, and imagination, unlocked by unconstrained discussion and unpolluted by prejudice and preconception, just leads to progressive views.

A belief of this sort may underestimate differences in culture, perception, values and experience. It may result from arrogance about the rightness of one's own position. For reasons I have already given, it almost certainly reflects a naïve view about the likely effects of a speech right in our current circumstances.

Still, something like this belief provides an explanation for why many progressives cling to a belief in freedom of speech. And, suppose that, despite all the reasons for skepticism, progressives are right to be optimistic about the outcome of unfettered speech. That very optimism should make them hesitate to invoke constitutional free speech claims which, themselves, obstruct the very unconstrained dialogue that they favor.

IV. Conclusion

"Civil liberties once were radical." That's how Laura Weinrib begins her magnificent book about the dramatic transformation of free speech ideology during the interwar period.[91] But those were in the days when free speech advocates embraced rights "'prior to and independent of constitutions,' secured without recourse to law."[92] Groups like the American Civil Liberties Union managed to translate this right of agitation into the language of law, but the radicalism of free speech got lost in the translation. As Weinrib explains

> By the early 1940s, civil liberties were no longer radical. . . . The ACLU had naively hoped, in an era when revolution seemed possible, that a mere right to agitate would pave the way to

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91 LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE 1 (2016).

92 Id.

> substantive change. Implicit in their position was the confidence that radicalism would prevail in the marketplace of ideas. By the 1940s, employers understood that no free exchange of ideas existed. They understood that a right to free speech would ordinarily favor those with superior resources.[93]

These were lessons learned long ago. And yet, many modern progressives seem to have forgotten them. They just can't shake their mindless attraction to the bright flame of our free speech tradition. Progressives need to turn away before they are burned again.

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[93] Id., at 326-27.