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Genevieve Lakier

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THE NON–FIRST AMENDMENT LAW OF FREEDOM OF SPEECH

Genevieve Lakier[*]

The First Amendment dominates debate about freedom of speech in the United States. Yet it is not the only legal instrument that protects expressive freedom, the rights of the institutional press, or the democratic values that these rights facilitate. A rich body of local, state, and federal laws also does so, and does so in ways the First Amendment does not. This Article explores the history and present-day operation of this non–First Amendment body of free speech law. Doing so changes our understanding of both the past and the present of the American free speech tradition. It reveals that there was more legal protection for speech in the nineteenth century than scholars have assumed. It also makes evident that the contemporary system of free expression is much more majoritarian, and much more pluralist in its conception of what freedom of speech means and requires, than what we commonly assume. Recognizing as much is important not only as a descriptive matter but also as a doctrinal one. This is because in few other areas of constitutional law does the Supreme Court look more to history to guide its interpretation of the meaning of the right. And yet, the Court's view of the relevant regulatory history is impoverished. Missing from the Court's understanding of freedom of speech is almost any recognition of the important nonconstitutional mechanisms that legislators have traditionally used to promote it. The result is a deeply inconsistent body of First Amendment law that relies on a false view of both our regulatory present and our regulatory past — and is therefore able to proclaim a commitment to laissez-faire principles that, in reality, it has never been able to sustain.

INTRODUCTION

The First Amendment dominates both popular and scholarly discussion of freedom of speech in the United States. If one takes a look at the tremendous amount of writing that has been produced to analyze, celebrate, or deplore how expressive freedom has been legally guaranteed in this country, one will quickly see that the vast majority of it focuses on the Free Speech and Press Clauses of the First Amendment and the judicial opinions that interpret and give those clauses force.

It is easy enough to understand why discussion of freedom of speech and press has tended to be so First Amendment–centric.[1] The Free

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[*] Assistant Professor of Law and Herbert and Marjorie Fried Teaching Scholar, the University of Chicago Law School. Thanks to Kate Andrias, Amy J. Cohen, Omar Kutty, Daphna Renan, Mike Seidman, Geoffrey Stone, Nelson Tebbe, Laura Weinrib, and participants at the University of Chicago Work-in-Progress Workshop, the Free Expression Scholars Conference at Yale University, and the American Constitutional Society Board of Academic Advisors Paper Workshop for helpful comments. A special thank you to Elisabeth Mayer, Lauren Nudelman, and Osama Alikhawaja for excellent research assistance, and to the superlative editors at the *Harvard Law Review*.

[1] Although the text of the First Amendment distinguishes between the "freedom of speech" protected by the Free Speech Clause and the "freedom of press" protected by the Press Clause, in

Speech Clause of the First Amendment has for decades now served as one of the most powerful mechanisms of individual rights protection in the Federal Constitution. It has been interpreted to apply to a dizzying variety of kinds of speech and expressive conduct. Today, the First Amendment protects not only explicitly political speech and journalism but also religious speech, artistic speech, scientific speech, most forms of popular entertainment, nonobscene pornography, commercial advertisements, and even nude dancing.[2] The strength and size of the modern First Amendment have given it a powerful cultural status.[3] They also make it easy to equate the free speech tradition in the United States with the First Amendment tradition.[4] Like the sun, the First Amendment's size and brightness tend to blot out all else.

It is nevertheless a mistake to presume that the only legal mechanism that protects freedom of speech in the United States is the First Amendment. This is because, as the Supreme Court has recognized, the federal courts do not possess a monopoly over the interpretation and enforcement of the rights to freedom of speech and press or the penumbral right of association. In its 1976 decision *Hudgens v. NLRB*,[5] the Court made clear that "statutory or common law may in some situations extend protection or provide redress against [efforts] to abridge . . . free expression" even when the First Amendment does not do so.[6] A few years later, in *PruneYard Shopping Center v. Robins*,[7] the Court similarly concluded that state constitutions might provide "rights in expression" that are "more expansive than those conferred by the Federal Constitution."[8]

The result is that speakers and listeners can, and sometimes do, receive more protection for their speech, press, and expressive association

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its First Amendment cases, the Court has generally refused to distinguish between the two. *See* Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1027–29 (2011). The result has been to make freedom of press and freedom of speech merely different ways of describing the same underlying bundle of rights. Although good arguments have been made for why it is a mistake to equate freedom of speech with freedom of press, for simplicity's sake, and in order to better reflect how the terms are used in contemporary constitutional discourse, in this Article I do just that. References to freedom of speech should be understood to include the rights that might otherwise be understood, and historically were referred to, as freedom of press.

[2] *See* Genevieve Lakier, *Sport as Speech*, 16 U. PA. J. CONST. L. 1109, 1111, 1114 (2014).

[3] *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1790 (2004).

[4] *See, e.g.*, HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 6 (Jamie Kalven ed., 1988) (referring to the First Amendment tradition as simply the "free speech tradition"); Owen M. Fiss, Essay, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1405 (1986) (conflating Professor Kalven's "free speech tradition" with First Amendment jurisprudence).

[5] 424 U.S. 507 (1976).

[6] *Id.* at 513.

[7] 447 U.S. 74 (1980).

[8] *Id.* at 81; *see also id.* at 88.

under state constitutional law, state and federal statutory law, and state common law than they do under the First Amendment. Although state constitutional law has proven to be less of an important source of free speech protection than some hoped or predicted after the *PruneYard* decision,[9] courts in New Jersey, California, and a number of other states have for many decades now interpreted state constitutional guarantees of expressive freedom to confer rights that the First Amendment does not confer.[10] More importantly, local, state, and federal legislators have over the course of the past two centuries enacted hundreds, perhaps even thousands, of laws that are intended to protect the same values and interests that the First Amendment protects. In some cases, legislators have also empowered regulatory agencies to do the same. To focus solely on the protection that the First Amendment provides is therefore to misunderstand how freedom of speech is actually understood and legally protected in the United States today.[11]

This Article attempts to correct this misunderstanding — or, at least, to begin the process of doing so — by exploring both the genealogical roots and the present-day operation of what it calls the non–First Amendment law of freedom of speech.[12] The term refers to the many local, state, and federal laws that work to protect the same interests that the Free Speech and Press Clauses of the First Amendment protect. These laws do so not by simply enforcing the speech rights and speech-facilitating duties that the First Amendment requires, but by granting rights and imposing duties that the First Amendment does *not* require,

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[9] Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1579 (1998).

[10] *See, e.g.*, Fashion Valley Mall, LLC v. NLRB, 172 P.3d 742, 749 (Cal. 2007); Green Party of N.J. v. Hartz Mountain Indus., Inc., 752 A.2d 315, 323 (N.J. 2000).

[11] This Article leaves entirely undiscussed another, also extremely important, domestic free speech tradition: namely, the tradition of private self-regulation that promotes free speech values in schools and universities, in the private media, and in a variety of other institutional settings. Like the free speech laws documented in this Article, institutional free speech policies play an important role in promoting free speech values in contexts where the First Amendment does not do so, particularly in the private sphere. They also serve as the terrain on which important debates about the meaning of free speech occur. To fully understand how freedom of speech is imagined, contested, and protected in the United States, one would need therefore to understand the relationship between three important strands of free speech law — the First Amendment, the non–First Amendment, and the private. For purposes of space, however, I leave exploration of this important third strand of the American system of free expression for another day.

[12] As will become evident, in what follows I provide only a cursory account of this capacious, contentious, and diverse body of free speech law. This Article is intended to open up exploration of this free speech tradition, not to provide the last word on it. In doing so, I follow the lead of two scholars who previously suggested, albeit in a much less fleshed-out form, the existence of a non–First Amendment free speech tradition. *See* Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 107 (1995); TIM WU, BROOKINGS INST., IS FILTERING CENSORSHIP? THE SECOND FREE SPEECH TRADITION 2 (2010), https://www.brookings.edu/research/is-filtering-censorship-the-second-free-speech-tradition [https://perma.cc/7Y7S-465L].

or by intervening in the speech marketplace in other ways not mandated by the First Amendment cases.

As I show in what follows, this body of non–First Amendment free speech law is extensive in its scope and significant in its effects. It also has deep roots in our regulatory traditions. In fact, the non–First Amendment free speech tradition is for all practical purposes older than the First Amendment tradition itself. In contrast to the First Amendment tradition, which began to emerge in its modern form only in the early decades of the twentieth century, legislatures acted to protect the interests that we today recognize the First Amendment as protecting beginning in the mid-eighteenth century, and continued to do so throughout the nineteenth and twentieth centuries in all sorts of ways.

This fact complicates the dominant narratives of the history of freedom of speech in the United States, which tend to depict the years prior to the early twentieth century as a period in which there was little legal protection for expressive freedom.[13] It is absolutely true that eighteenth- and nineteenth-century courts tended to interpret constitutional free expression guarantees to grant speakers and listeners few rights against the government.[14] But legislators proved much less insensitive to the need to protect expressive freedom, and the democratic freedoms that it enabled, against both government and private power than did the courts. Indeed, what we find during this period is significant and enduring legislative concern about the threat that the concentration of economic power produced by the increasing industrialization of the U.S. economy posed to the expressive freedom of the less powerful, as well as to the well-being of the institutional press.[15] The result was the creation of a rich body of nonconstitutional free speech law. To write legislative efforts to promote freedom of speech and press out of the history of freedom of speech in the United States is therefore to miss much of the story.

Paying attention to the non–First Amendment law of freedom of speech not only changes our understanding of the history of the free speech tradition in the United States, however. It also complicates our

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[13] *See, e.g.*, PAUL L. MURPHY, THE MEANING OF FREEDOM OF SPEECH: FIRST AMENDMENT FREEDOMS FROM WILSON TO FDR 4 (1972) ("In America, freedom of speech . . . [was] an operational reality largely outside the area of either legal definition or restriction from the adoption of the Bill of Rights until World War I. . . . [F]reedom of speech was treated as a dearly won prize, protected in a symbolic trophy case, but not used from day to day."); Lawrence M. Friedman, Lecture, *The Constitution and American Legal Culture*, 32 ST. LOUIS U. L.J. 1, 5–6 (1987) (noting that very few free speech cases reached the courts in the nineteenth century, and concluding that "structured controversy over the limits of free speech was largely absent as an overt political issue").

[14] *See* David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 523–24 (1981).

[15] *See, e.g.*, *infra* p. 2320.

understanding of its present. This is because what it shows us is that the modern free speech tradition is considerably more pluralist in its conception of the right, and more majoritarian in its operation, than we are accustomed to recognizing.

In its First Amendment cases, the Court has articulated, since at least the 1940s, a strongly counter-majoritarian and court-centric conception of freedom of speech. It has argued that what the ratification of the First Amendment was intended to do was remove the question of what freedom of speech means from "the vicissitudes of political controversy" and transform it instead into "a legal principle to be applied by the courts."[16] The Court has insisted, more generally, that the meaning of freedom of speech is not something that "may . . . be submitted to vote" or made to "depend on the outcome of . . . elections."[17]

The Court has never explained how its view of freedom of speech as a right whose meaning must "depend on the outcome of no elections"[18] coexists with its recognition that often popularly elected state courts and state and federal legislatures may grant rights of free expression that the First Amendment does not.[19] Nevertheless, scholars have largely accepted the Court's claim that what freedom of speech means in the United States — at least as a legal matter — is what the First Amendment cases say it means.[20] But this is a mistake.

In fact, once we look beyond the First Amendment cases, what we find is significant debate, from the eighteenth and nineteenth centuries until today, about what freedom of speech means and requires. More than that: what we find are legal protections for speech and association that are based on *a different conception of freedom of speech* than that given voice in the First Amendment cases — one that is much more concerned with the threat that private economic power poses to expressive freedom, and much less laissez-faire in its understanding of the government's responsibilities vis-à-vis the marketplace of ideas.

The non–First Amendment laws, policies, and judicial decisions chronicled in this Article do not, in other words, simply build on top of the federal constitutional "floor" — to use the famous metaphor that

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16 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

17 *Id.*

18 *Id.*

19 *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980); Hudgens v. NLRB, 424 U.S. 507, 513 (1976).

20 The tendency to believe the Court that it has a monopoly over the meaning of the free speech right is as common among the critics of the modern First Amendment tradition as it is among those who believe the tradition to be a "worthy" one. *See, e.g.*, Louis Michael Seidman, Essay, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2220 (2018) (defining the American free speech tradition to mean the First Amendment tradition, and concluding that it both has not been and likely can never be progressive); *see also* Fiss, *supra* note 4, at 1405–08 (same).

Justice Brennan developed to describe what he viewed as the ideal relationship between state and federal constitutional law.[21] Instead, they reflect and, in some cases, explicitly articulate a different view of how it is that the interests the First Amendment protects — chief among these, the interest in democratic flourishing, but also the interest in individual self-expression — should be realized. The result is a distinct and vibrant tradition of free speech law — and one that, as I show in what follows, is often quite difficult to reconcile with the principles that undergird the modern First Amendment cases.

Recognizing as much is important not only as a descriptive matter but also as a doctrinal one. This is because in few other areas of constitutional law does the Court look more to history to guide its interpretation of the meaning of the right. And yet, the Court's view of the relevant regulatory history is impoverished. Missing from the Court's understanding of freedom of speech is almost any recognition of the important nonconstitutional mechanisms that legislators have traditionally used to promote it. This is true even though the political and cultural power of the non–First Amendment body of free speech law has made the Court loath in many contexts to constrain its application, even when doing so is difficult to justify under existing First Amendment principles.

The result is an inconsistent body of free speech law that manages to reconcile the First Amendment and non–First Amendment free speech traditions only by implausibly denying in many cases that non–First Amendment free speech laws affect any significant free speech interests at all. This is a problem not only because it produces incoherent doctrinal distinctions but also because it permits the Court to proclaim a commitment to principles — in particular, the principle of free speech laissez-faire — that in reality it cannot sustain.

To craft a First Amendment doctrine that is capable of adequately protecting freedom of speech in our complex democratic society, it is necessary to first understand how that freedom of speech has in fact historically been protected. That is the task that this Article takes up. It proceeds in three parts. Part I explores the history and present operation of some of the laws that make up the non–First Amendment free speech tradition. Part II examines the implications of the non–First Amendment free speech tradition for how we think about the present, and the past, of freedom of speech in the United States. Finally, Part III argues that the failure of scholars to pay attention to the non–First Amendment free speech tradition has made it too easy for the Supreme Court to claim that the American free speech tradition is laissez-faire, when the reality is far more complicated.

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[21] William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986).

I. Decentering the First Amendment

Histories of freedom of speech in the United States tend to be written as histories of the First Amendment. The First Amendment's ratification in 1791, the fight over its meaning spurred by passage of the Alien and Sedition Acts in 1798, the restrictive Blackstonian interpretation of freedom of speech and press that courts adopted in the nineteenth century, and the radical changes to First Amendment doctrine that took place in the early twentieth century — these are the events that structure most histories of freedom of speech in this country.[22] When other legal mechanisms enter the story, they are usually discussed either as a threat to freedom of speech or as a tableau on which to explore the competing interpretations of the First Amendment that courts and others employed during the period.[23]

There are important exceptions to this rule. For example, historians have shown considerable interest in how the state constitutional guarantees that provided the primary judicially enforced source of protection for freedom of speech and press in the years prior to the First Amendment's incorporation were interpreted by courts and others.[24] Similarly, historians of the New Deal have explored how unions and workers argued for, and in some cases won, rights of speech and association that were not grounded in the First Amendment.[25] For the most part, however, both recent and not-so-recent histories of freedom of speech in the United States tend to focus on the First Amendment, and the First Amendment alone.[26]

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[22] *See, e.g.*, Michael Kent Curtis, Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History (2000); Donna Lee Dickerson, The Course of Tolerance: Freedom of the Press in Nineteenth-Century America (1990); Stephen M. Feldman, Free Expression and Democracy in America: A History (2008); David M. Rabban, Free Speech in Its Forgotten Years (1997); Geoffrey R. Stone, Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism (2004).

[23] *See, e.g.*, Dickerson, *supra* note 22, at 55–81.

[24] *See, e.g.*, Norman L. Rosenberg, Protecting the Best Men: An Interpretive History of the Law of Libel 61–71 (1986); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. Rev. 543, 565–69 (2009).

[25] *See, e.g.*, Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 Sup. Ct. Rev. 297, 323–24.

[26] *See, e.g.*, Christopher M. Finan, From the Palmer Raids to the Patriot Act: A History of the Fight for Free Speech in America (2007); Laura Weinrib, The Taming of Free Speech: America's Civil Liberties Compromise (2016); The Free Speech Century (Lee C. Bollinger & Geoffrey R. Stone eds., 2019). Historians of the mass media have paid significant attention to the non–First Amendment free speech laws that affect the mass media. *See, e.g.*, Ithiel de Sola Pool, Technologies of Freedom 2–3 (1983); Richard R. John, Spreading the News: The American Postal System from Franklin to Morse 25–63 (1995); Sam Lebovic, Free Speech and Unfree News: The Paradox of Press Freedom in America 6 (2016); Samantha Barbas, *Creating the Public*

The First Amendment is not, however, the only legal mechanism that protects, or has historically protected, the rights that its Free Speech and Press Clauses guarantee — like the right of the individual to access uncensored "channels of communication,"[27] or to take part in "free political discussion to the end that government may be responsive to the will of the people,"[28] or to decide what it is they do and do not say.[29] These rights are in fact protected in all kinds of ways, by all kinds of legal instruments. To tell the legal history of freedom of speech in the United States as an almost exclusively First Amendment story is to ignore many of the other mechanisms that attempt to ensure that individuals can meaningfully exercise the kind of expressive freedom that a democratic society requires.

Consider for example the many laws that make it a crime to threaten or intimidate another into, or out of, voting a certain way. Such laws exist in virtually every state,[30] and similar prohibitions are written into federal law also.[31] They are not required by the First Amendment, at least not as it is currently understood. Even if the government did nothing to prevent private persons from using threats or intimidation to stop others from voting, the victims of those threats and acts of intimidation would have, in most cases, no cognizable First Amendment claim they could bring against the government — or, in all likelihood, anyone else — under existing state action rules.[32] And yet, it obviously is the case that voter intimidation laws protect a right that the Supreme Court has insisted is a "major purpose"[33] of the First Amendment to protect:

Forum, 44 AKRON L. REV. 809, 830–45 (2011). These works tend to devote relatively little attention, however, to what the regulatory regimes they explore reveal about legal as well as popular understandings of freedom of speech and press in the period. Perhaps for this reason they have not been well integrated into the broader body of free speech scholarship. This can and should change.

27 Marsh v. Alabama, 326 U.S. 501, 507 (1946).

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

29 Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all.").

30 *See* Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling Places: How They Can Be Stopped*, 11 TEMP. POL. & C.R.L. REV. 401, 479–99 (2002) (listing the various state laws that prohibit private interference with voting).

31 *See, e.g.*, 18 U.S.C. § 594; 42 U.S.C. § 1985(3); 52 U.S.C. § 10307(b).

32 In its state action cases, the Court has held that constitutional rights like the First Amendment ordinarily do not protect against actions that are carried out by private persons, except when a government actor "exercise[s] coercive power or has provided such significant encouragement . . . [to the private actor] that the choice must in law be deemed to be that of the State." Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). Because this kind of encouragement will be lacking in most private voter intimidation cases, it is very unlikely that the First Amendment would provide any protection to the intimidated voter. The one exception to this rule is voter intimidation carried out by the political party officials who operate party primaries, but even in such cases, the Court has made clear that those officials count as state actors only while overseeing the primary election process. *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 572–73 (2000).

33 Mills v. Alabama, 384 U.S. 214, 218 (1966).

they help "ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."[34] Indeed, they protect perhaps the most crucial means of participation in our republican system of self-government, what we might think of as the core democratic expressive freedom: the right to vote.

These laws therefore can, and perhaps should, be thought of as non–First Amendment free speech laws: they protect expressive interests that the First Amendment protects but do so by granting speech rights that the First Amendment does not grant and by imposing speech-facilitating duties that the First Amendment does not require. And they have done so for many years — indeed, since before the First Amendment was enacted. As Professor Eugene Volokh reports, in the mid- and late eighteenth century, a number of colonies made it a crime to "attempt to overawe, affright, or force, any person qualified to vote, against his inclination or conscience,"[35] and in the years after independence, many states passed similar laws.[36]

The voter intimidation laws are not unique in this respect. Once one starts to look, one finds many local, state, and federal laws that protect expressive interests that the First Amendment protects but do so by non–First Amendment means. Many of these laws also have deep roots in our regulatory traditions.

This is not terribly surprising. The task of maintaining a democratic society is a difficult one. It requires, among other things, extensive coordination between different government actors, and a sufficient flow of information between the government and the people to enable citizens to critically analyze the government's activities and to maintain control over it (rather than the other way around). It also requires endless conversation between members of the body politic about the rules that do, and should, govern society. It would be quite strange if the entire responsibility for ensuring the robust expressive freedom that must exist in order for millions of people to be able to collectively govern themselves were borne by only one legal instrument, or even fifty-one. Nor is this the situation we are confronted with.

Instead, legislatures, regulatory agencies, and courts have crafted over the course of American history many different laws to protect the expressive freedom that a democratic society requires. These laws have largely been left out of the history of freedom of speech in the United States because they do not tend to speak in a constitutional register or acquire their authority from the constitutional text. It is time to stitch them back into the story.

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[34] Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 604 (1982).

[35] Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 297 (2012); *see also id.* at 297–300.

[36] *Id.* at 300.

This Part begins to do so, by exploring some of the laws that promote free speech interests by non–First Amendment means. Because the non–First Amendment law of freedom of speech is as capacious, if not more so, than the First Amendment itself, it would be impossible to provide anything like a comprehensive survey of its provisions in one part of one article. In what follows, I examine only a few of the many local, state, and federal laws that protect free speech interests by non–First Amendment means. Even looking at a relatively small sample of laws should nevertheless make evident the richness, significance, and diversity of this primarily majoritarian free speech tradition, as well as the marked differences in how the First Amendment and non–First Amendment bodies of free speech law attempt to vindicate the same values.

A. Postal Laws

A good place to look, to begin to get a sense of the significance and scope of the non–First Amendment law of freedom of speech, is at federal postal policy, particularly the postal law of the eighteenth and nineteenth centuries. Today the United States' mails are only one of the many mechanisms through which information travels around the body politic. In the eighteenth and early nineteenth centuries, however, the post office was a vital information network — an institution whose importance to "the diffusion of knowledge, the control of public opinion, and the dissemination of every species of truth" appeared "incalculable."[37] Federal postal policy determined how the post office performed this important knowledge-diffusion role, and Congress shaped this policy quite self-consciously in an attempt to promote the same values that the First Amendment protected.

This motivation becomes clear when one examines the arguments made to explain and justify the Post Office Act of 1792,[38] which undoubtedly represents the most significant piece of postal legislation ever enacted in the United States. The Act, which was the culmination of three years of legislative debate,[39] enacted a radical change to federal postal policy. Prior to 1792, the American postal service, like the royal postal service that preceded it, had been run as a money-making venture for the government.[40] Newspaper publishers and other members of the institutional press were permitted to pay for the privilege of using the

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[37] *Post Offices of the United States*, N.Y. TIMES, Oct. 20, 1852, at 2. For similar claims about the importance of the postal service to the diffusion of knowledge in the United States, see JOHN, *supra* note 26, at 7–15.

[38] An Act to Establish the Post-Office and Post Roads Within the United States, ch. 7, 1 Stat. 232 (1792).

[39] *See* JOHN, *supra* note 26, at 31.

[40] *Id.* at 25.

postal service but, except in a very narrow class of cases, they had no right to do so.[41]

The Post Office Act changed all that: it granted all newspapers a right of access to the mails and did so notwithstanding credible fears that granting the right would produce such high demand for postal services it would overwhelm the system.[42] Not only that, the Act granted newspapers the right to use the mails at heavily subsidized rates.[43] It also prohibited postal agents from opening or inspecting letters and other bundles of mail.[44] Finally, it granted Congress, rather than the executive branch, the power to designate new postal routes.[45] This was a power that members of Congress, aware of the popularity that the award of a post office brought with it, exercised with vigor.[46]

The very significant changes the Post Office Act made to the postal service had a profound impact on the operation of the public sphere in the United States. The postal subsidies the Act provided newspapers significantly lowered the cost of disseminating news and information through the new, very large republic. By enabling rural newspapers to compete for readers against newspapers in the denser commercial centers, the Act helped create the vibrant, diverse, and decentralized newspaper public sphere that Alexis de Tocqueville marveled at when he visited the United States in 1831.[47] By granting all newspapers a right of admission to the mail, the Act also prevented postal agents (many of whom were also newspaper publishers) from doing what they previously had almost total authority to do: namely, providing postal service to their own publications but denying it to their competitors.[48] By vesting

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[41] *Id.* at 31. Publishers were recognized to have a right under the pre-1792 system to transmit what were known as "exchange papers" free of charge, through the mail. *Id.* at 32. These were copies of newspapers that were sent to other publishers, so that they could include the information contained in them in their own papers. *Id.* But these exchange papers could be sent only to other publishers, not to members of the general public. *See id.* Members of Congress also had a right (the "franking privilege") to send an unlimited number of items through the mails in order to keep their constituents informed. *Id.* at 31. Many used this right to circulate newspapers, as well as government documents, but the right belonged to the representative, not the newspaper. *Id.* at 31–32.

[42] *Id.* at 33.

[43] *Id.* at 38–39.

[44] *Id.* at 42–43.

[45] *Id.* at 44–45.

[46] *Id.* at 49–51. In 1790, there were 75 post offices in the United States, each of which serviced an average of 43,084 people. *Id.* at 51 tbl.2.1. By 1840, there were 13,468 post offices, each of which serviced an average of 1,087 people. *Id.*

[47] "There is an astonishing circulation of letters and newspapers among these savage woods," de Tocqueville wrote in 1831 of the United States. "I do not think that in the most enlightened rural districts of France there is intellectual movement either so rapid or on such a scale as in this wilderness." ALEXIS DE TOCQUEVILLE, JOURNEY TO AMERICA 268 (J.P. Mayer ed., George Lawrence trans., 1959) (1831–1832).

[48] *See* Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671, 679 (2007).

letter writers with a right of privacy in their mail, the Act made it harder for the government to surveil and censor dissident speech.[49] Finally, by transferring the power to designate postal routes to Congress, the law enabled the dramatic expansion in the size of the postal service that resulted by the mid-nineteenth century in a web of postal routes across the United States that was denser than any that existed in Europe at the time, and far denser than what existed in Canada.[50]

Supporters justified the changes that the Post Office Act made to federal postal policy by arguing that they were necessary to create the rich information environment that a democratic society required. Congressman Elbridge Gerry argued, for example, that "[h]owever firmly liberty may be established in any country, it cannot long subsist if the channels of information be stopped."[51] Therefore, Gerry argued:

> [T]he House ought to adopt measures by which the information, contained in any one paper within the United States, might immediately spread from one extremity of the continent to the other; thus the whole body of the citizens will be enabled to see and guard against any evil that may threaten them.[52]

The prominent politician and scientist Benjamin Rush similarly argued that, in order to prevent the new republic from losing its liberty, the government should ensure that "citizens . . . [have] means of acting in concert with each other," and more specifically should "convey newspapers free of all charge for postage"[53] by enacting something like the Post Office Act. Newspapers, Rush added, "are not only the vehicles of knowledge and intelligence, but the centinels of the liberties of our country."[54] It was the government's duty, he argued, to ensure that they circulated widely.[55]

Supporters made, in other words, essentially the same argument to justify the Act as the one that was made just a few years earlier to justify the ratification of the First Amendment, and that was made a few years before that to justify the inclusion of free expression guarantees in the state constitutions. In all these contexts, the claim was that legal protection for the press — the "centinels" or "bulwarks" of liberty — was necessary to check the despotic tendencies of government and to guarantee "the security of freedom in a State."[56]

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[49] *See* JOHN, *supra* note 26, at 42–44.

[50] *See id.* at 5, 52–53.

[51] 3 ANNALS OF CONG. 289 (1791).

[52] *Id.*

[53] Benjamin Rush, Address to the People of the United States 3 (Jan. 1787), https://archive.csac.history.wisc.edu/Benjamin_Rush.pdf [https://perma.cc/D73E-8TJN].

[54] *Id.*

[55] *See id.*

[56] MASS. CONST. of 1780, pt. 1, art. XVI ("The liberty of the press is essential to the security of freedom in a State; it ought not therefore, to be restrained in this Commonwealth."); *see also*

Despite the marked similarities in the arguments made to justify the laws, however, almost no one during three years of legislative debate even hinted at the possibility that the changes the Post Office Act made to federal postal policy were required by the First Amendment.[57] That no one did so may reflect Congress members' assumption that the baldly negative language of the First Amendment prohibits government action but does not require it. And the Post Office Act, and subsequent postal legislation, required a great deal of action. The historian Richard John reports that by 1831 the postal system employed over *three-quarters* of the entire federal civilian workforce and had a larger personnel roster than the federal army did.[58] Creating a democratic public sphere turned out to require a great deal of work.

In later decades also, virtually no one argued that the system of postal subsidies that the Post Office Act helped create, or the dense web of postal routes it authorized, was required by the First Amendment's guarantee of freedom of speech and press. And although abolitionists and others argued that the right of admission to the mails that the Post Office Act granted newspapers was constitutionally required, the Court unequivocally rejected this argument when it first confronted it in 1877.[59] Even in the twentieth century, although the Court made clear that there were constitutional limits on the government's power to exclude speech from the mails, it continued to interpret the First Amendment to grant Congress significant power to decide for itself what kinds of material could be transmitted in the federal mail and at what kinds of rates.[60]

David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 490–91 (1983) (discussing the idea of the press as "bulwark[s] of liberty," *id.* at 491, and noting that "[t]hroughout the formative period, the focus of discussion was on the role of the press in relation to the government. The [central idea] . . . was that freedom of the press was a necessary concomitant of self-government," *id.* at 490–91).

57 One member of Congress did suggest that if Congress were to remove the traditional franking privileges from the postal bill (which it did not), the result "would be [to] level[] a deadly stroke at the liberty of the press," but it is unclear whether this was meant as a constitutional argument. 3 ANNALS OF CONG. 252 (1791). In any event, he was the only member of Congress I have found who explicitly invoked the idea of freedom of press to argue in favor of the postal subsidies.

58 JOHN, *supra* note 26, at 3–4.

59 *Ex parte* Jackson, 96 U.S. 727, 733–37 (1877) (holding that Congress could exclude from the mail "obscene, lewd, or lascivious book[s], pamphletl[s], picture[s] . . . or any article or thing designed or intended for the prevention of conception or procuring of abortion, [or] any article or thing intended or adapted for any indecent or immoral use," *id.* at 736, so long as it did not "prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails," *id.* at 735); *see* Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 NW. U. L. REV. 785, 826–36 (1995) (discussing the claim made by abolitionists that a proposed federal bill to exclude antislavery materials from the mail would violate the First Amendment).

60 *See, e.g.*, U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 127 n.5 (1981) ("The Government might . . . decline altogether to distribute newspapers; or it might decline to carry any at less than the cost of service; and it would not thereby abridge the freedom of the press,

The broad discretion that the First Amendment gives Congress to provide or not to provide postal subsidies as it chooses means that it would be wrong to think of the Post Office Act and the many postal laws that followed it as contributors to a First Amendment tradition of free speech law, or to think of the postal service that these laws created as a kind of "First Amendment institution" — as some have argued we should.[61] Instead, the Post Office Act represents an archetypal example of a non–First Amendment free speech law, and the postal service it helped create represents, by implication, an important non–First Amendment free speech institution. The little postal vans that circulate around our cities and towns make visible the significant amount of labor the government expends to promote free speech values voluntarily, *not* because it is required to do so by the First Amendment.

This fact is important to recognize. Doing otherwise risks obscuring the extent to which the survival of this important speech-promoting institution depends ultimately on democratic politics, not legal principles.[62] It also obscures the markedly different conceptions of freedom of speech that undergird federal postal policy and the First Amendment cases.

In his history of communications policy in the United States, Professor Ithiel de Sola Pool interprets the Post Office Act as evidence that the "twentieth century notion that the proper relation between government and the press is one of arm's-length adversaries [had] no roots in the thinking of the founding fathers."[63] "Their belief in the importance of the press," de Sola Pool argues, "not only led them to insist that Congress pass no law 'abridging the freedom of . . . the press' but also persuaded them to subsidize that press."[64]

This argument isn't entirely correct. For one thing, the Congress that enacted the Post Office Act didn't choose to subsidize the press itself. Instead, it established a system of cross-subsidies, whereby letter

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since to all papers other means of transportation would be left open." (quoting United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 431 (1921) (Brandeis, J., dissenting))); Hannegan v. Esquire, Inc., 327 U.S. 146, 154–56 (1946) (recognizing that Congress has the power "to encourage the distribution of periodicals which disseminate[] 'information of a public character' or which [are] devoted to 'literature, the sciences, arts, or some special industry,'" *id.* at 154 (quoting Lewis Publ'g Co. v. Morgan, 229 U.S. 288, 305 (1913)), but noting that "grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever," *id.* at 156).

61 Desai, *supra* note 48, at 673.

62 The political nature of the postal service is in fact something that has become vividly evident last year, but not because of the work of free speech scholars. *See* Nicholas Fandos & Reid J. Epstein, *A Fight over the Future of the Mail Breaks Down Along Familiar Lines*, N.Y. TIMES (May 27, 2020), https://www.nytimes.com/2020/05/10/us/politics/postal-service-trump-coronavirus.html [https://perma.cc/CNE3-FHQH].

63 DE SOLA POOL, *supra* note 26, at 78.

64 *Id.*

writers (usually merchants) paid higher postage prices so that newspaper publishers didn't have to.[65] And the Second Congress *did* think that the press and the government might sometimes be arms-length adversaries. This is why it guaranteed to all newspapers, not just some, a right of admission to the mail. Its members feared that without such a policy, the government would use access to the mails as a carrot to reward friendly newspapers and as a stick to punish unfriendly newspapers — that it would set up what Elbridge Gerry described as a "court press and a court gazette."[66]

But de Sola Pool is completely correct that the Post Office Act demonstrates a remarkably different understanding of the government's role in the marketplace of ideas than the very restricted role the modern First Amendment cases envisage for it. In his concurring opinion in *CBS v. Democratic National Committee*,[67] in 1973, Justice Douglas argued that the First Amendment required the government to adopt a "laissez-faire regime" of media regulation.[68] The "one hard and fast principle" of the "old-fashioned First Amendment," Justice Douglas insisted,[69] is "that Government shall keep its hands off the press."[70] The Court effectively adopted this view of the First Amendment the following year, when it held in *Miami Herald Publishing Co. v. Tornillo*[71] that the freedom of press guaranteed by the First Amendment permitted no regulatory interference whatsoever with the "editorial control and judgment" of newspaper editors.[72]

The Post Office Act reflects, in contrast, a very non-laissez-faire approach to the problem of media regulation. While the Act did not attempt to directly interfere with the editorial judgment of members of the press, it did strongly incentivize certain kinds of editorial choices (those that resulted in the production of newspapers) and disincentivize others (those that resulted in the production of magazines, or pamphlets, or books).[73] The Act also treated some speakers (magazine and book

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65 JOHN, *supra* note 26, at 31, 38–39.

66 *Id.* at 34.

67 412 U.S. 94 (1973).

68 *Id.* at 161 (Douglas, J., concurring in the judgment).

69 *Id.* at 160.

70 *Id.* at 160–61.

71 418 U.S. 241 (1974).

72 *Id.* at 258.

73 These incentives had a measurable impact on the editorial choices that publishers made. John notes, for example, that because only newspapers were guaranteed admission to the mails, abolitionist groups took great care when sending antislavery materials to the South to make sure that their mailings either took the form of newspapers or adopted the "magazine format that . . . postal officers routinely admitted into the mail." JOHN, *supra* note 26, at 262. And because books were excluded from the mails until 1851, "enterprising printers of all kinds quickly adapted their publications to a newspaper format, leading in short order to the publication of religious newspapers,

publishers) worse than it treated others (newspaper publishers) and did so because members of Congress believed that the information that newspapers conveyed was more politically valuable than the information that magazines and books conveyed.[74]

In the First Amendment cases, this kind of content discrimination is generally considered anathema to freedom of speech. The Court has insisted that when the government treats some speakers worse than others because of the viewpoint they express or the subject matter they address it harms the "equality of status in the field of ideas" that the First Amendment guarantees to all speakers.[75]

But it was by means of content distinctions — or at least, it was by means of genre distinctions that were closely correlated to differences in content — that Congress attempted in 1792 to *promote* freedom of speech.[76] Although members of Congress clearly worried about the possibility that postal agents might make viewpoint-based distinctions when determining access to the mail, no one raised any concern about the genre-based distinctions that were written into the postal laws, even though these reflected a set of widely shared views about both the nature and the relative value of the content of different kinds of publications.[77] To the contrary: given a scarcity of resources, and a cash-strapped state, Congress appears to have believed that the only way to ensure a sufficient diffusion of political information to sustain a democratic system of government was to grant newspaper publishers privileges that other speakers did not receive — privileges that other speakers were in fact required to subsidize.[78]

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agricultural newspapers, reform newspapers, and even literary newspapers that reprinted entire novels for transmission at the low newspaper rate." *Id.* at 39.

[74] *See* Richard B. Kielbowicz, *The Press, Post Office, and Flow of News in the Early Republic*, 3 J. EARLY REPUBLIC 255, 267–68 (1983) [hereinafter Kielbowicz, *Early Republic*]; Richard Kielbowicz, *Mere Merchandise or Vessels of Culture?: Books in the Mail,* 1792–1942, 82 PAPERS BIBLIOGRAPHICAL SOC'Y. AM. 169, 176 (1988); Desai, *supra* note 48, at 694 n.104 ("The drafters of the 1792 Act . . . fully understood that they were writing into law what was, in effect, a *content-based* distinction. They recognized that newspapers printed information about public affairs, whether as propaganda for the government or attacks on it, and that letter-writers — generally speaking — did not. . . . One might even see the postal subsidies for newspapers as the first example of Congress favoring political over commercial speech, since most letter-writers were merchants sending market information."); JOHN, *supra* note 26, at 39–40 (describing system of cross-subsidies between letter-writers and newspapers).

[75] Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972) (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)).

[76] In later years, the content distinctions were made explicit. For example, the 1825 postal law required that newspapers provide "an account of political or other occurrences" in order to receive the subsidized postal rates. U.S. POSTAL SERV., POSTAL LAWS & REGULATIONS OF THE UNITED STATES: 1825, at 37 (1825).

[77] *See* Desai, *supra* note 48, at 693–95.

[78] Worries about overburdening the post office pervaded the legislative debates about the Post Office Act, yet no one suggested that the federal government should expend more resources to prop the post office up. One can understand why not. The new federal government had very little

This belief wasn't entirely disinterested. Congressmen from both parties embraced newspaper privileges not only because they believed newspapers conveyed information that was crucial to the preservation of democratic liberty in the United States, but also because they believed that newspapers, by reporting on their activities and reprinting their speeches, shored up their political power.[79] Ideological commitments overlapped with more self-interested concerns and motivations.

The result was nevertheless a body of law that furthered many of the same values as the First Amendment was intended to, but which did so by embracing a much more interventionist, even redistributive, concept of the government's role in the speech marketplace than the First Amendment cases assume, and typically permit.[80] It is a view of democratic liberty, and of freedom of speech, that continues to inform federal postal policy to this day.[81]

B. Common Carrier and Quasi–Common Carrier Laws

A similar story can be told about the significant body of common carrier and quasi–common carrier law that limits the ability of many of the private media companies that disseminate information to the public in the United States to control the content of the information that they disseminate, or to determine the rates they charge consumers for using their communication networks to speak. These laws also protect free speech values and interests, but do so by non–First Amendment means.

Consider, for example, one of the more important current common carrier laws, § 202 of the Communications Act of 1934,[82] which prohibits telephone and telegraph companies, and all other communications companies that are defined as common carriers under federal law,[83]

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money and considerable debt. In early 1792, it also staved off a potentially serious financial crisis. *See generally* Richard Sylla, Robert E. Wright & David J. Cowen, *Alexander Hamilton, Central Banker: Crisis Management During the U.S. Financial Panic of 1792*, 83 BUS. HIST. REV. 61 (2009). Under these conditions, even the very ambitious members of the Second Congress appear not to have taken seriously the idea that vindicating democratic values might require deficit spending on the post.

79 *See* Kielbowicz, *Early Republic*, *supra* note 74, at 255.

80 JOHN, *supra* note 26, at 39–40 ("To reduce the cost of securing political information for citizen-farmers, many of whom lived in the South and West, Congress increased the cost of doing business for merchants, most of whom lived in the North and East. In the broadest sense, then, this policy was not distributive, but regulatory or, more precisely, redistributive.").

81 The history recounted above explains, for example, why newspapers and magazines continue to pay lower postage rates than letter-writers and why nonprofit publications receive lower postage rates still. *See Classes of Mail*, U.S. POSTAL SERV., https://pe.usps.com/BusinessMail101/Index?ViewName=ClassesOfMail [https://perma.cc/NKP4-HP8S]; *Special Prices for Nonprofit Mailers*, U.S. POSTAL SERV., https://pe.usps.com/BusinessMail101/Index?ViewName=NonprofitPrices [https://perma.cc/9YGR-Q7UP].

82 Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended in scattered sections of 47 U.S.C.).

83 *See* 47 U.S.C. § 153(11).

from "mak[ing] any unjust or unreasonable discrimination" in the facilities they provide or the rates they charge consumers, and from "subject[ing] any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."[84] The law, which has been interpreted to prevent common carriers from discriminating against consumers because of the content of their speech, their identity, or any other irrelevant characteristic, clearly protects a number of interests that the First Amendment also protects.[85] By prohibiting telephone companies like AT&T from denying service to customers because they dislike what the customers say or who they are, common carrier laws act, just as the First Amendment does, as a shield under which "many types of life, character, opinion and belief can develop unmolested and unobstructed" by external repression.[86] By preventing common carriers from engaging in discriminatory pricing, the laws safeguard "the free communication of views" that the First Amendment also safeguards.[87] And by ensuring that the rates companies charge are not unreasonably high, the laws help ensure that the public has access to a wide "dissemination of information from diverse and antagonistic sources," just as the First Amendment does.[88]

The same is true of the many quasi–common carrier laws that impose somewhat narrower speech-facilitating obligations on media companies that are not considered common carriers under federal or state law.[89] A good example of a quasi–common carrier law is § 315 of the Communications Act[90] and its regulatory extension in the Code of Federal Regulations.[91] These laws require radio and television broad-

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[84] *Id.* § 202(a).

[85] What counts as "unreasonable discrimination" is not always clear. The courts have interpreted the broad language of the statute to vest the Federal Communications Commission (FCC) with significant discretion to decide. Bell Atl. Tel. Cos. v. FCC, 79 F.3d 1195, 1202 (D.C. Cir. 1996) ("The generality of these terms — unfair, undue, unreasonable, unjust — opens a rather large area for the free play of agency discretion . . . ."). There is no question, however, that content-based discrimination is generally considered unreasonable, as are distinctions based on race or gender. *See* Nat'l Ass'n of Regul. Util. Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) ("An examination of the common law reveals that the primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking 'to carry for all people indifferently . . . .'" (omission in original) (quoting Semon v. Royal Indem. Co., 279 F.2d 737, 739 (5th Cir. 1960))).

[86] Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

[87] *See id.* at 308.

[88] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[89] Brent Skorup and Joseph Kane have usefully defined a quasi–common carrier as a carrier, such as a cable television company, that "may control and curate some content on its network but is prohibited from exercising total control over content." Brent Skorup & Joseph Kane, *The FCC and Quasi-Common Carriage: A Case Study of Agency Survival*, 18 MINN. J.L. SCI. & TECH. 631, 649–50 (2017).

[90] 47 U.S.C. § 315.

[91] 47 C.F.R. § 76.205 (2019).

casters, and by extension cable television companies, that permit candidates for public office to use a broadcast station to "afford equal opportunities to all other such candidates for that office in the use of such broadcasting station."[92] They also prohibit these companies from censoring the candidate speech that they air.[93] And they require radio and television stations to charge candidates the same rates as are charged for comparable use of that airtime, and, close to elections, the lowest rate they charge anyone else for that time.[94] By preventing radio and television companies from refusing to provide airtime to political candidates they dislike and from censoring their speech, these laws help to ensure a public sphere that is "uninhibited, robust, and wide-open"[95] — one in which all speakers (at least all speakers who happen to be legally qualified candidates for public office) have an opportunity to persuade others of the merits of their views.[96]

Although these laws protect many of the same interests that the First Amendment protects, the Court has never interpreted the First Amendment to require their enactment. Nor has it interpreted the First Amendment to itself impose nondiscrimination duties on media companies. Under current state action rules such a conclusion would be unimaginable, but in the 1940s and 1950s it was entirely plausible, given the very significant public benefits the government provided (and continues to provide) to many of the companies regulated by these laws.[97] In its Fourteenth Amendment cases during this period, the Court repeatedly held that when the government uses its "power, property and prestige"[98] to shore up the authority or enable the actions of private actors (restaurants, for example, or political parties, or property owners), the Equal Protection Clause prevents those private actors from acting in a way that violates constitutional equality norms, or at least, prevents the government from enabling them to do so.[99] But the Court never found the same to be true of the media companies that used the

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92 47 U.S.C. § 315(a); *see also* 47 C.F.R. § 76.205(a).

93 47 U.S.C. § 315(a); 47 C.F.R. § 76.205(a).

94 47 U.S.C. § 315(b); 47 C.F.R. § 76.205(b).

95 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

96 That the equal opportunities requirement serves these goals was recognized by the Court in *Farmers Educational & Cooperative Union v. WDAY, Inc.*, 360 U.S. 525, 529–30 (1959).

97 For example, the federal government allows the radio broadcasters subject to § 315 to use the public airwaves free of charge. R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 22–24 (1959) (noting the "extraordinary gain accruing to radio and television station operators as a result of the present system of allocating frequencies," *id.* at 23). Similarly, telegraph and telephone companies have traditionally received a variety of public benefits — such as the right to construct their lines on public roads, as well as the right of eminent domain. *See* Herbert H. Kellogg, *Telephone Law*, 4 YALE L.J. 223, 224–25 (1894).

98 Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

99 *Id.* at 724–25; *see also* Shelley v. Kraemer, 334 U.S. 1, 19–20 (1948); Smith v. Allwright, 321 U.S. 649, 664–66 (1944).

public airwaves, or that built their communication networks on public land.[100] This may be because it did not need to. Already by that period, a rich body of common carrier and quasi–common carrier law prevented many of these companies from engaging in viewpoint discrimination or otherwise threatening the interests that the First Amendment protects. No comparable law existed to vindicate the equal protection rights at stake in the Court's Fourteenth Amendment cases.

Whatever the reason, the Court's refusal to find that nondiscrimination duties imposed on private media companies by common carrier and quasi–common carrier laws are constitutionally required means that Professor Tim Wu is completely correct when he argues that laws like § 202 and § 315 contribute to a "second free speech tradition" that is entirely distinct from the First Amendment free speech tradition.[101] This is the case even if, as this Article makes clear, the second free speech tradition consists of a lot more than just the media laws that are the focus of Wu's concern.

Nevertheless, like the postal laws discussed in the previous section, the many state and federal laws that impose common carrier or quasi–common carrier duties on media companies protect important First Amendment interests not because they are constitutionally required but because the legislators that enacted them, or the regulators that promulgated them, came to believe (often in response to significant pressure from labor unions, civil society groups, and others) that these laws were necessary to safeguard the democratic nature of the government and the vitality of the press. Indeed, although Wu suggests that the communications common carrier laws were initially motivated solely by legislators' concern with the commercial or economic harms that powerful monopolies in the communications business could create, in fact an important motivation behind many of these laws, including the early ones,

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[100] The closest the Court ever came to suggesting the possibility that common carrier or quasi–common carrier laws might be constitutionally required was its assertion, in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), that the First Amendment right of the radio-listening public to access "an uninhibited marketplace of ideas" that was not "monopoliz[ed] . . . [either] by the Government itself or [by] a private licensee" could "not constitutionally be abridged either by Congress or by the [FCC]," the agency that enforced the Communications Act. *Id.* at 390. The language here does suggest that were Congress or the FCC to do nothing to prevent the monopolization of the marketplace of ideas by a private radio broadcaster, the First Amendment might be offended. But the Court never held as much explicitly. In any event, *Red Lion* applied only to radio and television broadcasters, not to the broad sweep of media companies that are today, or were at the time, subject to common carrier and quasi–common carrier obligations. *See id.* at 386–87 (distinguishing the First Amendment rights of radio broadcasters from those of newspapers and other members of the press).

[101] Wu, *supra* note 12, at 2.

was the belief that they were necessary to ensure the unconstrained public sphere that a democratic society requires.[102]

We can see this when we look at the legislative debates surrounding the very first communications common carrier laws ever enacted in the United States. These laws required the telegraph companies that played such an important role in the dissemination of information in the second half of the nineteenth century to "operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatever."[103] Dozens of states enacted statutes of this sort between 1848 and the early twentieth century, as did the federal government.[104] Beginning in the late nineteenth century, a number of states also required the newsgathering organizations that gathered and disseminated news on the telegraph wires to provide their services "to all newspapers, persons, companies or corporations . . . at uniform rates and without discrimination."[105]

These early common carrier laws were a response to the largely unprecedented problems created in the mid-nineteenth century by the private commercialization of the new technology of the electric telegraph. When it was invented in 1838, the telegraph was hailed as a marvelously democratizing device because of its ability to "diffuse with the speed of thought, a knowledge of all that is occurring throughout the land."[106] But because of the power it placed in the hands of whomever operated it, it was widely assumed that the telegraph both would, and should,

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[102] *Id.* at 4 (arguing that the "primary interest" in early federal regulation of communications common carriers "was commercial or economic" but that "whatever the original intent of the law, when applied to an industry that moves information, the common carriage rule automatically became a law affecting speech").

[103] Telegraph Lines Act, Act of Aug. 7, 1888, 25 Stat. 382, 383.

[104] The earliest such law was enacted in New York in 1848 and required all telegraph companies that operated in the state to "receive despatches [sic] from and for . . . any individual, and on payment of their usual charges . . . to transmit the same with impartiality and good faith . . . in the order in which they are received . . . ." Act of April 12, 1848, ch. 265, §§ 11-12, 1848 N.Y. Laws 392, 395 (providing for the incorporation and regulation of telegraph companies). But many states enacted similar laws. *See* William Jones, *The Common Carrier Concept as Applied to Telecommunications: A Historical Perspective*, CYBERTELECOM (1980), http://www.cybertelecom.org/notes/jones.htm [https://perma.cc/5AVH-CBQD]. The federal laws included the Act of June 16, 1860, Pub. L. No. 36-137, 12 Stat. 41 (1860) (facilitating communication between the Atlantic and Pacific states by electric telegraph); Act of July 2, 1864, Pub. L. No. 38-216, 13 Stat. 357 (1864) (amending an Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean); and the Telegraph Lines Act.

[105] *State Statutes Affecting the Associated Press*, *in* LAW OF THE ASSOCIATED PRESS 503 (1914). The language comes from the 1913 Arkansas statute, but similar laws were enacted in Nebraska, Kentucky, Mississippi, Kansas, and Utah. *Id.* at 484–90, 504 (describing the Arkansas, Nebraska, Kentucky, Mississippi, and Kansas laws); *see also* UTAH REV. STAT. ANN. §§ 73-2-1 to 73-2-7 (1933).

[106] DAVID HOCHFELDER, THE TELEGRAPH IN AMERICA, 1832–1920, at 176 (2013) (quoting Samuel Morse).

remain exclusively under government control.[107] This was not to be, however: after an early experiment at a government-run telegraph failed, the federal government disclaimed any interest in developing a government-run or "postal" telegraph.[108]

The specter of an entirely privately run telegraph industry raised significant concern about the possibility that the private entities that controlled this amazing new technology would use that power to manipulate the flow of information to the public when doing so served their economic or political self-interest. These concerns only intensified when the initially competitive telegraph market consolidated under the control of the Western Union Telegraph Company, and Western Union in turn forged a close alliance with the Associated Press (AP), the most powerful newsgathering organization in the country.[109]

The behavior of these two industrial titans appeared to bear out all the fears that led so many people to earlier advocate for a government-run telegraph. It came to light, for example, that as part of its alliance with Western Union, the AP required newspapers that wished to receive its valuable news digests to contractually agree to refrain from publishing any newspaper articles that expressed support for Western Union's competitors or that criticized Western Union itself.[110] There were reports that Western Union refused to carry telegraph messages from

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[107] The Whig Party candidate for president, Henry Clay, argued in 1844 that the telegraph "ought to be exclusively under the control of government" because if "private individuals" were to control it, "they will be able to monopolize intelligence and to perform the greatest operations in commerce and other departments of business." JOHN, *supra* note 26, at 87. Views of this sort were expressed by a wide variety of people during this period. *Id.* at 87–88. Even the inventor of the new technology, Samuel Morse, argued that the federal government should operate his invention, although this may have been because he wanted to receive government funds to finance its construction (as he did). *See id.*

[108] HOCHFELDER, *supra* note 106, at 33 ("Despite [Samuel] Morse's and [Postmaster General] Johnson's appeals, the federal government abandoned the telegraph to capitalists.").

[109] *See* PAUL STARR, CREATION OF THE MEDIA 166 (2004) ("The American [telegraph] industry . . . first splintered into a large number of firms — more than fifty different companies, as of 1851 — and then underwent consolidation, ultimately leaving a single corporation, Western Union, in control."). By 1876, Western Union was the largest corporation in the United States and transmitted something like 90% of the telegraphs sent in the United States. Menahem Blondheim, *Rehearsal for Media Regulation: Congress Versus the Telegraph-News Monopoly, 1866–1900*, 56 FED. COMMC'NS L.J. 299, 305 (2004). By the end of the century, the AP had achieved a similar dominance of the news-gathering industry. Thomas W. Brown, *A Newspaper Trust*, 31 AM. L. REV. 569, 569–70 (1897) (noting that after vanquishing its chief rival, the United Press, the "Associated Press [had] acquire[d] a practical monopoly of the business of collecting and disseminating, through its members, the news of the day" and that, although "under certain circumstances, a member may leave the association . . . this liberty is something like that of a passenger to leave a vessel in mid-ocean, by jumping overboard").

[110] These provisions were enforced. In one case, the AP stopped supplying news to a newspaper, the *Omaha Republican*, after it called Western Union a "'grievous,' 'onerous,' and 'gigantic' 'monopoly' in one of its editorials." HOCHFELDER, *supra* note 106, at 44; *see also* Blondheim, *supra* note 109, at 315.

newspapers that used newsgathering organizations that competed with the AP, or that when it did, it charged them exorbitant rates.[111] It was also widely believed that Western Union's directors delayed the transmission of telegrams containing financial information so that they could take advantage of that information before the rest of the market.[112] Unions meanwhile complained that Western Union delayed the transmission of strike-related telegraphs in order to "demoraliz[e] the strike and frustrat[e] the plans and confus[e] the orders of the leaders."[113] And both Western Union and the AP were accused of influencing the reporting of political elections in an effort to promote the election of candidates their directors favored.[114]

It was in order to protect the independence of the newspaper press, and to prevent companies like Western Union and the AP from manipulating the flow of information to the public that lawmakers in dozens of states imposed on telegraph companies and telegraph newsgathering associations nondiscrimination duties similar to those the postal laws imposed on the post office. As the House of Representatives Appropriation Committee put it in 1872, to explain why it was necessary to impose these kinds of duties on telegraph companies like Western Union:

> In this country, the perpetuation of the Government must have its ultimate guarantee in the intelligence of the people. No agency is so potent in the dissemination of intelligence as the press, and to the daily press the telegraph is far more essential that the post. Yet, the telegraph in the United States, [is] owned and controlled . . . by private corporations . . . [who] have so hedged themselves in by alliances with press associations that no new or projected journal can have the use of the telegraph at rates not absolutely ruinous, and many journals, long established and receiving reports, are in the absolute power of the telegraph companies. . . . No government, autocratic or democratic, would dare authorize such discriminating privileges in the administration of its postal facilities. And yet, the telegraph sustains practically the same relation to the masses of the people that the post sustains. The conveniences and the exigencies of Social Affairs, of Commerce, of Trade, of Finance, of Government, have become as dependent on the

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111 S. REP. NO. 43-242, at 3 (1874).

112 HOCHFELDER, *supra* note 106, at 44–45 ("Although there is no hard evidence that any officers or directors of Western Union manipulated the country's financial news, this suspicion had widespread currency. . . . Just after the turn of the century, muckraker Gustavus Myers similarly charged that [Jay] Gould [Western Union's president from 1881] had routinely used his control over Western Union's wires to manipulate the stock market.").

113 *Monster Petition: Knights of Labor Moving for a Postal Telegraph*, N.Y. TIMES, Jan. 16, 1888.

114 In 1884, for example, the New York Times published a full-page article accusing the AP of trying to influence the extremely close presidential election between James G. Blaine and Grover Cleveland by misreporting, and delaying the transmission of, election returns. *The Blaine Men Bluffing*, N.Y. TIMES, Nov. 6, 1884, at 5. Similar accusations were made about Western Union's role in the presidential contest, eight years earlier, between Rutherford B. Hayes and Samuel J. Tilden. HOCHFELDER, *supra* note 106, at 44.

> telegraph as the mails and the same general laws of equality of privileges which have been wisely extended over the latter should, at the earliest possible day, be extended over the former.[115]

The Committee's argument, in other words, was that the same nondiscrimination duties that applied to the postal workers that controlled the important government-operated communication networks not only could be but *had to be* imposed on the private companies that controlled the most important communication networks of the day; that doing so was necessary to ensure the fundamentally democratic character of the mass public sphere, as well as the continuing independence of the newspaper press.

The Illinois Supreme Court made a similar argument in 1900 to explain why, even in a state like Illinois, which did not impose common carrier duties on newsgathering organizations like the AP, the common law required the imposition of such duties. "The Associated Press, from the time of its organization and establishment in business, sold its news reports to various newspapers," the court wrote, "and the publication of that news became of vast importance to the public, so that public interest is attached to the dissemination of that news."[116] This meant, the court held, that "all newspaper publishers desiring to purchase [AP] news for publication are entitled to . . . without discrimination against them."[117] To hold otherwise, the court noted, would enable the AP to "create a monopoly in its . . . favor" that would allow the corporation to "designate the character of the news that should be published" and would mean that "whether true or false, there could be no check on [its power] by publishing news from other sources."[118] Such a result, the court concluded, "could prejudice the interests of the public . . . and [would be] hostile to public interests."[119]

Although neither the House Appropriations Committee nor the Illinois Supreme Court used the constitutional language of freedom of speech, it is clear from their arguments that what motivated their actions was the fear that unconstrained private control of the telegraphs would threaten the "uninhibited, robust, and wide-open" public debate on public matters that the First Amendment also protects.[120] Nor were they the only ones to believe that constraints had to be imposed on the power of telegraph and newsgathering associations in order to preserve freedom of speech and press in the mass public sphere.

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115 H.R. REP. NO. 42-6, at 7–8 (1872).
116 Inter-Ocean Publ'g Co. v. Associated Press, 56 N.E. 822, 825 (Ill. 1900).
117 *Id.*
118 *Id.* at 826.
119 *Id.*
120 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

Arguments of this sort pervaded the intense debates about telegraph regulation that took place throughout the country during this period.[121] Although there was disagreement about the solution to the problem — some lawmakers argued, for example, that Congress should go further than it did and entirely wrest control of the telegraph lines from the private companies, whereas others vigorously disagreed — there was broad consensus in Congress, as well as in many of the state legislatures, that something had to be done to prevent the companies that controlled the telegraph wires from acting as "master[s] of the press" and "giv[ing] to the news of the day such a color as [it] chose . . . thus fatally pollut[ing] the very fountain of public opinion."[122] The result was the creation, by the end of the nineteenth century, of a rich body of state and federal common carrier law that not only promoted free speech values but did so quite intentionally in the belief that this kind of regulation was crucial to the preservation of the democratic character of the mass public sphere.

This body of free speech law would only continue to grow in the twentieth century, in large part because the problems it addressed did so as well. Consider, for example, the regulation of the radio. When radio broadcasting first emerged in the 1920s, it was celebrated, just as the telegraph had been, as a "powerful agent of democracy" because of its ability to erase social distinctions and create translocal "communit[ies] of interest."[123] But, just as occurred with the telegraph, control over the new technology quickly consolidated. By 1931, two national radio networks — the National Broadcasting Corporation and the Columbia Broadcasting System — dominated the market.[124] Meanwhile, the National Association of Broadcasters (NAB), which represented the 500 largest radio broadcasters in the United States, encouraged its members to abide by often highly repressive speech policies. For example, in 1939, the NAB decreed that its members should not sell airtime to labor unions (although they could give it away) because of the

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[121] Blondheim, *supra* note 109, at 306–07 ("In the period between 1866 and 1900, all Congresses but one considered plans to regulate Western Union. This intensive involvement yielded no less than ninety-six bills and resolutions brought before Congress that addressed the problem of Western Union. . . . The issue of telegraph regulation was very prominent in the public sphere as well. It was debated extensively in the press and even constituted a favorite topic for college exercises in rhetoric and debating.").

[122] S. REP. NO. 42-242, at 5 (1872) (citations omitted). For a general discussion of the debates see Blondheim, *supra* note 109; David Hochfelder, *A Comparison of the Postal Telegraph Movement in Great Britain and the United States, 1866–1900*, 1 ENTER. & SOC'Y 739, 748–55 (2000).

[123] HADLEY CANTRIL & GORDON W. ALLPORT, THE PSYCHOLOGY OF RADIO 20 (1935).

[124] ROBERT W. MCCHESNEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING 1928–1935, at 29 (1993).

"controversial" nature of their views.[125] The result, labor groups asserted, was a virtual blackout of union voices from the air.[126]

These developments led the ACLU and other civil-society groups to express strong concern about the problem of private censorship on the airwaves, and led Congress to impose a variety of speech-facilitating and nondiscrimination duties on broadcasters.[127] When it enacted the Radio Act of 1927,[128] Congress chose not to classify radio broadcasters as common carriers because it feared that, were it to do so, stations would no longer be able to provide the programming their listeners wanted to hear.[129] But Congress did impose on broadcasters the "equal opportunities" and no censorship requirements that would later be encoded in § 315 of the Communications Act.[130] It did so because its members feared that, absent these requirements, radio broadcasters would possess too much power to shape democratic politics by "permitting one party or one candidate . . . to employ [their] service[s] and refusing to accord the same right to the opposing side."[131]

Some members of Congress argued that, given the tremendous power that the "few men" who controlled the "great publicity vehicle" of the radio possessed, the federal government should impose on license holders far broader nondiscrimination duties than simply the duty to afford equal opportunities to opposing political candidates.[132] And in fact, in

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125 ELIZABETH FONES-WOLF, WAVES OF OPPOSITION: LABOR AND THE STRUGGLE FOR A DEMOCRATIC RADIO 63 (2006). Even prior to the adoption of the NAB code, labor groups "struggled for access to the radios" and the big networks already had policies that prohibited the sale of airtime to unions. *Id.* "When [stations] did sell time to labor, most stations demanded that the speakers provide advance scripts. When speakers veered from their scripts, the stations turned their microphones off." Samantha Barbas, *Creating the Public Forum*, 44 AKRON L. REV. 809, 834 (2011).

126 FONES-WOLF, *supra* note 125, at 64.

127 In 1935, for example, the ACLU's newly formed Radio Committee declared that private censorship was the greatest threat to "free speech on the radio," although not without ambivalence. Barbas, *supra* note 125, at 833. The Radio Committee noted in the 1935 report that it was not "without wistful glances in other directions" that it had decided to "abandon the notion that censorship means exclusively government censorship." *Id.*

128 Pub. L. No. 69-632, 44 Stat. 1162 (1927).

129 *Id.* An early version of the Act prohibited holders of radio broadcast licenses from making any "discrimination as to the use of [their] broadcasting station" for "the discussion of any question affecting the public" and provided furthermore that "with respect to said matters the licensee shall be deemed a common carrier in interstate commerce." 67 CONG. REC. 12,503 (1926). It was removed from the bill, however, after a member of Congress objected that "[i]f they [we]re made common carriers," radio stations would be unable "to give a regular entertainment at regular hours" and "there would be no inducement on the part of the public to listen in." *Id.* at 12,504 (1926) (statement of Sen. Broussard).

130 47 U.S.C. § 315(a); *see also* Radio Act § 18.

131 Roscoe L. Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CIN. L. REV. 447, 452 (1968); *see also id.* at 452–53 (describing the legislative history of the provision); Primer on Pol. Broad., 100 F.C.C.2d 1476, 1486 (1984).

132 67 CONG. REC. 12,503–04 (1926) (statement of Sen. Howell).

1932, both houses approved an amendment to the Radio Act that would have required broadcasters to allow equal opportunity to present both sides of public questions.[133] President Hoover used a pocket veto to kill the amendment, however; and when it enacted the Communications Act of 1934, Congress included the equal-opportunities provision in the Radio Act without broadening it in any way.[134] But Congress also vested the Federal Communications Commission (FCC), the agency charged with enforcing the Act, with the power to regulate holders of radio broadcast licenses as the "public interest, convenience, or necessity" required.[135]

The FCC used this power to impose on radio broadcasters the same broad nondiscrimination obligations that Congress had tried to add to the text of the Radio Act in 1932. Specifically, it required radio broadcasters to "devote a reasonable percentage of their broadcast time . . . to the consideration and discussion of public issues of interest in the community served by the[ir] . . . station" and to "provide the listening public with a fair and balanced presentation of differing viewpoints on [those] issues, without regard to the[ir own] particular views."[136] The FCC also required radio stations that, "during the presentation of views on a controversial issue of public importance, [aired] an attack . . . upon the honesty, character, integrity or like personal qualities of an identified person or group," to offer the person or group attacked a reasonable opportunity to respond on air.[137] The FCC imposed the same right of reply obligation on radio stations that endorsed or opposed a legally qualified candidate for public office.[138] This complex of rules came to be known as the fairness doctrine.

To justify its actions, the FCC made the same argument that the House Appropriations Committee and the Illinois Supreme Court made to justify the telegraph common carrier rules: namely, that the constraints the fairness doctrine imposed on the freedom of radio broadcasters were necessary to preserve the fundamentally democratic character of the mass public sphere. This time around, however (perhaps in a sign of the growing cultural power of the First Amendment), the agency explicitly relied upon the language of freedom of speech to make its argument. In crafting the doctrine, the agency asserted that

> [W]e have recognized . . . the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the

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133 Steven J. Simmons, *Fairness Doctrine: The Early History*, 29 FED. COMMC'NS BAR J. 207, 235–36 (1976).

134 *Id.* at 236–38.

135 *See* Editorializing by Broad. Licensees, 13 F.C.C. 1242, 1248 (1949).

136 *Id.* at 1249, 1253.

137 Red Lion Broad. Co. v. FCC, 395 U.S. 367, 373–74 (1969) (quoting 47 C.F.R. § 73.1920(a) (1997)).

138 *Id.* at 374–75 (quoting 47 C.F.R. § 73.1930 (1997)).

> different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community.[139]

"Only where the [broadcaster's] discretion in the choice of the particular programs to be broadcast over his facilities is exercised so as to afford a reasonable opportunity for the presentation of all responsible positions on matters of sufficient importance to be afforded radio time," the FCC argued, "can radio be maintained as a medium of freedom of speech for the people as a whole."[140]

Despite the similarities in the arguments made to justify the fairness doctrine and the telegraph and newsgathering-organization common carrier laws, the fairness doctrine generated intense and persistent controversy (unlike those earlier laws). This was in part because the fairness doctrine directly regulated the choices private media companies made about what to include in the news (whereas the earlier laws had done so only indirectly), and in part because of the breadth and vagueness of the obligations it imposed on radio broadcasters — and later, television broadcasters and cable television providers as well.[141] Critics argued that, rather than promoting a vigorous and varied debate about public issues on the radio, the fairness doctrine had a chilling effect on the willingness of radio and television stations to discuss controversial issues.[142] Others, including Justice Douglas, argued that it simply gave the government too much power over the press.[143] These criticisms led the FCC, after more than fifty years of its enforcement, to revoke the fairness doctrine in part in 1987 and to do so fully in 2000.[144]

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139 Editorializing by Broad. Licensees, 13 F.C.C. at 1249.

140 *Id.* at 1250.

141 *See, e.g.*, Thomas G. Krattenmaker & L.A. Powe, Jr., Comment, *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 152, 155, 157. Beginning in the late 1940s, the FCC began to apply the fairness doctrine, and the other quasi–common carrier requirements imposed on radio broadcasters by the Communications Act, to television broadcasters. *See generally* Lance S. Davidson, *Extension of the Federal Communications Commission's Jurisdiction to the Television Networks*, 4 J. COMMC'NS & ENT. L. 235 (1981). Beginning in the late 1960s, the FCC extended the fairness doctrine to cable television providers. It argued that doing so was necessary to prevent its rules from being "grossly circumvented." 34 Fed. Reg. 17,658, 17,658 (Oct. 31, 1969).

142 *See, e.g.*, P.M. Schenkkan, Comment, *Power in the Marketplace of Ideas: The Fairness Doctrine and the First Amendment*, 52 TEX. L. REV. 727, 736–38 (1974).

143 CBS, Inc. v. DNC, 412 U.S. 94, 162 (1973) (Douglas, J., concurring) (describing "the prospect of putting Government in a position of control over publishers" as "an appalling one, even to the extent of the Fairness Doctrine").

144 Repeal or Modification of the Personal Attack and Political Editorial Rules, 65 Fed. Reg. 66,643 (2000) (repealing the right-of-reply obligations). It took thirteen additional years for the FCC to revoke the right-of-reply rules because of persistent disagreement within the agency about the merits of doing so. *See* Commission Proceeding Regarding the Personal Attack and Political Editorial Rules, 13 FCC Rcd. 11809 (1998) (noting the deadlock among Commissioners about whether to repeal the rules).

The revocation of the fairness doctrine did not spell the end of the law of quasi–common carriage, however, as applied to radio broadcasters or anyone else. The same concerns that prompted its development, and that motivated Congress to include the "equal opportunities" requirement in § 315 of the Communications Act, also led Congress in subsequent decades to impose a number of other nondiscrimination and equal-time obligations on radio and television broadcasters, and other media companies. In 1972, for example, Congress amended the Communications Act to require broadcasters to allow "legally qualified candidate[s] for Federal elective office" to purchase "reasonable amounts of [air]time."[145] This last requirement, unlike § 315, did not merely prohibit radio and television stations from discriminating in favor of commercial speakers and against political speakers, but granted qualified federal candidates an affirmative right of access to the airwaves.[146] In 1990, Congress imposed another requirement on television broadcasters: namely, that they broadcast a certain number of hours of educational children's programming each week.[147]

Congress also imposed quasi–common carrier duties on cable companies. In 1984, for example, it enacted the Cable Communications Policy Act, which required cable television stations to devote a certain number of their channels to public, educational, or governmental use, if required to do so by state or local law.[148] And in 1992, it required cable television providers to devote an additional number of channels to the transmission of local broadcast television programming.[149]

In all these cases, Congress imposed constraints on the editorial freedom of media companies not despite but because of what its members understood to be their obligation to protect a healthy marketplace of ideas in which, as Judge Learned Hand put it in 1943, "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."[150] Even the requirement

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145 47 U.S.C. § 312(a)(7).

146 CBS, Inc. v. FCC, 453 U.S. 367, 381–82 (1981).

147 Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified as amended at 47 C.F.R. § 73.671 (2019)).

148 Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779.

149 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

150 United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945); *see also* Frank J. Kahn & Erwin G. Krasnow, *The Public Interest in Political Broadcasting: Evaded, Eroded, and Eviscerated*, 2 J. COMMC'NS & ENT. L. 635, 638 (1979) (noting that § 312(a)(7) appears to have been added to the Communications Act in order to ensure that "broadcasters who happen to favor incumbent candidates cannot continue to do so by forbidding the sale of time to the opposition" (quoting *Federal Election Campaign Act of 1971: Hearings Before the Senate Subcomm. on Commc'ns of the Comm. on Com.*, 92d Cong. 348 (1971) (statement of Senators Scott and Mathias))).

that broadcasters show a certain amount of educational children's television each week was motivated by the fear that the economic self-interest of broadcasters would produce stultifying uniformity in the children's television market, and more specifically, would result in the broadcasting of almost no educational children's programming, during a historical period when children were spending more and more time watching TV.[151]

Nor was it only Congress that acted to impose additional common carrier and quasi–common carrier obligations on private media companies. So, too, did state governments and the FCC, which, in 2015, significantly expanded the regime of federal common carriage when it held that broadband internet service providers (ISPs) should be treated as common carriers under federal law.[152] To justify this decision, the agency made many of the same free speech arguments it made seventy years earlier to justify the fairness doctrine. Given an economic context in which consumers frequently had no real choice in internet service providers,[153] the FCC argued that its decision to designate ISPs as common carriers, and to prohibit them from "unreasonably interfer[ing] with or . . . disadvantag[ing] . . . users' ability to select, access, and use . . . lawful Internet content, applications, services or devices,"[154] did not "burden[] free speech" but instead promoted it, by "ensuring a level playing field for a wide variety of speakers who might otherwise be disadvantaged" and furthering "the paramount government interest in assuring that the public has access to a multiplicity of information sources."[155] The echoes of the argument the FCC made to justify the fairness doctrine are palpable. And although the FCC, under a new administration, subsequently changed its mind about whether ISPs should be treated as common carriers under federal law,[156] in the wake of the agency's rescission of its net neutrality rules, more than a dozen states enacted similar laws (some as ordinary legislation and some by executive order), and similar laws are on the horizon in many others.[157]

What all this legislative, judicial, and, in a few cases, executive-branch activity has produced is a body of law that, notwithstanding the

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151 *In re* Policies and Rules Concerning Children's Television Programming and Revision of Programming Policies for Television Broadcast Stations, 11 FCC Rcd. 10,660, 10,674–76 (1996).

152 *In re* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5615–16 (2015).

153 *See id.* at 5604.

154 *Id.* at 5609.

155 *Id.* at 5872.

156 *In re* Restoring Internet Freedom, 33 FCC Rcd. 311, 312 (2018).

157 *Id.* at 312; Thomas B. Nachbar, *The Peculiar Case of State Network Neutrality Regulation*, 37 CARDOZO ARTS & ENT. L.J. 659, 667–68 (2019); Heather Morton, *Net Neutrality 2020 Legislation*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 19, 2021), https://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-2020-legislation.aspx [https://perma.cc/K86D-GCA6] (noting that twelve states, plus Washington, D.C. and Puerto Rico, introduced net-neutrality bills in the 2020 legislative session).

controversies that have sometimes attended its implementation, imposes speech-facilitating or nondiscrimination duties on virtually every technology of mass communication in the contemporary public sphere, with the important, and marked, exception of internet content providers. Even newspapers — the private media companies whose First Amendment right to absolute editorial autonomy was championed by the *Tornillo* Court[158] — are required by both state and federal law to satisfy a number of nondiscrimination obligations, albeit narrow ones. Under federal law, newspapers are prohibited from charging more for political advertising than they charge for commercial advertising.[159] In some states, newspapers are also prohibited from charging political candidates more to run their ads than they charge others.[160] And, in many states, newspapers are forbidden from receiving money or any other thing of value in exchange for their editorial endorsement of a political candidate or an idea,[161] just as radio and television broadcasters are prohibited by federal law.[162] These laws, like the laws that impose nondiscrimination duties on cable companies, on radio and television broadcasters, and on telephone and telegraph companies, attempt in their own small way to ensure that private control of important channels of mass communication does not undermine the diversity and vitality of information available to the public writ large — that the economic self-interest of newspaper publishers, or their political biases, or whatever other predilections may determine their editorial choices, do not threaten the ability of their readers to access a diverse range of viewpoints or ideas.

The result is a vibrant, if contentious, body of media law that attempts to promote free speech values but does so in ways that are not only *not* required by First Amendment jurisprudence but that are — as I discuss in more detail in the next Part — quite difficult to justify under existing First Amendment rules. It is nevertheless a body of law that, as the net neutrality laws indicate, only continues to expand, and that some argue should be expanded even further, to account for the new problems of private censorship that have arisen in the internet age.[163]

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158 *See supra* note 72 and accompanying text.

159 52 U.S.C. § 30120(b).

160 *See, e.g.*, MINN. STAT. § 211B.05(2) (2020) (prohibiting newspapers from charging some candidates for office more than others); W. VA. CODE § 59-3-6 (2020) (prohibiting newspapers from charging political candidates more than "private patrons").

161 *See, e.g.*, MASS. GEN. LAWS ch. 56, § 38 (2020); N.D. CENT. CODE § 16.1-10-05 (2021); FLA. STAT. § 104.071(b) (2020); W. VA. CODE § 3-8-11(d) (2020); UTAH CODE ANN. § 20A-11-901(6)(b) (LexisNexis 2020).

162 *See supra* notes 90–94 and accompanying text.

163 Scholars have recently suggested, for example, that lawmakers impose on Facebook and Google and other internet platforms nondiscrimination duties similar to those imposed on telegraph and telephone companies, in order to prevent important viewpoints from being excluded from these vital public forums and their users "consuming a tainted or manipulated information stream." K.

C. Worker Speech Protection Laws

It is not, of course, only laws that regulate the media that contribute to the non–First Amendment law of freedom of speech. As the introductory example of the voter intimidation laws suggests, legislative efforts to promote free speech values by non–First Amendment means affect many kinds of expressive relationships, not just those that take place in the mass public sphere.

To get a sense of the scope and diversity of this body of law, consider one last set of laws that contribute to the non–First Amendment free speech tradition: the numerous local, state, and federal laws that protect the freedom of workers to speak as they wish, and to associate with whom they wish, against the economic coercion of their employers. These laws, like the common carrier laws and postal laws, protect interests that the First Amendment protects — chief among these, what the Court has described as the right of the individual "to speak freely and . . . to refrain from speaking at all"[164] — but do so for the most part by allocating speech rights and duties differently than the First Amendment cases do.

This is the case, even though, unlike the first two sets of examples, the specific rights that these laws protect are also protected by the First Amendment cases. The First Amendment neither grants, nor has ever granted, anyone a right to subsidized mail delivery. Nor has it ever granted anyone a right not to be discriminated against by a private media company. But the First Amendment does protect the right of (at least some) workers to speak and associate without having to fear employment sanctions.

The worker speech rights that the First Amendment protects are relatively narrow, however. At present, it is only when a government worker speaks on a matter of public concern and outside the scope of her official duties that she has any possibility of First Amendment protection against employment sanctions motivated by that speech.[165] Even then, her speech will be constitutionally protected only if a court finds that the worker's expressive interests outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[166]

Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1670 (2018); *see also* Frank Pasquale, *Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines*, 2008 U. CHI. LEGAL F. 263, 288–89. They make, in other words, essentially the same arguments that lawmakers made to justify the imposition of common carrier requirements on telegraph companies.

164 Wooley v. Maynard, 430 U.S. 705, 714 (1977).

165 Garcetti v. Ceballos, 547 U.S. 410, 419 (2006).

166 Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

Statutory protection for workers' speech and association extends, in some respects, much more broadly — although how much more broadly depends significantly on the jurisdiction. But in all states, private as well as government workers receive some amount of protection against employment sanctions motivated by their speech and association.[167] They receive protection for speech that does not touch on matters of public concern, as well as speech that does so.[168] And in some cases, they also receive protection for speech uttered pursuant to their official work responsibilities.[169]

Statutory protection for workers' freedom of speech and association also extends much further back in time than First Amendment protection for the same freedom. It was only in the 1960s that the Supreme Court recognized that government employers might violate the First Amendment when they fired, refused to hire, or disciplined government employees because of their speech or association.[170] Prior to that, the Court assumed that, because individuals "have a constitutional right to talk politics, but . . . [have] no constitutional right to be a policeman," the First Amendment usually wasn't implicated when the government refused to hire, fired or disciplined workers because of what they said or whom they associated with.[171] Only after both the federal and state governments began to aggressively purge Communists and fellow travelers from public employment during the Second Red Scare did the Court recognize that granting government officials virtually unrestricted power to hire, fire, or discipline whomever it wanted might threaten the democratic and egalitarian values that the First Amendment protects.[172]

Legislatures, in contrast, recognized the threat that the use of employment sanctions posed to the expressive freedom of workers and to democratic freedom writ large, *more than a century* before the federal courts did. Indeed, the earliest worker speech protection laws date back as far

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167 *See infra* notes 199–205 and accompanying text.

168 *See infra* note 317 and accompanying text.

169 *See, e.g.*, Trusz v. UBS Realty Invs., LLC, 123 A. 3d 1212, 1214 (Conn. 2015).

170 The earliest case in which the Court interpreted the federal Constitution to prohibit speech-motivated employment sanctions against government workers was *Wieman v. Updegraff*, 344 U.S. 183 (1952), but *Wieman* was decided on due process grounds rather than First Amendment ones. *Id.* at 191. It was only in the 1960s that the Court developed the modern doctrine of government employee speech rights in cases such as *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

171 The language comes from Justice Holmes's opinion for the Massachusetts Supreme Judicial Court in *McAuliffe v. Mayor of New Bedford,* 29 N.E. 517, 517 (Mass. 1892), however, as the Court noted in *Connick v. Myers*, 461 U.S. 138 (1983), "[f]or many years . . . [it] expressed this Court's law," *id.* at 144, that "a public employee had no right to object to conditions placed upon the terms of employment — including those which restricted the exercise of constitutional rights," *id.* at 143.

172 Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 66–67, 66 n.165, 67 n.167 (2006) (discussing the Court's effort in its public employee speech cases to protect against "the abuses of the McCarthy era," *id.* at 66).

as the 1830s. In 1839, Ohio criminally prohibited employers from "us[ing] any threat or coercion to procure any voter in his employ . . . to vote contrary to the [employee's] inclination."[173] Over the next twenty years, five other states and the then-territory of Nebraska enacted similar legislation.[174] And in 1868, two more states — South Carolina and Louisiana — enacted somewhat broader laws that prohibited employers from, in the words of the South Carolina statute, "discharg[ing], or threaten[ing] to discharge, from employment . . . any operative or employee . . . for or on account of his political opinion."[175]

That legislatures acted so much earlier than courts to protect worker speech interests was in part a consequence of the partisan dynamics that motivated them. Proponents of these laws were frequently members of the Democratic Party — a party that tended to depend very heavily during this period on the votes of the working men.[176] Fear that Whig-supporting employers were using their economic power to prevent their supporters from voting appears to have motivated at least some of these laws — for example, the 1846 Connecticut law.[177]

That these laws emerged when they did cannot be chalked up merely to political self-interest, however (at least not if we assume self-interest to be a relatively constant feature of democratic politics). Instead, it reflects the profound political as well as economic changes then taking place in the American republic. When the federal Constitution was ratified, and for quite some time thereafter, most states denied the right to vote to men who lacked property because they feared that men who were economically dependent on others would not be able to exercise meaningful political independence.[178] By the early nineteenth century,

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[173] An Act to Punish Betting on Elections, § 1, 1838 Ohio Laws 79; *see also* Volokh, *supra* note 35, at 299–300.

[174] Volokh, *supra* note 35, at 299.

[175] Act of Sept. 26, 1868, No. 68, § XI, 1868 S.C. Acts 136, 137; *accord* Act of Sept. 4, 1868, No. 54, 1868 La. Acts 64, 64.

[176] Both Isaac Toucey and Marcus Morton were Democrats, for example. *See* Charles Warren, *The Charles River Bridge Case* (pt. 2), 20 GREEN BAG 346, 354 (1908); *Gov. Isaac Toucey*, NAT'L GOVERNORS ASS'N, https://www.nga.org/governor/isaac-toucey [https://perma.cc/F9TZ-4UV7]. For discussion of the white working-class base of the nineteenth-century Democratic Party, see Robert J. Cottroll, *Law, Politics and Race in Urban America: Towards a New Synthesis*, 17 RUTGERS L.J. 483, 509–13 (1986).

[177] *See* Volokh, *supra* note 35, at 300. Chilton Williamson reports that in Connecticut in the mid-nineteenth century, Democrats believed that "Whig employers were influencing their employees in the way which Blackstone had deplored." CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760–1860, at 264 (1960). Williamson notes that "Whigs were not discontented with this state of affairs, but Democrats, needless to say, were very much so." *Id.*

[178] ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 6–10, tbl.A.1 (2000). Professor Keyssar notes that the argument that William Blackstone made in his Commentaries on the Law of England — that property qualifications on voting were necessary to "exclude such persons as are in so mean a situation that they are esteemed to have no will of their own" — "was repeated endlessly during the revolutionary

this restriction on the right of suffrage proved politically untenable because — given a quickly urbanizing and industrializing economy — it meant depriving a large, growing proportion of the white male population of the right to vote.[179] This proved increasingly difficult to reconcile with the republican principles that were supposed to govern the new country.[180]

The result was a dramatic expansion in the scope of suffrage — and the exact reaction by employers that opponents of expanding the right to vote feared. An 1854 article published in the Boston-based journal, *Democratic Review*, reported that voter intimidation was "constantly practised" by private employers in Massachusetts and in the other manufacturing states.[181] "Many [employers]," it asserted, "boldly avow their right to discharge from employment those who vote against their peculiar interest."[182] Even when workers were not fired, the author added, "other means, quite as effectual as dismissal, are often employed to influence their votes, and [workers] soon find that their wages are diminished by their political opinions."[183] Others reported much the same.[184] And the problem only appeared to get worse in the wake of the Civil War, at least in the South. Military commanders and lawmakers reported that supporters of the defeated Confederacy were kicking tenants off their land and firing workers who dared to vote for Republican candidates, when they were not using more violent means to punish Republicans for their votes.[185]

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era" and endorsed by even such democratic thinkers as Thomas Jefferson, even if many of those who made these arguments also articulated "an altogether contradictory argument," namely "that the poor, or the propertyless, should not vote because they would threaten the interests of property." *Id.* at 10–11 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765–1769, at 165 (Univ. of Chi. Press 1979) (1765)).

179 *Id.* at 34.

180 *See id.* at 35–37.

181 *Voting by Ballot*, 3 U.S. DEMOCRATIC REV. 19, 24 (1854).

182 *Id.* It was easy to figure out whom someone voted for, given the highly public nature of the process in the early and mid-nineteenth century. Because "voters . . . obtained their ballots from political parties . . . [and simply] drop[ped that] ballot in a box" to vote, and because "ballots tended to be of different sizes, shapes, and colors, a man's vote was hardly a secret — to election officials, party bosses, employers, or anyone else watching the polls." KEYSSAR, *supra* note 178, at 142.

183 *Voting by Ballot*, *supra* note 181, at 24.

184 Governor Isaac Toucey, Message from His Excellency to the Legislature of Connecticut (May 1846), *in* JOURNAL OF THE HOUSE OF REPRESENTATIVES, OF THE STATE OF CONNECTICUT, MAY SESSION, 1846, at 25 [hereinafter Toucey Message].

185 *See* Gen. Ords. No. 57 (Apr. 10, 1868), S. EXEC. DOC. NO. 13, at 91 (1870) ("[N]umerous complaints have been made at these headquarters that . . . laborers will be intimidated from voting at the approaching election by fear of the loss of employment."); 1 THE DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF VIRGINIA 43 (Richmond, New Nation 1868) [hereinafter VIRGINIA DEBATES] ("[M]any laboring men of Virginia are reported as having been thrown out of employment, because they conscientiously exercised the

Laws like the ones enacted in Massachusetts and Connecticut in the 1840s and 1850s, or South Carolina and Louisiana in the 1860s, were a response to what the author of the article in *Democratic Review* claimed to be the uniquely American problem produced by the willingness of American lawmakers to grant political rights to rich and poor (white men) alike.[186] By making it a crime for employers to threaten workers with the loss of their jobs if they did not vote as the employer desired or if they did not break their ties to a political party the employer despised, lawmakers attempted not only to save their own political hides, but also to protect the political autonomy of laboring men and the integrity of the democratic system writ large.[187] The Governor of Connecticut certainly argued as much, when he urged the state legislature to criminalize the act of worker vote intimidation, which it did the same year[188]:

> The elector [i.e., the voter] is bound by an oath to the faithful discharge of his duty. By the whole theory of republican government, he, as one of the people, is to pass upon all laws and their administration. The whole country has a deep interest in the independent as well as intelligent exercise of the electoral franchise by every citizen in it. . . . [I]f the proprietors of an establishment, employing several hundreds of workmen, are to be considered as the proprietors of their votes, and when they purchase their labor for a pecuniary consideration, are to be considered as purchasing for the same consideration their rights as independent citizens at the ballot box, in whatever manner or under whatever color it may be done, the evil is too intolerable to be permitted to exist in a free country.[189]

In 1840, the Governor of Massachusetts similarly argued that legislative action was "needed to protect the laboring classes, and the poorer portion of the community, from unjust and oppressive influences, and to secure to them more perfect independence and freedom of political action."[190] "The genius of liberty," the Governor added, "requires of every rational soul a free and honest expression of his unbiased convictions and volitions. [An employer who infringes] this right, and corrupt[s], at its source, the freedom of elections . . . cannot be a real friend

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rights of American citizens in voting the Republican ticket, and are on that account thrown with their families on the cold charity of the world.").

186 *Voting by Ballot*, *supra* note 181, at 21 ("There is one reason . . . why voters are here more exposed to intimidation than in most other countries. Universal suffrage exists at present . . . in no nation of Europe, and only privileged orders share in many of its representative systems. There is no danger of coercion being employed where the poorer classes are not included in the electoral body. . . . But here, where every man is a voter — the powerful capitalist and the dependent laborer — where votes are to be given by the one extreme of society, which may affect the pecuniary interests of the other, the practice of intimidation is especially to be feared.").

187 KEYSSAR, *supra* note 178, at 49–50.

188 *See* Volokh, *supra* note 35, at 300 n.15.

189 Toucey Message, *supra* note 184, at 25–26.

190 Governor Marcus Morton, Address of His Excellency Marcus Morton to the Two Branches of the Legislature 14 (Jan. 1, 1840) [hereinafter Morton Address].

of the equal rights of man, nor a sincere supporter of the true principles of the government under which he lives."[191]

As these quotes make clear, and much like the telegraph laws that many of these same states enacted a few years later, these early speech protection laws for workers were an attempt to protect, for both self-interested and principled reasons, exercises of expressive freedom that appeared necessary to the preservation of democratic government in the United States against concentrated economic power — specifically, in this case, the concentrated economic power of the "[m]anufacturers" that a Connecticut lawmaker noted in the early 1800s were "rapidly increasing" in the country.[192]

The restrictions these laws imposed on the common law prerogatives of the employer to hire and fire at will made them quite controversial.[193] The author of the article in *Democratic Review* argued, for example, that notwithstanding the epidemic of employer voter intimidation in the country, legislators should not make it a crime for employers to fire or threaten to fire their employees because of how they voted or planned to vote. Such a law, he claimed, would "trench[] upon the offender's right of property" and "interfer[e] with his disposal of that which is his own."[194] Similar arguments ultimately defeated a proposal introduced during the Virginia Constitutional Convention of 1867[195] to "cloth[e] the General Assembly with power to declare and punish as a misdemeanor the discharge of any . . . laborer on account of his political opinions."[196] A member of the Convention, Mr. Liggett, argued that the problem of worker coercion in Virginia surely could not be so dire as to make "necessary . . . a despotism . . . which shall say to every man whom he may, and whom he may not discharge."[197]

Despite the sometimes-heated opposition they generated, however, legislative efforts to protect workers' political independence by limiting the common law rights of employers to govern the workplace as they saw fit only proliferated in subsequent decades — presumably because the power that the "manufacturers" wielded over their workers' political activities remained a problem, notwithstanding the increasing use of the secret ballot in local, state, and federal elections.[198] Over the next 150 years, many more states, territories, and municipalities made it illegal

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191 *Id.* at 15.

192 KEYSSAR, *supra* note 178, at 47.

193 For a discussion of employers' common law contractual rights in the early and mid-nineteenth century, see Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 122–24 (1976).

194 *Voting by Ballot*, *supra* note 181, at 22.

195 *See* Volokh, *supra* note 35, at 301 n.19.

196 VIRGINIA DEBATES, *supra* note 185, at 46.

197 *Id.*

198 KEYSSAR, *supra* note 178, at 142–43 (discussing the increasing use of the secret ballot).

for employers to fire, not hire, discipline, and/or coerce workers because of their political expression.[199]

Some of these laws were as narrow, or almost as narrow, as the laws enacted in the early 1830s and 1840s. They protected workers only against employer efforts to coerce their vote or to punish them for how they had voted.[200]

Other laws were considerably broader and prohibited employers from attempting to influence or constrain or, in some cases, from enacting workplace rules that had the effect of influencing or constraining workers' political expression generally. In 1915, for example, the California legislature made it both a crime and a civil violation for employers to "make, adopt or enforce any rule, regulation, or policy [that f]orb[ade] or prevent[ed] employees from engaging or participating in politics or from becoming candidates for public office [or that c]ontroll[ed] or direct[ed], or tend[ed] to control or direct the political activities or affiliations of employees."[201] The legislature also made it both a crime and a civil violation for an employer to fire, or threaten to fire, employees in order to "coerce or influence [them] . . . to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."[202] In 1938, the state of Louisiana enacted a very similarly worded law.[203]

Beginning in the late 1860s, both state and federal lawmakers also began to provide specialized statutory protection to civil service workers who faced political threats and coercion at work.[204] These laws, unlike

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[199] *See* Volokh, *supra* note 35, at 301, 309–33 (describing statutes protecting employees' political rights).

[200] For example, in 1900, the state of Kentucky banned corporations from "influenc[ing] . . . by bribe, favor, promise, inducement, threat or otherwise, the vote or suffrage of any employee or servant of such corporation against or in favor of any candidate, platform or principles or issue in any election." Act of Mar. 17, 1900, ch. 12, § 3, 1900 Ky. Acts 41, 43 (available at Hein's Session Laws Library). More than sixty years later, the North Carolina legislature made it a misdemeanor for "any person . . . to discharge or threaten to discharge from employment, or otherwise intimidate or oppose any legally qualified voter on account of any vote such voter may cast or consider or intend to cast, or not to cast, or which he may have failed to cast." Act of June 14, 1967, ch. 775, § 163–274(6), 1967 N.C. Sess. Laws 959, 960 (current version at N.C. GEN. STAT. ANN. § 163–274(a)(7) (West 2021)).

[201] CAL. LAB. CODE § 1101 (West 2021).

[202] *Id.* § 1102.

[203] LA. STAT. ANN. § 23:961 (2021).

[204] The first federal law of this kind was enacted in 1867 and Congress made it a crime for government agents or employees to "require or request any workingman in any navy yard to contribute or pay any money for political purposes" or to "remove[] or discharge[] [any workingman] for [his] political opinion[s]." Naval Appropriations Act of 1867, ch. 172, § 3, 14 Stat. 489, 492. It was soon followed by the more expansive 1883 Pendleton Act, which made it unlawful to "discharge, or promote, or degrade . . . for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose." Civil Service Act, ch. 27, § 13, 22 Stat. 403, 407 (1883). Many states enacted similar laws in subsequent years. *Developments in the Law — Public Employment*, 97 HARV. L. REV. 1611, 1628 n.60 (1984).

the earlier ones, were not a response to the threat that the growing power of private manufacturers posed to democratic principles. Instead, they were a response to the threat that another set of powerful private entities — namely, the political party machines that controlled government hiring decisions — posed to those principles.[205] The result nonetheless was additional protection for the political speech and association of government workers.

Statutory development didn't stop here. By the end of the nineteenth century, both the federal government and states began to extend statutory protection to workers' pro-labor speech and association, not just their political speech and association. In 1898, for example, Congress passed the Erdman Act of 1898,[206] which prohibited railroad companies and other common carriers from "discriminat[ing] against any employee because of his membership in . . . a labor . . . organization" or from "requir[ing] any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement . . . not to become or remain a member of any labor . . . organization."[207] Many states enacted similar measures.[208] Other states directly prohibited employers from disciplining or firing workers because of their pro-union speech or organizing activities.[209]

These laws were a response to sustained pressure by labor groups like the American Federation of Labor (AFL). These groups argued that ensuring republican values in an age of industrial capitalism required protecting not only the right of workers to participate in political struggles beyond the workplace but also their ability to exercise some measure of political agency at work. This view was eloquently expressed by a program promulgated by the AFL in 1918 that insisted that because the rules that governed the workplace "affect . . . workers' opportunities in life and determine their standard of living . . . more than legislative enactments" it was "essential that the workers should have a

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[205] *See Developments in the Law — Public Employment*, *supra* note 204, at 1627–28; *see also* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 Yale L.J. 2314, 2334 n.75 (2006) (noting that, at the time, one of the arguments for the Pendleton Act was that it was necessary to prevent "political servitude" and to stop "honest but mistaken" civil servants from "becom[ing] a suppliant for the official crumbs which fall from the table of some political master" (quoting S. REP. NO. 47-576, at iv (1882))).

[206] Ch. 370, § 10, Pub. L. No. 55-370, 30 Stat. 424, 428, *invalidated by* Adair v. United States, 208 U.S. 161 (1908).

[207] *Id.*

[208] WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 177–78 (1991) (listing statutes).

[209] *See, e.g.*, COLO. REV. STAT. ANN. § 8–2–102 (West 2021); An Act to Protect Employees and Guarantee Their Right to Belong to Labor Organizations, Hurd's Rev. Stat. (Ill.) § 32 (June 17, 1893); An Act to Provide a Penalty for Coercing or Influencing or Making Demands upon or Requirements of Employees, Servants, Laborers, and Persons Seeking Employment, Gen. Stat. (Kan.) §§ 4674–4675 (Mar. 13, 1909).

voice in determining the laws within industry and commerce . . . equivalent to the voice which they have as citizens in determining the legislative enactments . . . ."[210] This is what the early labor laws attempted to guarantee.

Although most of these laws were struck down by state and federal courts on freedom of contract grounds, by the end of the 1930s, the Court, facing a severe political crisis of its own, instead declared "[d]iscrimination and coercion [by employers] to prevent the free exercise of the right of employees to self-organization and representation" to be "a proper subject for condemnation by competent legislative authority."[211] The result was to allow Congress, as well as the state legislatures, to enact and enforce a new generation of labor laws, like the National Labor Relations Act of 1935[212] (NLRA), that granted significant protection to both public- and private-sector workers for their work-related speech and association — protection that Congress, for its part, made clear when it enacted the NLRA was motivated by a desire to "protect[] the exercise by workers of full freedom of association."[213]

Today, as a result of all this legislative activity, a significant body of what Professor Cynthia Estlund has described as "quasi–First Amendment law" protects the expressive autonomy of public- and private-sector workers even when the First Amendment cases do not.[214] Under current law, employers in the majority of states are not only prohibited from firing, not hiring, and/or disciplining both private- and public-sector workers for their political as well as work-related speech and association, but are also required to facilitate workers' speech — by, for example, adjusting workers' schedules to allow them to attend political party meetings, or by giving them paid time off to vote, or by granting them access to employer property for union organizing purposes.[215] A vast network of laws also protects public- as well as private-sector workers when they engage in whistleblowing speech — that is to say, when they publicly report fraud, waste, or abuse at work.[216]

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[210] *American Federation of Labor Reconstruction Program*, *reprinted in* TRADE UNIONISM AND LABOR PROBLEMS (SECOND SERIES) 563 (John R. Commons ed., 1921).

[211] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

[212] 29 U.S.C. §§ 151–169.

[213] *Id.* § 151.

[214] Estlund, *supra* note 12, at 107.

[215] *See, e.g.*, ALA. CODE § 17-1-5 (2021); COLO. REV. STAT. ANN. § 31-10-603 (West 2021); OKLA. STAT. ANN. tit. 26, § 7-101 (West 2020); *see also* NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 111 (1956) (discussing the varying property access rights of employees and nonemployees under the NLRA).

[216] *See* Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99 (2000) (documenting the federal whistleblower laws as well as the laws that have been enacted in all fifty states).

Employers in many states are also prohibited from coercing or attempting to coerce workers' political speech and association.[217] Under the NLRA, employers are also prohibited from "threat[ening] . . . reprisal . . . or promis[ing a] benefit" if workers do or do not vote to join a union, or go on strike, or engage in other statutorily protected expressive activity.[218] And in some states, employers are prohibited from "requir[ing] . . . employees to . . . participate in any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer's opinion about religious or political matters."[219] The assumption underlying this last and most recent group of what we might call "captive audience laws," is that requiring employees to listen to the employer's views on non-work-related matters is inherently coercive because it violates the employees' right *not* to hear *or not* to associate with speech they dislike.[220]

In a few states, protection for workers' speech extends beyond political and work-related speech and association, or even the religious speech regulated by the captive audience laws. The Connecticut Free Speech Act makes it unlawful, for example, for either public or private employers to "subject[] any employee to discipline or discharge on account of the exercise . . . of rights guaranteed by [either] the [F]irst [A]mendment . . . or . . . the [Connecticut State] Constitution.[221] Courts have interpreted this to mean that workers in Connecticut are protected against employment-motivated sanctions for all speech they utter on matters of public concern, except when they speak pursuant to their official duties.[222] In those cases, their speech will be protected only if it "implicates an employer's 'official dishonesty . . . other serious wrongdoing, or threats to health and safety.'"[223]

In New York, meanwhile, the legislature enacted a law in 1992 that prohibits employers from refusing to hire, firing, or otherwise discriminating against employees because of their off-duty "political activities" or their off-duty "recreational activities" — a category that the legislature defined to include the expressive acts of "reading and the viewing

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217 *See infra* notes 346–348 and accompanying text.

218 29 U.S.C. § 158(c).

219 N.J. STAT. ANN. § 34:19–10 (West 2020); *see also* OR. REV. STAT. ANN. § 659.785 (West 2020); V.I. CODE ANN. tit. 24, § 620 (2018); WIS. STAT. ANN. §§ 111.32, 111.321 (West 2020).

220 *See* Defendant Brad Avakian's Response to Plaintiffs' Motion for Summary Judgment at 9–10, Associated Or. Indus. v. Avakian, No. 3:09-CV-1494 (D. Or. May 6, 2010) (explaining that the Oregon law "establishes an important job-related right — the right to walk away from unwanted communication about politics or religion — and provides workers with a cause of action, similar to the common-law tort of wrongful discharge, to protect that right").

221 CONN. GEN. STAT. ANN. § 31-51q (West 2020).

222 *See* Schumann v. Dianon Sys., Inc., 43 A.3d 111, 122–23 (Conn. 2012).

223 Trusz v. UBS Realty Invs., LLC, 123 A.3d 1212, 1232 (Conn. 2015) (quoting Garcetti v. Ceballos, 547 U.S. 410, 435 (2006) (Souter, J., dissenting)).

of television, movies and similar material."[224] The purpose of this law was not to protect the expressive freedom of workers per se. Like even broader statutes enacted around the same time in Colorado and North Dakota, its primary purpose appears to have been to prevent employers from firing workers because they smoked, or from engaging in other acts of what was sometimes called "lifestyle discrimination."[225] Nevertheless, like the other laws discussed in this section, the New York law was an attempt to prevent employers from using the economic power that the employment relationship gave them to render workers subordinate to them in some important, democratically troubling, way. As the sponsor of the bill argued, during legislative debates: "[W]e have long since passed the days of company towns, where the company told you when to work, where to live and what to buy in their stores. This bill would ensure that employers do not tell us how to think and play on our own time."[226] The result, once again, was statutory protection for rights the First Amendment protects — in this case, what the Court in *Stanley v. Georgia* described as the "right to read or observe what [one] pleases" and "to satisfy [one's] intellectual and emotional needs in the privacy of [one's] own home" — but protection that was not articulated in a constitutional language.[227]

As this very brief summary suggests, a dense web of laws protects many different aspects of public- as well as private-sector workers' freedom of speech and association against employment sanctions, threats, and coercion. The strength of this body of law varies considerably and has fluctuated over time in response to changing political winds. The NLRA, for example, provides much narrower protection for workers' speech and association today than it once did.[228] This body of labor, employment, and election law nevertheless continues to provide significantly more protection for many kinds of worker speech and association than the First Amendment does. And it does so for precisely the same

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[224] N.Y. LAB. LAW § 201-d(1)(b) (McKinney 2020). The statute defines political activities to mean "(i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group." *Id.* § 201-d(1)(a).

[225] COLO. REV. STAT. ANN. § 24-34-402.5 (West 2020); N.D. CENT. CODE ANN. § 14-02.4-03 (West 2021); Jessica Jackson, *Colorado's Lifestyle Discrimination Statute: A Vast and Muddled Expansion of Traditional Employment Law*, 67 U. COLO. L. REV. 143, 143 n.5 (1996) (noting that the Colorado bill "was proposed by the tobacco lobby" but extended to protect all "'lawful activities' . . . [in] an effort to make the bill more appealing to the legislature as a whole").

[226] Alyce H. Rogers, *Employer Regulation of Romantic Relationships: The Unsettled Law of New York State*, 13 TOURO L. REV. 687, 690 (1997) (quoting Sen. James J. Lack Mem., Ch. 776, N.Y.S. LEGIS. ANN. (1992)).

[227] Stanley v. Georgia, 394 U.S. 557, 565 (1969).

[228] *See* CELINE MCNICHOLAS, MARGARET POYDOCK & LYNN RHINEHART, ECONOMIC POLICY INSTITUTE, UNPRECEDENTED: THE TRUMP NLRB'S ATTACK ON WORKERS' RIGHTS (2019) (describing the significant narrowing of the scope of protection afforded workers under the NLRA that has occurred under the Trump Administration). *See generally* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

reason that the First Amendment protects the speech of government workers: because legislators have come to believe, just as courts have, that allowing employers unimpeded freedom to use their economic power to constrain their employees' speech threatens the vitality of the marketplace of ideas and undermines the political, and perhaps also social, equality that is a crucial precondition of democracy.

II. A Pluralistic Free Speech Tradition

As the previous Part indicates, the First Amendment's Free Speech and Press Clauses are by no means the only legal instruments that protect the expressive autonomy of private individuals in the United States, or that attempt to ensure that public debate on public issues is uninhibited, robust, and wide open. Instead, a thick body of federal, state, and local law — much of it *not* constitutional — promotes these and other First Amendment interests but does so by granting speech rights and by imposing speech-facilitating duties on private and government actors that are quite different than those the First Amendment requires.

The laws canvassed in the previous Part may in fact represent only the tip of the iceberg that is the non–First Amendment law of freedom of speech. Many other local, state, and federal laws work to protect free speech values by non–First Amendment means. This is true, for example, of the many state laws that prohibit both public and private school and university administrators from disciplining students for their speech even when the First Amendment does not require it,[229] the local and state laws that prohibit landlords and places of public accommodation from discriminating against members of the public because of their viewpoint,[230] the many state laws that prohibit the use of otherwise valid tort laws when the purpose of the suit is to chill others' expression,[231] the state and federal open records laws that require government actors to disclose information about their activities to members of the

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[229] *See, e.g.*, Cal. Educ. Code §§ 48950, 66301, 94367 (West 2020); Colo. Rev. Stat. Ann. § 22-1-120 (West 2020); Or. Rev. Stat. Ann. § 336.477 (West 2020); Ark. Code Ann. § 6-18-1203 (West 2020); For a general overview of these laws, see *New Voices*, Student Press L. Ctr., https://splc.org/new-voices [https://perma.cc/TP9X-5DAR].

[230] *See, e.g.*, Bock v. Westminster Mall Co., 819 P.2d 55, 56 (Colo. 1991); State v. Schmid, 423 A.2d 615, 629–31 (N.J. 1980); Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979).

[231] *See* David L. Hudson, Jr., *Anti-SLAPP Coverage and the First Amendment: Hurdles to Defamation Suits in Political Campaigns*, 69 Am. U. L. Rev. 1541, 1542–49 (2020) (discussing the emergence and rationale of these laws). For a current listing of state laws that prohibit "strategic lawsuit against public participation" or SLAPP suits, see *State Anti-SLAPP Laws*, Pub. Participation Project, https://anti-slapp.org/your-states-free-speech-protection [https://perma.cc/3VQ8-DRV8].

public,[232] the state and federal laws that provide journalists special privileges because of the important structural role they play in American democracy[233] — the list goes on and on.

The existence of this sizable body of law makes it clear that the American system of free expression is not composed entirely — or even, perhaps, primarily — of federal constitutional law. As the list of laws in the previous paragraph suggests, whether an individual can exercise the kinds of expressive and associational autonomy that the First Amendment protects in principle will often depend in practice less on the details of First Amendment doctrine than on the existence of other local, state, or federal laws. This is a significant fact about the regulation of speech in the United States, but one that gets obscured by the tendency of scholars to equate the First Amendment free speech tradition with the American free speech tradition more broadly.

That nonconstitutional law would come to play the important role in the American system of free expression that it does today wasn't inevitable. The Supremacy Clause of the Federal Constitution vests the federal courts with the power to establish not only a floor of rights protection — a minimum set of rights that no government actors may infringe — but also a ceiling.[234] Particularly when it comes to the many state and federal laws that protect the free speech rights of some private individuals by restricting the property and speech rights of others (think here of the common carriage laws described in section I.B, or the employment, labor, and election laws described in section I.C), the Court could have set the federal constitutional ceiling very low. It easily could have interpreted the First Amendment or other constitutional provisions like the Takings Clause to deprive legislatures, agencies, or other government actors of the power to add significantly to the rights that the First Amendment provides. In other areas of law, the Court has in fact used the authority granted it by the Supremacy Clause to do just that.[235]

But while there are some First Amendment cases — *Tornillo,* for example — in which the Court did set the constitutional ceiling very

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[232] Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1159–61 (2002).

[233] Sonja R. West, *Favoring the Press*, 106 CALIF. L. REV. 91, 115–18 (2018) (describing the various laws that grant special privileges to the institutional press).

[234] *See* John E. Simonett, *An Introduction to Essays on the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 227, 234 (1994) ("[T]he state may not raise its constitutional protection for a particular civil liberty so far above the federal floor that it bumps against the federal floor for some other competing civil right; in this case the federal floor becomes a ceiling.").

[235] The Court has done so, for example, in its Fourteenth Amendment jurisprudence, by vesting Congress with very limited power under section 5 of the Fourteenth Amendment to interpret section 1 of the amendment differently than the Court interprets it. *See* Douglas Laycock, *Federalism as a Structural Threat to Liberty*, 22 HARV. J.L. & PUB. POL'Y 67, 76 (1998).

close to the constitutional floor, for the most part the Court has not interpreted the First Amendment so restrictively.[236] Instead, in a wide variety of decisions, the Court has permitted legislatures, regulatory agencies, and state courts to grant speech rights and impose speech-facilitating duties that the First Amendment does not require, even when doing so has the effect of intruding to some degree on constitutionally protected property or expressive autonomy interests. The most famous, or infamous, example of this is the 1969 decision in *Red Lion v. FCC*[237] which found the right of reply rules that made up part of the fairness doctrine to be a constitutional attempt by Congress to effectuate the core purpose of the First Amendment as recognized by the Court; namely, to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee," notwithstanding the significant constraints they imposed on the editorial autonomy of radio broadcasters.[238] But there are many other cases, besides *Red Lion*, in which the Court has affirmed the constitutionality of non–First Amendment free speech laws.[239]

The result has been to grant other branches of the federal government, and other governments, considerable power to vindicate free speech values in their own ways. As Part I makes clear, this is a power that these other governmental actors have sometimes exercised with vigor. What this has produced is a system of free expression in which legislatures as well as courts play an important role in defining speech rights and duties, and always have.

Recognizing this fact has important implications for how we evaluate the system of free expression in the United States. It means that if we want to understand how well the existing body of free speech law is achieving the goals we set for it, we cannot look only to the constitutional law cases. Given the very significant constraints on the scope of the First Amendment's application, it is entirely possible that even the most speech-protective constitutional doctrines would not achieve the purposes the First Amendment is intended to, in the absence of other kinds of regulation. Conversely, a very weak constitutional jurisprudence might not matter in a world in which there was vigorous legislative protection for freedom of speech (or, alternatively, a vigorous free

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[236] As the discussion in section I.C demonstrates, even *Tornillo* has not been interpreted to deprive lawmakers of all power to promote free speech values by constraining the "editorial control and judgment" of newspaper editors. Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974). But it has certainly constrained their discretion in very significant ways. *See supra* section I.C, pp. 2331–2342.

[237] 395 U.S. 367 (1969).

[238] *Id.* at 390.

[239] *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 224–25 (1997); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980); Hudgens v. NLRB, 424 U.S. 507, 521–23 (1976); NLRB v. Gissel Packing Co., 395 U.S. 575, 618–20 (1969); United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 103 (1947); Associated Press v. United States, 326 U.S. 1, 20 (1945).

speech culture). We simply cannot know how well our system works to promote free speech values if we look only at the First Amendment cases.

Recognizing the important role that nonconstitutional laws play in the American system of free expression also has significant descriptive implications. It changes how we understand both the historical and the contemporary operation of the system of free expression in the United States. In this Part, I spell out what those implications are before exploring, in Part III, their consequences for First Amendment doctrine.

A. Our Pluralistic Past

The first thing that recognizing laws like the postal laws, or the common carrier laws, or the worker protection laws as free speech laws changes is our view of the past. For decades now, it has been widely accepted that the hegemonic conception of freedom of speech in the eighteenth- and nineteenth-century legal debates was what we might describe as a "weakly libertarian" one. There has been intense debate about precisely how weak, or precisely how libertarian, the eighteenth- and nineteenth-century view of freedom of speech was.[240] But virtually no one disputes that the dominant view of freedom of speech was that it entitled the individual to, as Justice Story put it in 1833, "speak, write, and print his opinions upon any subject whatsoever," without governmental sanctions, but protected this negative liberty only so long as what was spoken, written, or printed did not "injure any other person . . . [or] disturb the public peace, or attempt to subvert the government," as determined by a jury.[241] Nor is there much dispute that, in the eighteenth and nineteenth centuries, it was relatively easy to convince juries that speech *did* threaten the public peace or attempt to subvert the government — that what this view of freedom of speech produced was a rather enervated body of state and federal constitutional law: one in which the

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[240] Debate has raged, for example, about whether the men who ratified the First Amendment and state constitutional free expression guarantees intended to abolish the law of seditious libel. *Compare* Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 947 (1919) (arguing that they did), *with* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 168 (1985) (arguing that they probably did not). More recently, scholars have debated the extent to which late nineteenth-century jurists like Chief Justice Cooley and Dean Christopher Tiedeman articulated a distinctive "conservative libertarian" view of freedom of speech. *Compare* MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991) (making this argument), *with* Charles L. Barzun, *Politics or Principle? Zechariah Chafee and the Social Interest in Free Speech*, 2007 BYU L. REV. 259, 268–83 (criticizing the claim for resting on weak historical foundations).

[241] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 993, at 704 (Hilliard, Gray & Co. ed., 1833).

right to freedom of speech was frequently claimed to be of crucial democratic importance, but in practice constrained the government's power very little.[242]

Recent scholarship on nineteenth-century legal debates about the federal and state constitutional free expression guarantees has complicated this story somewhat by suggesting that, rather than the unchallenged "consensus about the boundaries of free speech" that an earlier generation of scholars espied in the nineteenth century,[243] there was in fact considerable disagreement about precisely what kinds of speech posed a sufficient threat to public peace or morality to warrant repression.[244] Nevertheless, the conclusion this new body of historical scholarship tends to reach is, in its broad outlines, the same one that the earlier histories reached: namely, that "nineteenth-century America embraced a strong libertarian ideology that endorsed a press unrestrained by government even in the most trying times," but "did not prohibit suppression of expression by the community itself" when that expression violated the community's social norms, as determined by a jury.[245]

Almost entirely missing from this body of scholarship, however, is any analysis of the nonconstitutional debates about expressive freedom that took place in the eighteenth and nineteenth centuries. As Part I makes quite clear, it wasn't only when discussing the meaning of the state or federal constitutional guarantees of freedom of speech that legislators invoked ideas of expressive liberty or attempted to vindicate what we recognize today to be First Amendment interests and rights. There was also vigorous discussion throughout the eighteenth and nineteenth centuries about the extent of the government's duty to protect the

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242 Donna I. Dennis, *Obscenity Law and the Conditions of Freedom in the Nineteenth-Century United States*, 27 LAW & SOC. INQUIRY 369, 383 (2002) ("Antebellum jurists and treatise writers routinely interpreted the common law of nuisance and obscene libel to give local authorities extremely broad powers to punish any form of expression that had a tendency to promote indecency or corrupt morality. . . . In this regulatory regime, the state's authority to suppress immorality necessarily trumped individual claims to freedom of speech or freedom of the press."); Rabban, *supra* note 14, at 523–24 (noting that nineteenth-century judicial "[o]pinions constantly reiterated that the First Amendment and analogous provisions of state constitutions do not protect 'license' or the 'abuse' of speech.").

243 Friedman, *supra* note 13, at 5–6.

244 GRABER, *supra* note 240, at 46–48 (noting that nineteenth- and twentieth-century "conservative libertarians" believed that "doctrines attacking the principles of republican government had no claim to free speech protection" had "clear[] . . . repressive implications" and also that the "military needs of the state . . . required that the government be able to use the war power to curtail such personal freedoms as free speech").

245 DICKERSON, *supra* note 22, at xii–xiii (italics omitted); *see also* FELDMAN, *supra* note 22, at 119–20 ("Despite the vitality of the tradition of [political] dissent" in nineteenth-century America, "[a]n individual was free to speak or write so long as he remained roughly within the broad mainstream of culture and opinion, but social penalties were severe for those who ventured outside those borders.").

expressive and associational freedom of its citizens and subjects, *not* because it was obligated to do so by a specific constitutional clause, but because this was what a commitment to democratic principles required.

Including these debates in the story changes it considerably. This is because the view of freedom of speech that informed these debates was *not* a weakly libertarian one. When Elbridge Gerry insisted in 1791, for example, that "the House ought to adopt measures by which the information, contained in any one paper . . . might immediately spread from one extremity of the continent to the other . . . [so that] the whole body of the citizens [would] be enabled to . . . guard against any evil that may threaten them," he was not making a libertarian argument for freedom of speech, weak or strong.[246] Nor was the Senate Committee on Post-Offices and Post-Roads, when it argued that Congress should create a postal telegraph because it would be "for the press a proclamation of emancipation, and it will not be really a free press until it, or something like it, is enacted into a law."[247] Nor, for that matter, was the Governor of Connecticut, when he argued in 1846 that allowing employers to interfere with their workers' "independent as well as intelligent exercise of the electoral franchise" was an "evil . . . too intolerable to be permitted to exist in a free country."[248]

In all of these cases, the claim was not that the government merely had a negative obligation to refrain from punishing nonharmful speech. The claim was instead that the government had a positive obligation to regulate the conditions under which speech occurred when doing so was necessary to safeguard viewpoint diversity in the public sphere, political equality, or some other important democratic good.

What these debates and the laws they helped produce reveal is not only that there was more vigorous enforcement of at least certain kinds of speech rights — the right to receive nondiscriminatory telegraph service, for example, or the right to vote free of employer coercion, or the right to subsidized postal service — than we typically recognize. They also suggest that eighteenth- and nineteenth-century lawmakers had a more complicated and a less complacent view of what kinds of expressive liberty a democratic society requires than the conventional story reveals. It may have been the case, as Professor Donna Lee Dickerson argues, that most people in the nineteenth century assumed that conventional moral norms should guide the legal regulation of speech and

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[246] 3 ANNALS OF CONG. 289 (1791).

[247] S. REP. NO. 48-577, pt. 1, at 19 (1884) (noting also that "[i]t is only the fact of a monopolized news distribution which makes a news censorship [by Western Union and the AP] possible" and that, because the "telegraphic news is the breath of life of the daily press, . . . to receive such news practically at the will of one company is an intolerable condition, degrading to the newspapers and alarming to the country").

[248] Toucey Message, *supra* note 184, at 25–26.

that indecent or immoral speech should therefore receive no legal protection.[249] But this does not mean that "[f]reedom of expression issues . . . were local problems that each community dealt with in its own way" without much state or federal involvement.[250] Nor does it mean that eighteenth- and nineteenth-century lawmakers assumed that all that was required to ensure what Dean Christopher Tiedeman described in 1886 as "[the] popular government and . . . freedom from tyranny" that was "only possible when the people enjoy the freedom of speech, and the liberty of the press,"[251] were the weak limits that the state and federal constitutions imposed on the government's ability to punish speech. Instead, many lawmakers also believed that the government had to create the conditions under which freedom of speech could flourish — and this includes some of the lawmakers who wrote and ratified the First Amendment itself.[252]

It is true, of course, that those who argued in favor of the postal laws, the common carrier laws, or the worker speech protection laws didn't tend to use the phrases "freedom of speech" or "freedom of press" to describe the speech-fostering duties that they believed democratic principles imposed on the government (although the Senate committee report on the postal telegraph makes clear that they sometimes did). But they did claim that legislative action was necessary to protect what the Governor of Massachusetts described as the right of "every rational soul [to] . . . free[ly] and honest[ly] express[] . . . his unbiased convictions and volitions,"[253] as well as the "intelligence . . . of the people" that was the ultimate guarantee of democratic government.[254] They attempted to protect free speech interests, in other words, even if they did not use the (largely constitutional) language of freedom of speech.

What these debates thus illuminate is the existence of what we might call a second strand of eighteenth- and nineteenth-century discourse and practice about freedom of speech — one that, in contrast to the first, constitutional strand of discourse and practice, assumed that government intervention into the marketplace of ideas was sometimes necessary to protect expressive liberty and the democratic values it facilitated. The two strands were not incompatible with one another. Both, after all, granted the government considerable power to regulate speech when necessary to promote the public good.

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249 DICKERSON, *supra* note 22, at xv.

250 *Id.* at xiii.

251 CHRISTOPHER GUSTAVUS TIEDEMAN, TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT § 81 (photo. reprt. 2001) (1886).

252 James Madison, for example, not only wrote the first draft of the Bill of Rights but also was an important supporter of the Post Office Act. JOHN, *supra* note 26, at 60–63.

253 Morton Address, *supra* note 190, at 15.

254 *Id.* at 11.

The second strand of free speech discourse and practice would have, however, a much more lasting impact on the modern system of free expression than the first. This is because the rather extensive body of constitutional discourse and practice that reflected the weakly libertarian view of the First Amendment was rendered almost completely irrelevant to anyone but historians by the Court's embrace in the 1930s and 1940s of a much more strongly libertarian view of the free speech right.[255] After this point, the fine distinction that jurists like Tiedeman or Justice Story drew to delimit the constitutional right to freedom of speech simply didn't inform to any meaningful degree how courts actually interpreted the First Amendment — or, for the most part, the state constitutional free expression guarantees.[256]

In contrast, the non–First Amendment laws of freedom of speech continued to apply with full force, in large part because the Court adamantly refused to interpret the new, much more strongly libertarian First Amendment to require the invalidation of the many state and federal laws that lawmakers had by then enacted to promote free speech values by nonconstitutional means.[257] Instead, the Court made clear in a number of significant cases that legislatures and regulatory agencies continued to possess considerable power to intervene in the speech marketplace when doing so promoted the same values as the First Amendment did.[258] In its 1945 decision in *Associated Press v. United States*,[259] for example, the Court rejected a First Amendment challenge to a district court order that interpreted the Sherman Antitrust Act[260] to require the AP to comply with very similar nondiscrimination duties to those the earlier generation of newsgathering common carrier laws had imposed.[261] "It would be strange indeed," Justice Black wrote for the majority, "if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom."[262] The following year in *Hannegan v. Esquire, Inc.*,[263] the Court held that, alt-

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255 *See* Rabban, *supra* note 14, at 521.

256 *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174–78 (2018).

257 This was despite the efforts by business groups and others to get the Court to do just that. *See* WEINRIB, *supra* note 26, at 221–22.

258 *See id.* at 222.

259 326 U.S. 1 (1945).

260 15 U.S.C. §§ 1-7.

261 *Associated Press*, 326 U.S. at 21–23 (upholding a judicial order that required the AP to "furnish[] [news] to competitors of old members without discrimination," *id.* at 21, and prohibited it from preventing members "from furnishing spontaneous news to anyone not a member of the [AP]," *id.*).

262 *Id.* at 20.

263 327 U.S. 146 (1946).

hough significant constitutional questions would be raised by an interpretation of the postal laws that gave the postmaster general the power to deny publications entry to the mail merely because she disliked their content,[264] Congress had broad power to do what it had done, in one way or another, since 1792[265]: namely, "encourage the distribution of periodicals which disseminated 'information of a public character' . . . because it was thought that those publications as a class contributed to the public good."[266] The year after that, in *United Public Workers v. Mitchell*,[267] the Court upheld the Hatch Act[268] against constitutional challenge, even though — in an effort to protect civil service workers from political coercion, as well as promote the efficiency of the civil service writ large — the law imposed very significant constraints on the ability of civil service workers to engage in partisan political activity.[269] The result was to embed within the modern First Amendment this much older body of non–First Amendment free speech law.

Recognizing the second strand of free speech discourse and practice as part of the broader American system of free expression thus changes not only our view of the past, but also how we understand the relationship between the past and the present. It suggests that when it comes to freedom of speech, the past is much less of a foreign country than we might otherwise suppose. More specifically, it makes clear that it is not in fact true — as First Amendment scholars often assume — that the "American system of freedom of expression . . . [only] beg[a]n to emerge as a coherent body of legal principles . . . well into the twentieth century."[270] In fact, important elements of the system — the common carrier laws, the worker speech protection laws, the postal subsidies, even the first journalism shield laws[271] — had begun to develop in their modern form well before the 1930s and 1940s and would continue to develop

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[264] *Id.* at 155–56.

[265] *Id.* at 151.

[266] *Id.* at 154.

[267] 330 U.S. 75 (1947).

[268] 5 U.S.C. §§ 7321–7326.

[269] *United Pub. Workers*, 330 U.S. at 102–03. In its decision, the Court emphasized the efficiency-promoting purposes of the Act. *Id.* at 103. But, as the legislative debates make clear, a central motivation behind the Hatch Act, like earlier antipatronage laws, was to prevent government workers from imposing "political tribute" on either their subordinates, or those who wished to receive federal government funds. 84 CONG. REC. 9598 (1939) ("This measure[,] . . . the Hatch bill, is an outgrowth of the scandalous political manipulations of Federal relief appropriations, as well as intimidation of relief workers during the primary and general elections of 1936 and 1938. . . . [A] superintendent was tried and convicted . . . for misappropriation of W. P. A. funds, and for levying political tribute on poor, unfortunate relief workers." (statement of Rep. Taylor)).

[270] David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 32, 44 (Lee C. Bollinger & Geoffrey R. Stone eds., 2018).

[271] *See* Dean C. Smith, *The Real Story Behind the Nation's First Shield Law: Maryland*, 1894–1897, 19 COMMC'N L. & POL'Y 3, 5–6 (2014).

largely unaffected by the revolution that took place in the First Amendment cases (at least for a while).[272]

Our present body of free speech law is not, in other words, only a product of the judge-made changes to constitutional doctrine that took place in the decades after World War I. It is also a product of the much more extended series of changes to the statutory and common law that state and federal legislatures and state courts enacted throughout the eighteenth and nineteenth centuries, and that they would continue to enact throughout the twentieth and twenty-first centuries. This fact has significant implications, not only for how we understand the historical evolution of the American system of free expression, but also for how we understand its contemporary operation.

B. Our Pluralistic Present

The fact that the non–First Amendment law of freedom of speech continues to play an important role in the regulation of speech in the mass public sphere, in our workplaces, and in many other arenas of public expression today suggests at least two important, and perhaps surprising, things about how freedom of speech is interpreted and enforced in the contemporary United States.

1. A Partially Majoritarian System of Free Expression. — First, it suggests that the right to freedom of speech is far more majoritarian in its operation than we usually recognize. First Amendment scholars frequently refer to freedom of speech as a counter-majoritarian right — even the "most significantly counter-majoritarian right" guaranteed by the Bill of Rights.[273] The Supreme Court, for its part, has reaffirmed on multiple occasions the claim it made in *West Virginia School Board v. Barnette*[274]: namely, that

> The very purpose of [the] Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . free speech, a free press . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[275]

It is certainly true that the right to freedom of speech is a much *more* counter-majoritarian right today than it was in the nineteenth century.

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[272] *See infra* notes 296–300 and accompanying text for recent developments.

[273] FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 40 (1982) (arguing that the principle of "freedom of speech is by its nature anti-democratic, anti-majoritarian"); Kent Greenawalt, *Speech and Crime*, 1980 AM. BAR FOUND. RSCH. J. 645, 735 ("Of all the guarantees of the Bill of Rights, freedom of speech may be the most significantly counter-majoritarian, preventing ruling groups from suppressing antagonistic points of view and protecting unpopular dissidents from the outrages of popular feeling.").

[274] 319 U.S. 624 (1943).

[275] *Id.* at 638; *see, e.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2486 n.28 (2018); McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 884 (2005) (O'Connor, J., concurring); Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736–37 (1964).

The revolution that took place in First Amendment law in the 1930s and 1940s not only greatly expanded the role that the First Amendment played in the American system of free expression in general; it also made the First Amendment much more significantly counter-majoritarian than it had previously been, by greatly diminishing the role that the majoritarian institution of the jury played in delimiting the boundaries of constitutional protection for speech and greatly expanding the role of the judge.

This does not mean, however, that the right to freedom of speech is exclusively or even primarily counter-majoritarian. In fact, majoritarian institutions — state and federal legislatures, their agents, the regulatory agencies, popularly elected state courts — continue to play a tremendously important role in determining the scope of freedom of speech and association, just as they did in the eighteenth and nineteenth centuries, even if juries no longer play the important role in the system that they once did.

Indeed, in many contexts, whether individuals receive any protection whatsoever for speech and associational rights that the Court itself has declared to be crucially important to the preservation of democratic values will depend entirely on the decisions that these majoritarian institutions make. This is true, for example, of what the Court in *NLRB v. Jones & Laughlin*[276] declared in 1937 to be the "fundamental right" of workers "to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer."[277] It is equally true of the "paramount" right of the public to "have the medium [of radio] function consistently with the ends and purposes of the First Amendment."[278] It is also true of the right of the democratic citizenry to access information about the government's activities, which the Court has recognized to be a "structural necessity in a real democracy."[279] In all these cases, whether and to what extent anyone will actually be able to exercise these rights depends entirely on the choices that state and federal legislators, or regulatory agencies like the National Labor Relations Board (NLRB) and the FCC, make.[280]

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[276] 301 U.S. 1 (1937).

[277] *Id.* at 33.

[278] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[279] Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 171–72 (2004).

[280] The First Amendment does not provide any protection for the first two sets of rights because of the state action requirement. *See supra* note 32 and accompanying text. State action does not present any problems with the third — but in this context, as in many others, the Court has unequivocally rejected the idea that the First Amendment grants the individual any positive rights. *See, e.g.*, McBurney v. Young, 569 U.S. 221, 232 (2013) ("This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws."). The result is that, if Congress were to get rid of FOIA tomorrow or any of the other public records laws that attempt to ensure that the government is minimally legible to the citizens in whose name it purports to act, the First Amendment would prove no impediment.

The fact that these institutions are the only ones that, under current precedents, have the responsibility to protect these "fundamental" or "paramount" or "structurally necessary" rights suggests that it is not quite correct to think of the role that they play in the American system of free expression as merely additive. Legislatures and state courts do not (to return to Justice Brennan's metaphor) merely add protection above a well-built federal constitutional floor. In many contexts, there is no federal constitutional floor for them to build upon.

Instead, it is more apt to characterize the relationship between majoritarian and counter-majoritarian institutions in our system of free expression as a departmentalist one. Legislatures, agencies, and state and federal courts sometimes "exercise[] exclusive control over discrete interpretive areas" when it comes to the fashioning of speech rights.[281] In other cases, they "render overlapping and potentially conflicting interpretations on the same subjects"[282] — as is true for example when it comes to the laws that protect government workers' speech and association. The result is a significant body of free speech law that is created and also enforced by the political branches of the government.

The power that majoritarian institutions possess in our system to protect speech and associational freedom has clear benefits. As the history of the postal subsidies and the worker-protection laws suggests, partisan dynamics may lead legislators and other elected officials to be much more sensitive than life-tenured federal judges to certain kinds of threats, both to expressive freedom and to democratic values. Allowing the political branches to interpret freedom of speech differently than the federal courts may therefore result in more expansive rights protection than a more purely counter-majoritarian setup would produce. This possibility is particularly likely given the long-standing judicial tendency to interpret the rights guaranteed by the First Amendment as primarily negative ones. As the examples of the postal laws or the history of the Western Union suggest, ensuring the existence of an "uninhibited, robust, and wide-open" public debate on public matters may sometimes require positive government action (and a great deal of it).[283] We might think that majoritarian institutions, like legislatures, are both more likely to compel action of that sort, and more legitimately authorized to do so than courts.[284]

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[281] David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2063 (2010).

[282] *Id.*

[283] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[284] The idea that the provision of positive rights is a legislative rather than judicial function is one the Court has articulated on a number of occasions. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 58–59 (1973); Lindsey v. Normet, 405 U.S. 56, 74 (1972).

And of course, although the federal courts are political creatures in their own right and, for this and other reasons, are influenced by changing public attitudes and beliefs, there is no question that legislatures are both more accessible and more responsive to the demands of social movement actors — and ordinary citizens — than are the federal courts.[285] A system of free expression that is more majoritarian consequently makes it easier for ordinary citizens to play a role in delimiting the meaning and scope of free speech rights. We might think this is a good thing, both because it democratizes the process of rights interpretation and because it forces members of the political community to take responsibility for ensuring that the democratic principles that our system of government is supposed to be organized around are in fact meaningfully realized.[286] It may encourage, in other words, that attitude of self-reliance that Justice Frankfurter — writing in strong opposition to the claims of judicial supremacy made by the *Barnette* majority — argued is the only reliable way of ensuring an enduring popular commitment to democratic values.[287]

There are also, however, obvious downsides to a system of free expression that, like our own, is partially majoritarian. For one thing, it grants politically motivated institutions a great deal of power *not* to protect important expressive interests when it serves their interests not to do so. More generally, it allows rights that we ordinarily think of as preconditions of democratic government — rights that the Court described in 1937 as "the matrix, the indispensable condition, of nearly every other form of freedom"[288] — to be controlled, not entirely but in very significant ways, by the democratic institutions they are supposed to both enable and constrain. The result is to make these crucial democratic rights much more vulnerable to the machinations of self-interested majorities, and to the popular biases that fuel them, than we would want in a first-best world.

Like it or loath it, the fact that majoritarian institutions possess in some cases exclusive power to protect — or *not* to protect — crucially important rights of speech and association as they see fit is not only a

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[285] *See* United States v. Grace, 461 U.S. 171, 183 (1983) ("Courts are not subject to lobbying, judges do not entertain visitors in their chambers for the purpose of urging that cases be resolved one way or another, and they do not and should not respond to parades, picketing, or pressure groups.").

[286] For a democratic argument in favor of a greater role for the political branches in the practice of constitutional interpretation, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1945–47 (2003).

[287] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 670–71 (1943) (Frankfurter, J., dissenting) ("Reliance for the most precious interests of civilization . . . must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.").

[288] Palko v. Connecticut, 302 U.S. 319, 327 (1937).

long-standing feature of the American system of free expression but also is not something that is likely to change anytime soon. Certainly, the Court has given no indication that it intends to constitutionalize private workers' right to freedom of speech, or the right of the public to information about their government, or any of the other speech rights that have thus far been left to legislatures and state courts to protect. And although, as I discuss in Part III, the Court has proven increasingly willing in recent years to construe the First Amendment ceiling as somewhat lower than it did in previous decades, it has shown no indication of any desire to deprive legislatures of the power they currently possess to regulate common carriers, protect workers against employer sanctions, require government actors to provide information to the public, or regulate speech in many of the other ways they currently do. What this means is that, both today and in all likelihood for the indefinite future as well, legal protection for speech and association will depend not just on the federal courts but also on a much more diverse array of governmental institutions — many of which are not embedded in the hierarchical relationships, or governed by the judicial principles, that help ensure some degree of ideological conformity among the federal courts.[289]

This leads us to the second important fact about the modern system of free expression that a focus solely on the First Amendment cases threatens to obscure: namely, that like other departmentalist systems of rights interpretation, it permits different institutions to conceive and operationalize the same right in very different ways.[290] Notwithstanding all the other changes that have occurred in the American system of free expression, legislatures, regulatory agencies, and state courts continue to possess today, just as they did in the eighteenth and nineteenth centuries, considerable power to protect the expressive and democratic freedom of members of the political community in ways that the First Amendment cases do not.

The result is a system of free expression that, notwithstanding the scope and power of the modern First Amendment, remains as — or even more — pluralistic in how it conceives freedom of speech and association as it was in the eighteenth and nineteenth centuries. Indeed, the diverse array of statutory, regulatory, and state constitutional laws that makes up the non–First Amendment law of freedom of speech not only applies very often to speech contexts in which the First Amendment does not, but also operates according to principles that are very different from those that structure the First Amendment cases.

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[289] *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 826–28 (1994) (describing the doctrine of "hierarchical precedent"); *see also* Strauss, *supra* note 270, at 46–47 (describing the constraints imposed on judges by the common law principles that continue to inform the process of constitutional interpretation in the federal courts).

[290] Pozen, *supra* note 281, at 2063.

In the next section, I examine some of these differences. What doing so makes clear is that, although the system of free expression as a whole looks remarkably different than it did a century ago, there continue to be, roughly speaking, two strands of discourse and practice that organize the allocation of speech rights in the United States: the first, a primarily libertarian strand of free speech law that gains its authority from the constitutional text; and the second, a nonconstitutional strand that is much less libertarian, and much more redistributive, in what it understands freedom of speech to mean and to require.

2. Differing Conceptions of the Right. — To get a sense of how different the principles that organize, and the normative views that motivate, the non–First Amendment and First Amendment bodies of free speech law can be, consider two bodies of closely parallel law: the first, the sizeable collection of local, state, and federal statutes that prohibit employers from firing, not hiring, and/or discriminating against workers because of their speech or expressive association canvassed in section I.C; the second, the First Amendment government employee speech cases.

These two bodies of law clearly protect many of the same interests. By preventing employers from using their economic power to coerce or chill their employees' speech, both protect workers' expressive and associational autonomy.[291] Both also protect, by proxy, the right of the public to hear what those workers wish to say, and thereby promote the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people" that the Court has declared it a central purpose of the First Amendment to guarantee.[292]

The two bodies of law protect these interests, however, in markedly different ways. The First Amendment cases, for their part, cast a wide net. They apply to any speech by a government worker that touches on matters of public concern — a category the Court has defined expansively to include all speech that "can 'be fairly considered as relating to any matter of political, social, or other concern to the community'" or that becomes "a subject of legitimate news interest" — so long as that speech was not made pursuant to the worker's job duties.[293] But they

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[291] Elrod v. Burns, 427 U.S. 347, 357 (1976) (noting that employment actions motivated by the employee's political speech or associations, "to the extent [they] compel[] or restrain[] belief and association, [are] inimical to the process which undergirds our system of government and [are] 'at war with the deeper traditions of democracy embodied in the First Amendment'" (quoting Ill. State Emps. Union v. Lewis, 473 F.2d 561, 576 (7th Cir. 1972))).

[292] Lane v. Franks, 573 U.S. 228, 236 (2014) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)); *see id.* at 235–36.

[293] Snyder v. Phelps, 562 U.S. 443, 453 (2011) (first quoting Connick v. Meyers, 461 U.S. 138, 146 (1983); and then quoting San Diego v. Roe, 543 U.S. 77, 83–84 (2004) (per curiam)); *see also* Garcetti v. Ceballos, 547 U.S. 410, 417, 421 (2006).

do not immunize all of the speech that falls into this category from employment sanctions. Instead, they extend constitutional protection to the employee's speech only when a court finds that the worker's interest in communicating that information to the public, and the public's interest in receiving it, outweighs whatever institutional reasons the employer had for sanctioning it.[294] In practice, the significant deference that courts show toward the institutional prerogatives of government employers means that employers are frequently permitted to discipline or fire workers who speak on matters of public concern because they fear the speech will threaten workplace comity or cast the government agency in a bad public light.[295]

In contrast, the non–First Amendment laws tend to protect a narrower range of speech and expressive conduct. Whistleblower laws, for example, typically protect employees against employment sanctions only for speech that reveals a violation of the law, a threat to public safety, or some other pressing public harm — and in some cases, only when that speech is uttered to the specified audience.[296] Other local and state laws protect only workers' political speech, or specified kinds of politically expressive acts, such as voting, or running for public office, or contributing to a political campaign.[297] State and federal labor laws, meanwhile, protect only worker speech that constitutes concerted activity — speech that encourages or otherwise enables workers to act together "for the purpose of collective bargaining or other mutual aid or protection."[298]

These laws tend to apply to a broader range of workplaces than the First Amendment cases, however. Many protect not just government workers but private-sector workers as well.[299] Others protect only private-sector workers, but in those cases, these laws are frequently

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294 Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) ("The problem in any [government employee speech] case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

295 *See* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 8–20 (2009) (documenting and criticizing the extent of deference extended to government employers by the government employee speech cases).

296 The NLRA, for example, prohibits employers from discharging or discriminating against employees who give testimony to the NLRB. 29 U.S.C. § 158(a)(4). The Civil Service Reform Act, meanwhile, makes it unlawful for federal government employers to discipline workers who disclose information they reasonably believe "evidences . . . violation of any law, rule, or regulation; or . . . gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(a)(2)(D). For detailed examination of the state laws, see generally Callahan & Dworkin, *supra* note 216.

297 *See infra* notes 302–305 and accompanying text.

298 29 U.S.C. § 157; *see, e.g.*, CAL. LAB. CODE § 1152 (West 2021); FLA. STAT. § 447.301(3) (2020); OHIO REV. CODE ANN. § 4117.03 (West 2021).

299 This is true of many of the local and state statutes that protect workers against employer sanctions motivated by their political speech. *See* Volokh, *supra* note 35, at 313–25.

matched with a complementary law that provides similar protection to government workers.[300]

Perhaps because they apply to a narrower range of speech acts, these laws also tend to provide much more unequivocal protection to the speech they do protect than the First Amendment cases do. Rather than balancing the rights of the worker against the interests of the employer, many absolutely prohibit employers from firing or otherwise disciplining workers for engaging in statutorily protected speech, even when they have a good institutional reason to do so. This is certainly true of the many whistleblower laws that provide virtually absolute protection to workers who disclose statutorily protected kinds of information in the right kind of way.[301] But it is also true of many of the laws that protect workers' political expression. In Louisiana, for example, a state court of appeals held that a corporation that fired an employee who chose to run for a seat on the city council violated the state law that made it a crime for any employer that regularly employed twenty or more employees to "make, adopt, or enforce any rule, regulation, or policy forbidding or preventing any of his employees from . . . becoming a candidate for public office"[302] even though the company had reason to fear that the "plaintiff's candidacy would antagonize persons who could withdraw business from plaintiff's employer."[303] Although the court found this to be a valid business justification for the firing, it concluded that the statutory text was clear: employers simply could not sanction workers in any way for their decision to run for public office.[304] Similarly unequivocal language can be found in dozens of other laws that make it unlawful for employers to fire or otherwise discriminate against workers for their political expression, broadly or narrowly construed.[305]

These differences in how the two regimes of speech protection operate can be explained by the different pragmatic judgments that the legislators and judges who fashioned them made when doing so, and by their different institutional roles. The fact that the First Amendment

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[300] In many states, for example, public-sector workers receive roughly parallel protection for their concerted activity and association under state law that private-sector workers receive under the NLRA and complementary state statutes. *See id.* Indeed, the language used in these laws frequently mirrors that in the NLRA. *See, e.g.*, *infra* note 343 and accompanying text.

[301] Callahan & Dworkin, *supra* note 216, at 119–23 (discussing the often-expansive judicial interpretation of these laws). Professors Elletta Sangrey Callahan and Terry Morehead Dworkin note that courts disagree about whether employees are protected when they mistakenly report that their employers engaged in the prohibited practices. *Id.* at 121–22. But as their article makes clear, the issue in these cases is always whether the statute applies, *not* whether the employees' right to speak outweighs the employer's right to prevent them.

[302] Davis v. La. Computing Corp., 394 So. 2d 678, 679 n.1 (La. Ct. App. 1981) (quoting LA. STAT. ANN. § 23:961 (2020)).

[303] *Id.* at 679.

[304] *Id.*

[305] *See, e.g.*, CAL. LAB. CODE § 1101 (West 2021); N.C. GEN. STAT. § 163-274 (2014); TENN. CODE ANN. § 2-19-134 (West 2021). *See generally* Volokh, *supra* note 35, at 299–301 (noting the sweeping reach of many of these laws).

cases apply a very open-ended standard to determine whether the worker's speech is protected, whereas many of the non–First Amendment laws apply something much closer to a rule, may reflect, for example, a difference of opinion about the institutional capacities of courts versus legislatures — and specifically, whether it is better to empower courts to determine the scope of protection for workers' speech ex post, on a case-by-case basis (as the First Amendment cases do), or for the legislature to establish a firmer, clearer, but inevitably narrower, rule in advance.

Similarly, the fact that many of the non–First Amendment laws protect the speech and association of private-sector workers, while the First Amendment cases do not, can be explained by the different kinds of power that the legislators and judges who crafted these laws exercised when they did so — and specifically, the fact that the First Amendment cases exercise a power that has been interpreted to constrain only government actors, whereas the non–First Amendment laws rely upon instruments of legal power (state police power or the Federal Commerce Clause) that have not been found to be so limited in their reach.[306]

Some of the other differences in how these two regimes of speech protection operate do reflect, however, a difference of opinion about the relative value that different kinds of speech possess and, more generally, about the scope of the government's responsibility in a democratic society to protect the expressive autonomy of its citizens and subjects. Consider for example the choice that so many local and state legislatures have made to extend statutory protection only to employees' explicitly political speech. Because there is no reason to think that speech of this kind poses any less of a threat to employers' institutional interests than any other kind of speech — indeed, the Louisiana case discussed above suggests how damaging employees' public political activities can sometimes be to the interests of their employers[307] — the choice to protect, but to protect only, political speech appears to reflect an implicit legislative judgment that this kind of speech is more valuable than other kinds of speech. One might in fact interpret the narrower but stronger protection that many of these laws provide to workers' political expression to reflect the view that this kind of expression is so important to democratic government that it is better to concentrate all regulatory and enforcement resources on its protection than to dilute these resources by providing weaker protection to a much wider range of speech, as the First Amendment cases do.

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[306] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (recognizing the Commerce Clause as a broad constraint on private action); The Civil Rights Cases, 109 U.S. 3 (1883) (recognizing that states possess broad power to police the actions of private persons).

[307] In the Louisiana case, the employer credibly believed that its employee's decision to run against a member of the city council might endanger its relationship with the government agency that provided it sixty percent of its business. *Davis*, 394 So. 2d at 679.

Either way, it is difficult to interpret these laws as anything but an implicit repudiation of what has emerged as one of the most distinctive, if controversial, organizing principles of the modern First Amendment cases. This is the principle that all speech that touches on matters of public concern possesses equal constitutional value, even when it discusses seemingly unimportant topics (celebrity gossip, sports, popular music, poetry), because anything that is of interest to the public has the ability to influence public attitudes and beliefs and therefore contributes to the process of democratic self-fashioning that the First Amendment protects from government control.[308] Professor Robert Bork famously argued that the Court's insistence on extending equal amounts of constitutional protection to overtly nonpolitical and explicitly political speech reflected a ridiculously broad conception of the First Amendment's democratic purposes and that constitutional protection should instead extend only to speech that explicitly addresses public policy or other governmental matters.[309] This argument never convinced the Court, which continued to insist long after Bork made his argument that "speech concerning public affairs is more than self-expression; it is the essence of self-government."[310] But it is the view that legislatures in Arizona, California, Guam, Kentucky, Louisiana, Minnesota, Urbana-Champaign, Wyoming, and many other states and localities appear to hold. Certainly, what legislators in these jurisdictions have produced is a regime of speech protection that in practice values explicitly political speech more than other kinds, and that makes as a result the kinds of subject-matter distinctions — in particular, the distinction between political and nonpolitical speech — that the Court in its First Amendment cases has long disavowed.

A similar story can be told about the various state and federal labor laws that protect the right of private-sector workers to collectively organize at work. In this case also, the legislative decision to extend protection to certain kinds of speech — in particular, the decision to protect the right of workers to speak as they desire during collective bargaining or other acts of collective organizing — reflects a very different view of what kinds of speech possess democratic value than the view that informs the First Amendment cases.

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[308] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011) ("The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try."); *see also* United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 818 (2000); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Winters v. New York, 333 U.S. 507, 510 (1948).

[309] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20–31 (1971).

[310] Snyder v. Phelps, 562 U.S. 443, 452 (2011) (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

Specifically, it reflects the view that guaranteeing the democratic nature of the American state and society requires not only that members of the political community have a say in the rules that govern society writ large, but also that they have a say in the rules that govern their private working lives. As I noted in Part I, this was an idea of democracy that labor groups like the Knights of Labor and the AFL strenuously advocated for in the late nineteenth and early twentieth centuries.[311] It was also an idea of democracy that shaped how early twentieth-century labor laws like the NLRA were structured and that supporters invoked to justify their necessity.[312]

But it is not an idea of democracy that the Court ever endorsed. Although in *Jones & Laughlin* the Court recognized that workers have a fundamental right to collectively organize and engage in other acts of "mutual protection" at work, it never suggested that this right was democratically significant.[313] And certainly, in its government employee speech cases, the Court has interpreted the democratic significance of employee speech to be *solely* its capacity to inform the public about public matters.[314] This is the reason it has denied protection to employees who are disciplined for speech that affects purely internal workplace matters, no matter how important that speech may be to the negotiation of the relationship between employer and employee.[315]

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311 *See supra* note 210 and accompanying text.

312 For discussion of the role that ideals of industrial democracy played in legislative debates about the NLRA and other early twentieth-century labor laws, see Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 284–93 (1978); and Ruth Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556, 562 (1945).

313 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937). In that decision, the Court did acknowledge that guaranteeing the right of workers to collectively organize was necessary to protect their autonomy in the workplace. *See id.* But the argument it made for why worker autonomy mattered concerned economic necessity, not democratic legitimacy; it sounded in the register of freedom of contract rather than freedom of speech. *Id.* (explaining that labor unions were "organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family").

314 *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 674 (1994) (explaining that the First Amendment "play[s a] role in government employment decisions [because] . . . public debate may gain much from the[] informed opinions [of government employees a]nd a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters" (citation omitted)).

315 Connick v. Myers, 461 U.S. 138, 146 (1983) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary . . . ."); Smith v. Ark. State Highway Emps., Loc. 1315, 441 U.S. 463, 464 (1979) (per curiam) ("[T]he First Amendment is not a substitute for the national labor relations laws. . . . [T]he fact that procedures followed by a public employer in bypassing the union and dealing directly with its members might well be unfair labor practices were federal statutory law applicable hardly establishes that such procedures violate the Constitution.").

The result is a marked difference in the scope of protection provided to worker speech by the First Amendment and by state and federal labor laws like the NLRA. Although labor speech does sometimes enjoy First Amendment protection, it does so only when courts find it addresses matters of public concern.[316] In contrast, state and federal labor laws provide workplace speech significant protection even when it deals with only internal workplace matters. The NLRB has concluded, for example, that workers can be disciplined for speech they utter while engaged in concerted activity only when it is so "flagrant, violent, or extreme" that it reveals the employee to be "unfit for further service," because to allow employers to freely sanction workers engaged in acts of collective advocacy would undermine the fundamental equality between workers and employers that the labor laws are supposed to guarantee.[317] The old idea of industrial democracy continues to live on, in other words, in the everyday regulation of workplace speech under the NLRA; but it does not inform, and never has informed, how the courts conceive the First Amendment's democratic purposes.

As these examples demonstrate, once one begins to look at the non–First Amendment laws of freedom of speech, what one finds are all kinds of differences from the First Amendment cases in the assumptions they make and, consequently, the scope and nature of the legal protection they provide. The worker speech protection laws are not, in this respect, at all unique. Although it is impossible to say anything general about *all* of the laws that protect First Amendment interests by non–First Amendment means, there are at least three very significant ways in which many of these laws differ in their operation from the First Amendment cases — differences that in turn point to underlying differences in what lawmakers understand freedom of speech in a democratic society to require.

(a) Freedom of Speech in the Private Sphere. — First, as should be quite obvious by now, many of the non–First Amendment laws that protect the right of the public to access uncensored "channels of communication,"[318] or that protect the right of speakers to take part in "free political discussion,"[319] protect those rights against private as well as, or instead of, state action. Not only the worker speech protection laws

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316 Harris v. Quinn, 573 U.S. 616, 636 (2014) (concluding that the speech involved in public-sector collective bargaining touches on matters of public concern, whereas the speech involved in private-sector collective bargaining does not because "[i]n the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector").

317 United Cable Television Corp., 299 N.L.R.B. 138, 142 (1990); *see also, e.g.*, Am. Red Cross Blood Servs., 316 N.L.R.B. 783, 787–88 (1995); Hawaiian Hauling Serv., Ltd., 219 N.L.R.B. 765, 766 (1975).

318 Marsh v. Alabama, 326 U.S. 501, 507 (1946).

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

discussed earlier, but also the common carrier and quasi–common carrier laws, the many "anti-SLAPP" laws that protect freedom of speech against vexatious private litigation, education laws like California's Leonard Law,[320] the various state constitutional free expression guarantees that have been interpreted to grant speakers rights against private actors — all these laws, and many like them, protect freedom of speech and association in the private sphere.[321]

As I noted in the previous section, the fact that these non–First Amendment free speech laws protect against private action, whereas the First Amendment cases almost never do, does not *necessarily* tell us anything about how the different lawmakers responsible for fashioning them conceived the right to freedom of speech. Instead, it may reveal only what they understood to be the nature and scope of their legal authority.

It might, however, reveal more than that. This is because, in recent years, the Court has suggested that the strict state action requirement it applies in First Amendment cases should not be thought of merely as an external limit on the First Amendment's reach; that it is instead an important mechanism by which the First Amendment safeguards freedom of speech. The Court recently argued as much, for example, to explain why a nonprofit corporation that had been set up by the local government to operate the public access channel that state law required cable companies to provide could not be considered a state actor for First Amendment purposes, even though it not only performed a government-mandated service but was also prevented by state law from exercising any editorial discretion when it did so.[322] Maintaining a strict boundary between state and private actors, the Court asserted, was necessary to preserve the existence of a "robust sphere of individual liberty" in which private persons are free to make expressive choices for themselves.[323] Imposing constitutional duties on private actors like the nonprofit corporation, the Court warned, would result in a less vibrant marketplace of ideas by depriving private property owners of the ability "to exercise what they deem to be appropriate editorial discretion" over the property that they own.[324]

First Amendment scholars have made similar arguments to defend the current version of the state action doctrine. Professor Frederick Schauer, for example, has described the state action requirement as

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320 CAL. EDUC. CODE § 94367 (West 2020).

321 *See supra* notes 229–233 and accompanying text.

322 *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019).

323 *Id.* at 1928.

324 *Id.* at 1931; *see id.* at 1930–31.

"[t]he touchstone of the negative theory of the [F]irst [A]mendment."[325] "[B]y establishing limits on the reach of [the] constitutional prohibitions," Schauer argues, the requirement "leaves private persons free to 'discriminate' against the speech and speech-related activities of others in ways that are forbidden to the government."[326] This is vitally important, he claims, because it is by means of this kind of private content discrimination that the marketplace of ideas functions to sort the good ideas from the bad.[327] By ensuring that private persons are free to "prefer[] some ideas and information to others" and to "plac[e their] property at the service of some ideologies and not others,"[328] Schauer argues, the state action requirement "protect[s] an element of [F]irst [A]mendment freedom [that is] as important as the right to speak."[329]

This view of the state action doctrine's function is very difficult to reconcile with the Court's willingness to permit local, state, and federal legislatures to intrude as greatly as they do on the "individual sphere of liberty" that the state action doctrine is purported to protect.[330] But even if it is a view of freedom of speech that motivates the First Amendment state action decisions, it is certainly not a view of freedom of speech that motivates the many non–First Amendment laws of freedom of speech that protect speech and associational freedom against private action. As Part I makes clear, these laws instead reflect the view that legal restrictions on the freedom of private persons to "prefer[] some ideas and information to others" are not always a threat to the vibrancy of the marketplace of ideas but, to the contrary, can provide an important means of safeguarding it in a context in which private actors possess significant power not just to disseminate their own message but also to control the messages that others disseminate.

The result is what can be described without much overstatement as a radically different geography of speech protection than the one the First Amendment cases create: one that not only penetrates much further into the private sphere than the First Amendment ever has but that also, consequently, distinguishes between those who possess speech rights and those who possess speech-facilitating duties not by making the blunt, formal distinction between state and private actors that the First Amendment cases make but by making more fine-grained and functional distinctions by distinguishing between, for example, private

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325 Frederick F. Schauer, Hudgens v. N.L.R.B. *and the Problem of State Action in First Amendment Adjudication*, 61 MINN. L. REV. 433, 443 (1977).

326 *Id.*

327 *Id.* at 449.

328 *Id.*

329 *Id.* at 451.

330 For a more extended version of this argument, see Genevieve Lakier, Manhattan Community Access Corp. v. Halleck: *Property Wins Out over Speech on the Supposedly Free-Speech Court*, 2018–2019 AM. CONST. SOC'Y SUP. CT. REV. 125, https://www.acslaw.org/wp-content/uploads/2019/10/ACS-Supreme-Court-Review-2018-2019.pdf [https://perma.cc/67L6-FMYU].

employers and private employees, private school administrators and students, private radio broadcasters and political candidates, and the like. And the result of that is a body of law that also continues to be, just as it was in the eighteenth and nineteenth centuries, much more redistributive in its conception of freedom of speech than the First Amendment cases are, both when it comes to the duties it imposes on government actors and when it comes to the duties it imposes on private actors in the name of freedom of speech.

(b) A Redistributive Notion of Freedom of Speech. — For over four decades now, the Court has insisted that the "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[331] It has construed the First Amendment, in other words, to never require, and to only rarely permit, laws that attempt to equalize expressive opportunity. Laws that constrain the expressive freedom of particularly powerful speakers, so that less powerful speakers can be heard, the Court has argued, are anathema to the First Amendment, which was "designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources'" and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people" — to increase speech, in other words, not limit it.[332]

Even when it comes to government actors, the Court has largely resisted the idea that the First Amendment requires limiting their expressive freedom in order to "enhance the relative voice of others." This explains, among other things, the Court's conclusion that government employees lack any First Amendment protection for speech they utter pursuant to their job duties, even when that speech touches on matters of public concern.[333] Because speech government employees utter pursuant to their job duties is speech the government paid them to produce, a contrary conclusion would interfere with the government's ability to control its own property — and by proxy, the message it sends to the public.[334] "[W]hen the government appropriates public funds to promote a particular policy of its own," the Court noted in *Garcetti v. Ceballos*[335] in 2006, "it is entitled to say what it wishes."[336]

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331 Buckley v. Valeo, 424 U.S. 1, 48–49 (1976). The Court first stated as much in *Buckley*, but has repeated the claim on many occasions since. *See, e.g.*, McCutcheon v. FEC, 572 U.S. 185, 207 (2014); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 741 (2011).

332 *Buckley*, 424 U.S. at 49 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266, 269 (1964)).

333 Garcetti v. Ceballos, 547 U.S. 410, 426 (2006).

334 *Id.* at 421–22.

335 547 U.S. 410.

336 *Id.* at 422 (quoting Rosenberger v. Rector, 515 U.S. 819, 833 (1995) (alteration in original)); *see also* Norton, *supra* note 295, at 12 ("[*Garcetti*] created a bright-line rule that treats public employees' speech delivered pursuant to their official duties as the government's own speech — that

The Court's hostility to laws that attempt to equalize expressive opportunity has produced a very antiredistributive body of First Amendment law. Although the Court has interpreted the First Amendment in some circumstances to require that the government grant access to its property to speakers and viewpoints it dislikes, it has strictly circumscribed the class of cases in which the government is prevented from placing its property at the service of some ideologies and not others.[337] Private persons, meanwhile, are virtually never required by current First Amendment rules to grant the use of their property to speakers or viewpoints they dislike, or to otherwise facilitate the speech of others.[338] They also enjoy full constitutional protection when they use their voice to coerce or threaten others into speaking or not speaking a particular way, so long as they do not do so by seriously threatening "to commit an act of unlawful violence."[339]

This antiredistributive view of the freedom of speech guaranteed by the First Amendment stands in sharp contrast to the view of freedom of speech implicit in many of the non–First Amendment free speech laws. Consider once again the many local, state, and federal laws that protect private-sector workers' freedom of speech. *All* of these laws interfere with the ability of private persons to place their property at the service of some ideologies but not others by limiting their ability to discipline, fire, or not hire the workers whose wages they are paying, or will in the future pay. And some of these laws impose much greater constraints on employers' property rights. The NLRA, for example, requires employers to allow employees the use of their property for organizing purposes while not at work, and to grant some degree of access to nonemployee union organizers as well, although how much access has proved to be,

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is, speech that the government has bought with a salary and thus may control free from First Amendment scrutiny.").

337 The only class of cases in which the government is required to allow speakers onto its property are those involving "quintessential" public forums that have historically been used for expressive purposes — parks, roads, sidewalks. *See* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45–46 (1983). If the government chooses to open its property up to speech, it may not also exclude speakers because of their viewpoints, but it may establish reasonable limits on the kinds of speakers who may speak and the subjects they may speak about. *Id.* at 46. With respect to all other kinds of government property, the First Amendment treats government owners more or less like private owners, with full power to exclude. *See id.*

338 Only if a private property owner is found to exercise a function "traditionally exclusively reserved to the State," Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974)), or if it is effectively controlled by government agencies or peopled by government officials operating in their official capacity, *see, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 290–91 (2001), may it be required to open its property to outside speakers. The class of cases in which these standards are met is likely to be exceedingly small. *See generally* Lakier, *supra* note 330.

339 Virginia v. Black, 538 U.S. 343, 359–60 (2003) (defining the category of threats that may constitutionally be prohibited because of their content).

and remains, a highly contested question.[340] The California Agricultural Relations Act[341] (CARA) similarly requires agricultural employers to allow union representatives onto their property for the purpose of meeting and talking with employees 120 days out of every calendar year.[342]

Nor is it only property rights that these laws redistribute. Many of these laws also redistribute expressive opportunity by imposing sometimes very significant content-based constraints on what employers may say to their employees, in order to ensure that workers feel free to speak as they wish. Both the NLRA and the CARA, for example, make it unlawful for employers to tell workers that if they vote to join a union they will suffer economic repercussions, unless the employer has information that these repercussions are a "demonstrably probable consequence[] beyond [the employer's] control."[343] Employers also may not "denigrate the Union" or "threaten[] employees that they might lose their jobs if they [go] on strike" or engage in similar kinds of anti-union speech.[344] Similar restrictions are imposed on public employers by many state labor laws.[345]

Meanwhile, private as well as public employers are prohibited in many states from engaging in speech that has a coercive effect on their workers' political expression. In California, for example, neither public nor private employers may "attempt to coerce or influence . . . employees . . . by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."[346] In more than a dozen states, meanwhile, employers are prohibited from "exhibit[ing] in the [workplace] any handbill or placard containing any threat, notice, or information that if any particular candidate is elected or defeated, work in the establishment will cease in whole or in part,"[347] or from making

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[340] *See* Cynthia L. Estlund, *Labor, Property, and Sovereignty After* Lechmere, 46 STAN. L. REV. 305, 306–07 (1994). For recent developments, see Bexar Cnty. Performing Arts Ctr. Found., 368 N.L.R.B. 46 (2019); and MCNICHOLAS, POYDOCK & RHINEHART, *supra* note 228, at 5–10.

[341] CAL. CODE REGS. tit. 8, § 20900 (2021).

[342] *Id*. The Ninth Circuit recently rejected a takings challenge to this requirement. Cedar Point Nursery v. Shiroma, 923 F.3d 524, 533 (9th Cir. 2019), *cert. granted sub nom.* Cedar Point Nursery v. Hassid, 141 S. Ct. 844 (2020); *id.* at 538 (Leavy, J., dissenting).

[343] NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969); *see also* Merrill Farms v. Agric. Lab. Rels. Bd., 169 Cal. Rptr. 774, 777 (Ct. App. 1980).

[344] Ingredion, Inc., 366 N.L.R.B. 74 (2018); *see also* Harry Carian Sales v. Agric. Lab. Rels. Bd., 703 P.2d 27, 49 (Cal. 1985).

[345] *See, e.g.*, CAL. GOV'T CODE § 3506.5 (West 2021); DEL. CODE ANN. tit. 19, § 1307 (West 2021); N.Y. CIV. SERV. LAW § 209-a (McKinney 2020); OHIO REV. CODE ANN. § 4117.11 (West 2021).

[346] CAL. LAB. CODE § 1102 (West 2021).

[347] 25 PA. STAT. AND CONS. STAT. ANN. § 3547 (West 2021).

any "other threats expressed or implied, intended to influence the political opinions or votes of [their] employees."[348] The result is dozens upon dozens of laws that restrict the speech of some in order to enhance the speech of others.

These are by no means the only non–First Amendment free speech laws that operate in this way to redistribute expressive opportunity. The same is true of the common carrier and quasi–common carrier laws, and many of the other laws discussed in the previous Part.

This is not to say that non–First Amendment free speech laws always operate in a redistributive manner. Sometimes they do just the opposite. This is true, for example, of § 230 of the Communications Decency Act of 1996,[349] which works to promote freedom of speech on social media platforms by immunizing the powerful companies that control them from civil liability for their decision to keep speech on the platform or take it down.[350] The result is to reinforce the power that the social media companies already possess over those who use the platform to speak. It is nevertheless true that the redistribution of property and speech rights from some (private or government persons) to other private persons is a regular — even, one might say, a pervasive — characteristic of the non–First Amendment body of free speech law.

This fact reflects the very different presumptions that tend to motivate this body of law, when compared to the First Amendment cases. The modern First Amendment cases clearly presume that laws that mandate the redistribution of expressive opportunities not only are not required by, but actively endanger, the democratic and expressive freedom that the First Amendment protects. The redistributive non–First Amendment laws, in contrast, reflect the view that in some circumstances — in particular, when the existing regime of property rights and modes of economic production imperil the robust and inclusive public debate that democratic government depends on — the redistribution of both speech and property rights is in fact necessary to vindicate both expressive and democratic liberty.

Whether First Amendment law should also operate according to these presumptions has been a vigorous topic of debate among scholars for decades now.[351] Proponents of a more redistributive First Amendment have made little headway with the Court, however. But, as the history in Part I makes clear, the belief in the necessity of speech

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[348] Volokh, *supra* note 35, at 318 n.103; *see id.* at 334–37 (listing states).

[349] 47 U.S.C § 230.

[350] *Id.*

[351] *See, e.g.*, OWEN FISS, LIBERALISM DIVIDED (1996); Burt Neuborne, *Blues for the Left Hand: A Critique of Cass Sunstein's* Democracy and the Problem of Free Speech, 62 U. CHI. L. REV. 423, 425–26 (1995); Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CALIF. L. REV. 267, 278–79 (1991).

redistribution *has always motivated* the non–First Amendment free speech tradition, and continues to motivate its expansion today. The result is a rich body of nonconstitutional law that, although it attempts to protect many of the same interests that the First Amendment cases protect, frequently does so by means that are "wholly foreign to the First Amendment,"[352] as it is currently understood.

(c) Content- and Speaker-Based Discrimination. — Finally, perhaps because they do require so much more of the private persons who are the targets of their regulation, many of the laws described above tend to draw much finer distinctions between protected and unprotected speech than the First Amendment cases draw. It is not only the worker speech protection laws that apply to a much narrower range of speech than the First Amendment cases apply to. The same is true of virtually all the quasi–common carrier laws discussed in section I.B. Often, these laws require regulators to draw in fact rather minute distinctions between different kinds of speech acts to determine whether they fall within the statute's protection.

Consider once again § 315 of the Communications Act. The law, recall, requires radio and television broadcasters to provide equal opportunities for the "use" of their station to all "legally qualified candidate[s] for any public office" but not to anyone else.[353] In 1952, its reach was also limited, so that today it does not apply to "bona fide newscast[s]" or "bona fide news interview[s]" or "bona fide news documentar[ies] (if [but only if] the appearance of the candidate is incidental to the . . . subjects covered by the news documentary)."[354] As should be apparent from just reading the statutory text, the law requires regulators to make all kinds of content- and speaker-based distinctions when applying it. Regulators have to decide who counts as a legally qualified candidate for public office, what counts as a use, and what it means for a news interview to be "bona fide." The FCC has exercised that authority to decree (among other things) that the airing of a Hollywood movie in which a candidate for public office appears triggers the equal opportunities provision, as does the broadcast of a drawing of her face.[355] But an interview on the morning talk show "The Today Show" does not, although an interview on the evening talk show "The Tonight Show" does.[356]

Examples of this kind could be multiplied. But the point is plain: because in a redistributive regime of speech regulation, it is often not possible or politically feasible for speech or access rights that apply to

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[352] Buckley v. Valeo, 424 U.S. 1, 49 (1976).
[353] 47 U.S.C. § 315(a).
[354] *Id.*
[355] Primer on Pol. Broad., 100 F.C.C.2d 1476, 1491–92 (1984).
[356] *Id.* at 1494–95.

some group of speakers to apply to all, the many non–First Amendment free speech laws that require this kind of redistribution frequently make the kinds of subject-matter and speaker-based distinctions that the Court has insisted in recent years should be considered presumptively unconstitutional under the First Amendment.[357] They grant government regulators, in other words, significant power to "disfavor certain subjects or viewpoints" and "distinguish[] among different speakers, allowing speech by some but not others."[358]

Again, not all of the non–First Amendment free speech laws discussed above make these kinds of content and/or speaker distinctions. The Connecticut Free Speech Act, for example, applies just as broadly as the First Amendment does — in fact more broadly.[359] The same is true of the Leonard Law.[360] Meanwhile, state and federal common carrier laws extend protection to *almost* as much speech as the First Amendment does.[361]

But many of the laws discussed above do restrict the scope of their application by making distinctions based on the identity of the speaker, or the subject matter of the speech. Although almost none of these laws rely upon viewpoint distinctions to delimit the scope of their application, all clearly reflect the view that certain kinds of speech and/or certain kinds of speakers are more entitled to legal protection than others are, because of their importance to democratic government or to the operation of the democratic public sphere.

In this respect, as well, what we find when we look at the non–First Amendment body of free speech law is a very different view of what freedom of speech in a democratic society means and requires: one that is much less committed to the principles of content- and value-neutrality than the First Amendment cases are. What we find, in other words, is not just another body of free speech law, but a meaningfully distinct — in some ways startlingly foreign — free speech tradition.

III. Reconciling the Two Traditions

The fact that great swaths of non–First Amendment free speech law (1) protect speech rights that the First Amendment cases do not, (2) by making the kinds of content-based and speaker-based distinctions, and (3) engaging in the kinds of speech redistribution that the First

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357 *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 163–64, 170 (2015).

358 Citizens United v. FEC, 558 U.S. 310, 340 (2010).

359 *See* sources cited *supra* notes 221–223 and accompanying text.

360 Eule & Varat, *supra* note 9, at 1593–94 (noting that the law provides more protection to student speech than the First Amendment school-speech cases do).

361 Although the general presumption that courts apply when they interpret these laws is that content-based discrimination by common carriers is impermissible, courts have permitted common carriers to refuse to transmit sexually salacious speech and other kinds of "smut," even though this kind of speech is constitutionally protected. *See, e.g.*, Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1293–94 (9th Cir. 1987).

Amendment cases disavow makes evident how pluralistic the American system of free expression is and has always been. This pluralism has implications not only for how we think about free speech in the United States, but also for how we think about the First Amendment.

This is because, as I noted in the previous Part, however "wholly foreign" to the principles of the contemporary First Amendment many of the non–First Amendment free speech laws appear to be, their continued force depends on the actions the Court has taken, or failed to take, in its capacity as the ultimate arbiter of constitutional meaning. The Court has, in other words, made it possible for the interventionist and often redistributive non–First Amendment free speech tradition to continue to exist — and in some respects, to grow and prosper — notwithstanding the increasingly libertarian and antiredistributive view of freedom of speech the Court has adopted in its First Amendment cases.

It has not always done so easily. In fact, the Court has struggled a great deal to come up with explanations for why the laissez-faire principles that govern its interpretation of the First Amendment do not automatically invalidate the many, sometimes very significant, redistributive laws that populate the regulatory landscape. And the explanations it has come up with are far from satisfying.

Consider, for example, the argument the Court has made to explain why the quasi–common carrier obligations that the Communications Act imposes on radio and television broadcasters are constitutionally permissible. In a series of cases, it has argued that these regulations are permissible, notwithstanding the constraints they impose on the expressive freedom of radio and television broadcasters, because they regulate the use of a communications technology — namely broadcast radio (and by implication, broadcast television) — that is uniquely scarce. In theory, every person in the United States could publish their own newspaper. But the physics of the radio spectrum mean that not everyone can control a dedicated frequency. The fact that "radio inherently is not available to all" led the Court to conclude, in *NBC v. United States*[362] in 1943, that, "unlike other modes of expression, it [could be] subject to governmental regulation" and to uphold on that basis FCC regulations that, among other things, restricted the ability of radio broadcasters to contractually agree to provide exclusive content from only one network.[363]

Two decades later, in *Red Lion v. FCC*, the Court again argued that it was because radio was a uniquely scarce technology of communication

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[362] Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943).
[363] *Id.* at 226.

that the significant constraints the fairness doctrine imposed on the editorial autonomy of radio broadcasters were constitutional.[364] Because "only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had," the Court argued, "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[365] In the face of spectrum scarcity, the Court insisted, the ordinary, antiredistributive First Amendment rules must give way.

As numerous scholars have pointed out, the arguments the Court made in these cases for the constitutional specialness of radio and television broadcasting are completely unconvincing — even perhaps embarrassing.[366] It may have been true historically, and may also be true today, that significantly more people wish to obtain federal broadcast licenses than there are broadcast licenses available, but the same is also true of many other mass media technologies. Printing presses may be more plentiful than individual radio frequencies, but market conditions can't support all the newspapers people may want to operate.[367] The same is true of books, internet platforms, and all other commodified technologies of communication. Scarcity, one might say, is a pervasive condition of the market.[368] It is not, therefore, a meaningful basis on which to justify regulating radio any differently than any other communication technology.

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364 Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388–89 (1969).

365 *Id.* at 388.

366 *See* LEE C. BOLLINGER, IMAGES OF A FREE PRESS 89 (1991) (noting that "there is a devastating — even embarrassing — deficiency in [the *Red Lion*] analysis"); Thomas W. Hazlett, Sarah Oh & Drew Clark, *The Overly Active Corpse of* Red Lion, 9 NW. J. TECH. & INTELL. PROP. 51, 51 (2010) ("The logic of *Red Lion* . . . has been widely acknowledged as fatally flawed for a generation."); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 271 (2003) (criticizing the lack of "analytical coherence" of the scarcity argument).

367 It is also true, as Professor Thomas Hazlett, Sarah Oh, and Drew Clark note, that there is "literally no limit to the number of 'broadcast frequencies' [that may be created by] the creation of joint ownership interests in a license." Hazlett et al., *supra* note 366, at 54–55.

368 As Ronald Coase noted in 1959:

> [I]t is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor, and capital are all scarce, but this, of itself, does not call for government regulation.

Coase, *supra* note 97, at 14. In fact, in 1969, when *Red Lion* was decided, radio stations were a good deal *less* scarce than viable newspaper businesses. Brief for Petitioners at 35, *Red Lion*, 395 U.S. 367 (No. 717) (reporting census findings that as of 1967, there were "6253 commercial radio and television stations in the United States, compared to only 1754 daily newspapers, a ratio of better than 3½ to 1").

The Court itself has acknowledged as much, more or less. In *FCC v. League of Women Voters*,[369] it noted that the "prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years."[370] The Court nevertheless declined to "reconsider [its] longstanding approach without some signal from Congress or the FCC that . . . some revision of the system of broadcast regulation may be required."[371] Unable to come up with a more convincing justification for why the constitutional rules that apply to laws that regulate radio and television broadcasting are different than those that apply to newspapers and books — and clearly unwilling to deny Congress and the FCC the power to regulate broadcasting in the ways they had traditionally done so — the Court continued to cling to an argument that even its members appeared to find outdated.[372] The scarcity argument remains, consequently, one of the primary doctrinal justifications for the quasi–common carrier requirements imposed on broadcasters by laws like the Communications Act, even though it has no grounding in empirical reality. Nor is it unique in this respect.

In *Turner Broadcasting System, Inc. v. FCC*,[373] the Court made a similarly technology-specific, and similarly unpersuasive, argument to explain why the provisions in the Cable Television Consumer Protection and Competition Act[374] that required cable television providers to devote a certain number of their channels to the retransmission of local broadcast television programming were constitutionally permissible.[375] The Court argued that the so-called "must-carry provisions" were constitutional, even though they clearly interfered with the editorial autonomy of private cable companies, because the physical characteristics of cable television — specifically, the fact that it was transmitted via a cable that the cable provider owned and controlled — gave cable providers a power that other media companies did not possess.[376] The fact that cable companies controlled the cable that their customers used to watch not only their programming but also the programming of their competitors, the Court asserted, meant that "cable operator[s], unlike

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[369] 468 U.S. 364 (1984).

[370] *Id.* at 376 n.11.

[371] *Id.* at 377 n.11.

[372] Six years after *League of Women Voters*, the Court again relied upon the scarcity rationale to justify broadcast regulation. Metro Broad., Inc. v. FCC, 497 U.S. 547, 566–67 (1990) ("We have long recognized that '[b]ecause of the scarcity of [electromagnetic] frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.'" (alterations in original) (quoting *Red Lion*, 395 U.S. at 390)).

[373] 520 U.S. 180 (1997).

[374] Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified as amended in scattered sections of 47 U.S.C.).

[375] *Turner*, 520 U.S. at 185 (upholding the provisions); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 657 (1994) (determining the standard of review).

[376] *Turner*, 520 U.S. at 185.

speakers in other media, can . . . silence the voice of competing speakers with a mere flick of the switch."[377] This permitted the government, the Court concluded, to take steps to prevent the "potential . . . abuse of this private power over a central avenue of communication" — steps that would not be permissible if applied to other kinds of mass media.[378]

Although on its face more plausible than the scarcity argument the Court made in *NBC* and *Red Lion*, the *Turner* argument is, ultimately, equally unconvincing. As Ronald Adelman points out, although it is true that at one point in time cable companies did possess significant control over the broadcast television content that entered their consumers' homes, this was not a consequence of the physical characteristics of the technology they provided.[379] Instead, it was a product of the pro-monopoly policies that many municipalities adopted in the early years of the cable industry — policies, moreover, that, by the early 1990s, were increasingly a thing of the past.[380] By the time the Court decided *Turner*, there was no reason to presume that cable companies possessed any more gatekeeping power over the media that flowed into their consumers' homes than did newspapers or any other mass media companies that operate in highly concentrated markets. And there is certainly very little basis for thinking so today, in a world of streaming, satellite communication, and the iPhone.

In other regulatory contexts, the Court has made similarly unsatisfying arguments to justify redistributive speech laws while maintaining, in principle, its commitment to an antiredistributive view of the First Amendment. In *Hudgens v. NLRB*, for example, the Court denied the possibility that the First Amendment might require a private mall owner to permit a union that wanted to picket a store in the mall access to his property.[381] The Court insisted that to read a right of access into the First Amendment in these circumstances would impose too great a burden on the property rights, and expressive freedom, of mall owners.[382] But it remanded the case to the NLRB to decide whether the NLRA granted the union picketers a right of access, without explaining why a statutory right of access posed any less of a threat to the speech and property rights of mall owners than a constitutional right of access.[383]

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377 *Turner*, 512 U.S. at 656.

378 *Id.* at 657.

379 *See* Ronald W. Adelman, Essay, Turner Broadcasting *and the Bottleneck Analogy: Are Cable Television Operators Gatekeepers of Speech?*, 49 SMU L. REV. 1549, 1550–51 (1996).

380 *Id.* at 1550.

381 Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976).

382 *Id.*

383 *Id.* at 523. The only explanation the Court provided was that "[t]he task of the [NLRB] and the reviewing courts under the [NLRA]" is very different than "the duty of a court in applying the standards of the First Amendment." *Id.* at 521. This distinction may be true but does not explain

The Court simply insisted that the NLRB was better positioned than the federal courts to resolve the conflict between the mall owner's private property rights and the associational rights of workers.[384]

A few years later, in *PruneYard Shopping Center v. Robins*, the Court concluded that, although the First Amendment did not grant speakers any rights of access to a privately owned mall, the California Constitution could grant speakers a right of access without violating the First Amendment.[385] The mall owner's First Amendment rights were not threatened by the grant of access, the Court explained, because, given the facts of the case — specifically, the fact that the mall was a "business establishment that [was] open to the public to come and go as they please" — the owner was not likely to be associated with the message the speakers communicated and, in any event, could easily "disavow any connection with the message [the protestors communicated] by simply posting signs in the area where the speakers . . . stand."[386] The Court did not explain, however, how this conclusion was consistent with its conclusion, just a few years earlier, that because the First Amendment protected "both the right to speak freely and the right to refrain from speaking at all," private persons could not be required to carry messages they disliked on their property, even if those messages were ones they could easily disavow.[387] As Justice Powell argued in his concurrence, the decision appeared to rather cavalierly deny owners of shopping malls the full panoply of free speech and association rights that other property owners possessed, without acknowledging that was what it was doing.[388]

These decisions suggest how difficult the Court has found the task of reconciling the First Amendment and non–First Amendment free speech traditions. They make evident how inconsistent — even incoherent — the result of the Court's efforts to do so have been, particularly when it comes to the regulation of the mass media.

What these decisions also demonstrate, however — and demonstrate particularly vividly because of how incoherent and unsatisfying they tend to be — is how committed the Court has been to the task of reconciling, in these contexts at least, the First Amendment and non–First

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why a statutory grant of access is any less threatening to the rights of private mall owners than a constitutional grant.

384 *Id.* at 521–22.

385 PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980).

386 *Id.* at 87.

387 Wooley v. Maynard, 430 U.S. 705, 714 (1977) (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 633–34 (1943); *id.* at 645 (Murphy, J., concurring)).

388 *PruneYard*, 447 U.S. at 100–01 (Powell, J., concurring in part and concurring in the judgment) (arguing that "the right to control one's own speech may be burdened impermissibly even when listeners will not assume that the messages expressed on private property are those of the owner," *id.* at 100, and expressing concern about the possible reach of the opinion, *id.* at 101).

Amendment free speech traditions. It clearly would have been far easier doctrinally for the Court to have concluded, in all the cases discussed above, that the challenged law was unconstitutional because of the constraints it imposed on the expressive autonomy and property rights of private persons. And yet, the Court chose, again and again, not to do so, presumably because it recognized the important role that these laws play in the operation of the speech marketplace.

The Court, of course, has not always been willing to uphold redistributive speech laws. In *Tornillo*, it adamantly rejected the possibility that the government might, in an effort to "encourage[] and implement[] freedom of expression,"[389] require newspapers in the state to offer those they criticized in their editorial pages a right of reply.[390] And in numerous campaign finance cases, the Court has invalidated laws that restrict the amount that donors or candidates can spend on election-related speech when it has found they cannot be justified except as efforts to redistribute expressive opportunity.[391] In none of these cases did the Court show any desire to defer to the legislative view that these kinds of redistributive laws were necessary to vindicate democratic principles or ensure a healthy and robust public sphere.

In other contexts, however, the Court has been willing to defer, and to defer quite significantly. Indeed, a striking feature of all the decisions discussed above is the very significant amount of discretion they grant regulatory agencies like the FCC and the NLRB, and state courts like the ones in California, to decide for themselves when the redistribution of speech and property rights is necessary to further free speech values. In *NBC*, for example, the Court suggested that the only constitutional constraint on the FCC's power to constrain the expressive freedom of radio broadcasters when the FCC deemed it in the "public interest"[392] was that it not be exercised to discriminate against speakers because of their "political, economic or social views, or upon any other capricious basis."[393] In *Red Lion*, the Court interpreted the First Amendment somewhat more fulsomely, to guarantee the "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences" on the radio.[394] What the Court interpreted this to require of the FCC, however, was only that it fulfill its statutory duties

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389 Brief for Appellee Pat L. Tornillo, Jr., at 3, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (No. 73-797).

390 *See Tornillo*, 418 U.S. at 258.

391 *See, e.g.*, McCutcheon v. FEC, 572 U.S. 185, 207 (2014) (plurality opinion); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 741 (2011).

392 Nat'l Broad. Co. v. United States, 319 U.S. 190, 227 (1943).

393 *Id.* at 226.

394 Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

under the Communications Act, as the agency had understood those duties for over twenty years.[395] In *Hudgens*, meanwhile, the Court emphasized — as it has in many of its NLRA cases — the significant discretion the NLRB possessed to determine when the property and speech interests of employers or third parties had to give way to vindicate the expressive and associational rights of workers.[396] And in *PruneYard*, the Court appeared to apply nothing more than minimum rationality review to the question of whether the grant of a state constitutional right of access to the protestors violated the mall owner's First Amendment rights.[397] The result was to vest the California courts with very broad power to decide when and where state constitutional right of access applied, without having to worry about infringing upon the First Amendment rights of property owners.[398]

As these decisions show, in many contexts, the Court has embraced a much more departmentalist approach to the protection of freedom of speech than its strong assertion of judicial supremacy in *Barnette* would suggest. It has recognized, sometimes overtly, sometimes tacitly, the important role that majoritarian institutions play and always have played in the American system of free expression.

The result is a body of First Amendment law that, in fact, has never been as strongly antiredistributive as cases like *Tornillo*, or the recent campaign finance cases, suggest. It may be the case that laws that "restrict the speech of some elements of our society in order to enhance the relative voice of others [are] wholly foreign to the First Amendment,"[399]

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[395] Indeed, the Court's argument in *Red Lion* that the fairness doctrine furthered the First Amendment right of the listening public to receive access to a diverse array of views on the radio echoed, almost verbatim, the argument the FCC had made in 1949. *See* Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1249 (1949).

[396] Hudgens v. NLRB, 424 U.S. 507, 522–23 (1976) ("[T]he primary responsibility for [accommodating worker speech rights and private property rights] must rest with the Board in the first instance. 'The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.'" (internal citations omitted) (quoting NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975))); *see also* NLRB v. Gissel Packing Co., 395 U.S. 575, 612 n.32 (1969) ("In fashioning its remedies under the broad provisions of [the NLRA], the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts."); Julius G. Getman & Stephen B. Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681, 681 (1972) (critiquing the Court's tendency to defer to the NLRB's "special expertise to determine the impact of employer conduct on the exercise of employee rights guaranteed by the [NLRA]").

[397] Eule & Varat, *supra* note 9, at 1569.

[398] As far as I know, in the years since *PruneYard* was handed down, no California or federal court has ever found a California state constitutionally mandated right of access to conflict with the First Amendment. This is despite Justice Powell's assiduous efforts in his partial concurring opinion in *PruneYard* to identify the factual circumstances in which a mandated right of access to a privately owned shopping mall would, in his view, violate the First Amendment rights of the owner. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 97–101 (1980) (Powell, J., concurring in part and concurring in the judgment).

[399] Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

in the sense that they are not native to it; they are not *required* by it. But it is not in fact true that laws of this sort are "wholly foreign" to the First Amendment, in the sense that they are never *permitted* by it. In practice, as the previous two Parts make clear, modern First Amendment law permits, and has always permitted, a significant amount of redistribution in the name of freedom of speech and association. It has also allowed significant interference with the "editorial control and judgment"[400] of members of the press.

This is important to recognize, not only as a descriptive matter but also as a doctrinal one. This is because claims about the historical operation of the system of free expression play an important role in the Supreme Court's First Amendment jurisprudence. To divine what kinds of speech regulations are today constitutionally permissible, the Court often asks what kinds of speech regulations were permitted in the past.[401]

The descriptive assertion that certain kinds of speech regulations are, and always have been, "wholly foreign to the First Amendment" has, as a consequence, significant doctrinal weight. In its recent campaign finance cases, for example, the Court has relied upon this claim to conclude that redistributive purposes may never justify campaign finance laws, no matter how insignificant the constraint those laws impose on the expressive freedom of the wealthy or how profoundly they benefit the system of representative democracy.[402] The result has been to exclude from the judicial review of campaign finance legislation any analysis of what may be the most powerful — and certainly, historically, has been one of the primary — justifications for these laws.[403] In other words, the claim that the modern free speech tradition has always been laissez-

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400 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

401 *See, e.g.*, United States v. Stevens, 559 U.S. 460, 468–72 (2010); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964); Roth v. United States, 354 U.S. 476, 482–83 (1957); *see also* DICKERSON, *supra* note 22, at xi–xii (arguing that "[i]n no other area of constitutional law-making have historical traditions played so great a part in the [Court's] reasoning process" as they have in the First Amendment cases).

402 *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 340–41 (2010); *Buckley*, 424 U.S. at 48–49.

403 *See* David A. Strauss, Essay, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994) ("[I]t is far from clear that campaign finance reform is about the elimination of corruption at all. That is because corruption . . . is a derivative problem. Those who say they are concerned about corruption are actually concerned about two other things: inequality, and the nature of democratic politics. If somehow an appropriate level of equality were achieved, much of the reason to be concerned about corruption would no longer exist."). There is no question that inequality — in particular, the tremendous inequality between the large corporations that emerged in the Gilded Age and ordinary voters — was an important motivation behind the development of the modern campaign finance regime. *See* David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236, 253–54 (1991). Like many of the laws discussed in Part I, campaign finance regulations reflect legislative efforts to safeguard the principle of political equality that was understood to underpin our system of government against the corrosive power of private wealth.

faire can be used — and may well be used, by the Court in the future — to wipe out the non-laissez-faire elements of the system that currently exist. Just because the Court has been willing to tolerate free speech departmentalism in the past does not by any means guarantee that it will do so in the future.

Yet, as the previous Parts make clear, the claim that the First Amendment forbids redistributive speech laws rests on an overly narrow — even somewhat mythological — view of the First Amendment, and of the American system of free expression as a whole. Redistributive speech laws are *not* alien to our regulatory traditions. Instead, they date back as far as the First Amendment itself, or even further, if we include the colonial voter intimidation laws.[404] Of course, the eighteenth- and nineteenth-century postal laws did not stop anyone from speaking; but they did make it much more expensive for some (letter writers, novelists, book publishers) to speak than for others.[405] Meanwhile, the early nineteenth-century worker-protection laws did quite overtly restrict the speech of some (employers) in order to enhance the voice of others (workers).[406] In many cases, that is *all* that they did.[407] And over the course of the nineteenth and twentieth centuries, lawmakers enacted many other laws that did the same.[408]

Nevertheless, because this rich body of free speech law has been for the most part entirely excluded from the history of freedom of speech in the United States — or when it is included in that history, is included solely because of its connection to, or appearance in, an important Supreme Court case — it has been extremely easy for both courts and scholars to assume that the American system of free expression both is today, and has always been, organized around exclusively laissez-faire principles; that freedom of speech means freedom from regulation. Even Justice Frankfurter, arch opponent of judicial supremacy in *Barnette*, appeared to take for granted in his *NBC* decision that what the First Amendment ordinarily requires is the absence of any government regulation of "modes of expression."[409]

This assumption is problematic not only because it provides a powerful rhetorical weapon the Court can use to eviscerate the many redistributive speech laws that currently operate to promote free speech values by non-laissez-faire means but also because it produces a body of free speech law that is unduly confident about the benefits, and unduly

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404 *See supra* p. 2308.
405 *See supra* pp. 2313–15.
406 *See supra* p. 2336.
407 *See supra* p. 2337.
408 *See supra* pp. 2337–39.
409 Nat'l Broad. Co. v. United States, 319 U.S. 190, 226 (1943).

complacent about the costs, of a system of laissez-faire speech regulation. The failure of courts to recognize that the common carrier laws, the worker speech protection laws, the voter intimidation laws, and the postal laws *are* redistributive speech laws, just as surely as the campaign finance laws are, sustains the presumption that underpins the modern cases that redistribution is not in fact necessary to ensure an "uninhibited, robust, and wide-open"[410] public debate on public matters, or any of the other democratic values the First Amendment safeguards, even when the history in Part I strongly suggests that this presumption is false: that laissez-faire principles are, in many contexts, inconsistent with democratic values because they allow economic inequalities to translate too easily into the public sphere.

The presumption that redistributive speech laws are alien to our regulatory traditions is also a problem because it warps the doctrine. Because, in practice, the Court has not been willing to invalidate the many redistributive speech laws described in the previous pages, it has been forced — when confronted with redistributive speech laws it believes do in fact serve important or legitimate interests — to either deny that redistribution is occurring (as, for example, in the *PruneYard* case[411]), or to find some feature of the law or regulatory context to explain why redistribution is permitted in this case but not in others (as for example in the radio and television broadcasting cases[412]).

The result is a wildly inconsistent body of law, in which courts either show no deference at all to the judgment made by other governmental actors that redistributive speech laws are necessary to vindicate democratic values or other important ends or, alternatively, show tremendous deference to that judgment by more or less taking the First Amendment off the table as a regulatory constraint. This is far from ideal. Obviously, any law that shuts up the voices of some, in order to achieve any purpose including a redistributive one, poses a risk to the health and vitality of the democratic public sphere, and to the expressive freedom of those it regulates. In part because they are the product of majoritarian institutions, these kinds of laws can be abused and manipulated for partisan gain. They can be exploited to further other ideological agendas. And they can have unintended effects. But they are also, as this Article shows, one of the ways in which local, state, and federal governments have long attempted, and continue to attempt, to ensure the expressive freedom that a democratic society requires.

Ideally, one would want a First Amendment doctrine that could more rationally and consistently recognize the important role that laws of this sort play in the American system of free expression, while still providing some measure of protection against their manipulation and

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410 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

411 *See supra* p. 2375.

412 *See supra* pp. 2371–2374.

abuse. Crafting such a relationship would require courts to recognize more forthrightly than they have been willing to do so far the existence of the non–First Amendment free speech tradition. This Article is the first step toward enabling them to do just that.

CONCLUSION

In 2016, Senator Al Franken was harshly criticized by a journalist for describing the FCC's decision to enact net neutrality regulations as "the First Amendment issue of our time."[413] As the reporter pointed out, the only way in which the FCC's decision to enact the net neutrality regulations might implicate the First Amendment was if a court found the policy an infringement of the private media companies it regulated.[414] Given current state action rules, the First Amendment obviously did not compel the FCC to enact (or for that matter, to rescind) the net-neutrality rules, or any other common carrier law.

This is certainly true; and yet, what Senator Franken was clearly attempting to say was that the question of net neutrality is the *free speech* issue of our time. That he invoked the First Amendment to do so is a sign of how thoroughly the First Amendment dominates popular, as well as judicial, discourse on freedom of speech in the United States. As this Article has shown, this is a problem, not only because it impoverishes the scholarly understanding of the capacious, complicated, departmentalist American system of free expression, but also because it produces as a result an inconsistent, even incoherent, body of First Amendment law.

The American system of free expression is, and always has been, bigger than just the First Amendment. Courts neither are, nor is it plausible to expect them to be, the only government actors with responsibility for creating the conditions of expressive freedom under which democratic government can flourish. It is past time for all of us — politicians, legal scholars, ordinary citizens, and federal judges — to recognize that fact.

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[413] Daniel Lyons, *The First Amendment Red Herring in the Net Neutrality Debate*, FORBES (Mar. 10, 2017, 9:07 AM), https://www.forbes.com/sites/washingtonbytes/2017/03/10/the-first-amendment-red-herring-in-the-net-neutrality-debate [https://perma.cc/8EWR-H988].

[414] *See id.*