# ANOTHER FIRST AMENDMENT

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*What can the First Amendment accomplish in society? In particular, can it foster equality? This Essay, written for* Columbia Law Review*'s 2018 Symposium on equality and the First Amendment, argues that, if the question is whether freedom of speech* could *serve equality, the answer is yes. Freedom of speech can serve nearly any value, including equality, because it has enormous normative flexibility. Any number of normative frameworks can generate reasons to protect "freedom of speech," and many frameworks have in fact embraced free speech over the years. But despite its normative capacity, it is not clear that the First Amendment has the cultural capacity to do what is being asked of it. Presumably the goal of seeking a more egalitarian First Amendment is to achieve a more egalitarian society. It is not clear that the First Amendment is the engine for that project. To suggest that a progressive First Amendment could significantly alter a nonprogressive society is to overstate greatly the importance of the First Amendment. Simply and intractably, the way to have a more progressive First Amendment is to have a more progressive society, not vice versa.*



## INTRODUCTION

What can the First Amendment accomplish in society? Across the twentieth and twenty-first centuries, it has had an undeniable impact. It is why people can burn flags,[1] why schoolchildren can decline to say the Pledge of Allegiance,[2] and why state employees cannot be fired for

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1. See Texas v. Johnson, 491 U.S. 397, 399, 420 (1989).

2. See W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 628–29, 642 (1943).

unpopular political opinions.[3] It is why there is so much money in politics,[4] why the outsides of abortion clinics look the way they do,[5] why white supremacists can utilize a public park,[6] and why Nazis can march through a town of Holocaust survivors.[7] In each of these examples, the First Amendment intervened against political will, most often embodied in legislation or regulation. Other aspects of our society—including the right to criticize the government and the existence of a free press—would exist, one hopes, even in the absence of the First Amendment. But the First Amendment protects them and informs the political culture that has for some time, at least until recently, treated them as sacrosanct.

But can the First Amendment serve equality? One response to this question is to produce a wish list of remade First Amendment doctrines: less protection for corporate speakers, different campaign-finance law, more interest in listeners and the public, greater weight for equality in liberty–equality trade-offs. That is not the response offered here.[8]

Another response is skepticism. American free speech culture from the mid-twentieth century to the present has not adopted social or economic equality as a central goal. If anything, free speech often seems to

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3. See, e.g., Elrod v. Burns, 427 U.S. 347, 363 (1976) ("[I]f conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that . . . least restrict[s] . . . freedom of belief and association . . . , and the benefit . . . must outweigh the loss of constitutionally protected rights."); United States v. Robel, 389 U.S. 258, 265–66 (1967) (holding a statute unconstitutional because it "seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights").

4. See Citizens United v. FEC, 558 U.S. 310, 365 (2010) (holding unconstitutional statutory limits on independent political expenditures by corporations); Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam) (articulating the principle that restrictions on political spending limit the quantity and diversity of political speech); see also Chris Cillizza, How *Citizens United* Changed Politics, in 7 Charts, Wash. Post: The Fix (Jan. 22, 2014), http://www.washingtonpost.com/news/the-fix/how-citizens-united-changed-politics-in-6-charts (on file with the *Columbia Law Review*) (showing the impact of *Citizens United* on campaign spending).

5. See McCullen v. Coakley, 134 S. Ct. 2518, 2541 (2014) (holding that a Massachusetts statute criminalizing standing on a sidewalk within thirty-five feet of an abortion clinic violated the First Amendment).

6. See Kessler v. City of Charlottesville, No. 3:17CV00056, 2017 WL 3474071, at *1–3 (W.D. Va. Aug. 11, 2017); see also Jason Kessler, S. Poverty Law Ctr., http://www.splcenter.org/fighting-hate/extremist-files/individual/jason-kessler [http://perma.cc/JPR2-AYDB] (last visited Aug. 8, 2018) (describing Kessler as a "white nationalist").

7. See Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 43–44 (1977).

8. For consideration of some of these questions, see, e.g., Leslie Kendrick, The Answers and the Questions in First Amendment Law, *in* Charlottesville 2017: The Legacy of Race and Inequality 70, 74–75 (Louis P. Nelson & Claudrena N. Harold eds., 2018) (discussing the disproportionate impact of current law on non-Christians and people of color); Leslie Kendrick, Are Speech Rights for Speakers?, 103 Va. L. Rev. 1767, 1774 (2017) (arguing for recognition of speakers', and not just listeners', free speech rights); Leslie Kendrick, First Amendment Expansionism, 56 Wm. & Mary L. Rev. 1199, 1219 (2015) (explaining that novel uses of the First Amendment in ever more areas of law demonstrate the challenges in formulating a workable understanding of "the freedom of speech").

stand in tension with equality, whether political, social, or economic. One could reasonably ask whether an equality-based First Amendment is a contradiction in terms. To bring equality into the First Amendment, one could argue, is to demand of it something that it has not done.[9] This, too, is not this Essay's theme.

In fact, if the question is whether freedom of speech *could* serve equality, the answer is yes. Freedom of speech can serve nearly any value, including equality, because it has enormous normative flexibility.[10] Conceptual argument demonstrates this, and history confirms it. Any number of normative frameworks can generate reasons to protect "freedom of speech," and many frameworks have in fact embraced free speech over the years.

But while I shall contend that the ultimate answer here is a simple one, the question raises further questions. What kind of equality is the First Amendment being asked to advance? Why single out the First Amendment in particular? How does one "redesign" the First Amendment to advance equality? What are the goals of doing so? And given the goals, how likely is the project to succeed?

To address these questions, this Essay proceeds in three Parts. The first considers what it means to "redesign" the First Amendment and what "equality" means in the context of that endeavor. Each of these could mean different things, with important consequences for the project.

Second, although current First Amendment jurisprudence may seem hostile to various equality-related values, freedom of speech is a normatively capacious concept. Over time, it has found justification in many sources, some outlandish to us, some contradictory to one another. The great normative flexibility of freedom of speech makes it possible that it could relate (and has related) to social and economic equality in any number of ways.

Third, despite its normative capacity, I doubt whether the First Amendment has the cultural capacity to achieve what is being asked of it. Presumably the goal of seeking a more egalitarian First Amendment is to achieve a more egalitarian society. It is not clear that the First Amendment is the engine for that project. To suggest that a progressive First Amendment could significantly alter a nonprogressive society is to overstate greatly the importance of the First Amendment. Simply and intractably, the way to have a more progressive First Amendment is to have a more progressive society, not vice versa.

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9. See, e.g., Louis Michael Seidman, Can Free Speech Be Progressive?, 118 Colum. L. Rev. 2219, 2231 (2018) ("At its core, free speech law entrenches a social view at war with key progressive objectives. For that reason, it is not surprising that throughout American history, the speech right has, at best, provided uncertain protection for progressives.").

10. See infra Part II.

## I. FRAMING THE QUESTIONS

Existing First Amendment doctrine has been variously regarded as an enemy to political, social, and economic equality. In the political arena, critics lament rulings such as *Buckley v. Valeo*[11] and *Citizens United v. FEC*[12] for exacerbating inequalities in political participation and influence.[13] Likewise, American doctrine on hate speech has been criticized from many directions for eroding the equal dignity and respect warranted to each individual as a matter of both political and social equality.[14] Meanwhile, deregulatory rulings regarding commercial actors, business interests, public sector unions, and the like arguably contribute to economic inequality or at the least do not take distributional consequences into account.[15]

At the same time, evaluating whether the First Amendment can embrace equality as a core value must begin with considering how much it has already done so. It is easy to say that the answer is "not at all." There

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11. 424 U.S. 1 (1976) (per curiam).

12. 558 U.S. 310 (2010).

13. See, e.g., Kathleen M. Sullivan, Two Concepts of Freedom of Speech, 124 Harv. L. Rev. 143, 144–46 (2010) (arguing that *Citizens United* represents "the triumph of the libertarian over the egalitarian vision of free speech" but that the best view of freedom of speech combines aspects of both visions); J. Skelly Wright, Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?, 82 Colum. L. Rev. 609, 609 (1982) (contending that the Court's campaign-finance decisions gave "protection to the polluting effect of money in election campaigns").

14. See, e.g., Jeremy Waldron, The Harm in Hate Speech 1– 6 (2012) (arguing that hate speech undermines both the "sense of security in the space we all inhabit" and the dignity of those it targets); Mary Ellen Gale, Reimagining the First Amendment: Racist Speech and Equal Liberty, 65 St. John's L. Rev. 119, 127–28 (1991) (highlighting the "problematic relationship between the governing ideals of free expression and the incidents of resurgent racist, sexist, and other prejudiced speech on the college campus"); Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431, 457–58 (arguing that many civil libertarians have failed to understand "both the nature and extent of the injury inflicted by racist speech"); Mari J. Matsuda, The Keynote Address: Progressive Civil Liberties, 3 Temp. Pol. & C.R. L. Rev. 9, 10–11 (1994) (noting the tension between "[t]raditional civil liberties" and the author's support of hate speech regulation).

15. See, e.g., Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2459–60 (2018) (invalidating mandatory contributions to public-sector unions by nonmembers); Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1151 (2017) (mandating First Amendment scrutiny for a consumer protection law); Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015) (invalidating certain securities-related disclosure requirements); Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 959 (D.C. Cir. 2013) (drawing on First Amendment principles to hold that an NLRB rule requiring employers to post a notice on their properties and websites violated section 8(c) of the National Labor Relations Act), overruled in part by Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014); see also Jeremy K. Kessler & David E. Pozen, The Search for an Egalitarian First Amendment, 118 Colum. L. Rev. 1953, 1959 (2018) (arguing that the First Amendment has been "used to thwart economic and social welfare regulation"); Jedediah Purdy, Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment, 118 Colum. L. Rev. 2161, 2169 (2018) (arguing that "the refusal of distributional judgments" is central to the Court's recent free speech jurisprudence).

is no better illustration of this view than the passage in *Buckley* in which the Supreme Court roundly rejected the "governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections."[16] The Court said, "[T]he 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."[17] Equalizing voices was, to the *Buckley* Court, not just an inadequate interest but an illegitimate one. Equality, a value written into the Constitution, was in this arena "wholly foreign."[18]

Yet arguably the central tenet of twentieth-century First Amendment jurisprudence was an equality principle: a political nondiscrimination principle succinctly stated when the Supreme Court said in *Police Department of Chicago v. Mosley*, "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[19] Justice Marshall wrote these words for the majority in a case that the Court regarded as implicating both the First Amendment and the Equal Protection Clause. In it, the Court also stated:

> [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard.[20]

The Court located its nondiscrimination principle within both the First Amendment and the Equal Protection Clause. In doing so, it took a view of political neutrality that had been circulating within First Amendment discourse for decades—through the opinions of Justices Holmes and Brandeis,[21] through Justice Jackson's words in *West Virginia State Board of Education v. Barnette*[22]—and expressly identified it as an

16. *Buckley*, 424 U.S. at 48–49.

17. Id.

18. Id. at 49.

19. 408 U.S. 92, 95 (1972).

20. Id. at 96 (footnote omitted) (quoting Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1948)).

21. See, e.g., Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring) ("[W]e must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence."); Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting) ("[T]he most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow . . . .").

22. See 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in

equality principle. Since then, some scholars have argued that equality is a core feature of the First Amendment.[23]

Not everyone views this version of equality as sufficient. It does not expressly encompass social and economic equality, though it is worth noting that those it has helped—speakers with marginalized views—have often turned out to be marginalized generally.[24] This version of equality may indeed find itself at odds with other versions. Most obviously, nondiscrimination in the realm of ideas protects racist, sexist, and other illiberal views that reject the fundamental equality of all people.[25] Protection of these views comports with one equality principle while imperiling another. For another example, in the realm of campaign-finance regulation, *Buckley* holds that regulation of political expenditures warrants as much scrutiny as regulation of political content,[26] while *Citizens United* holds that differential treatment of corporations is as suspect as differential treatment of topics.[27] These positions deploy what began as "equality of status in the field of ideas" in a way that exacerbates inequality of political participation.[28] In these instances, the tension is perhaps not so much between liberty and equality as between one version of equality and another.

Equality, then, is not all created equal. Certain types of equality may be "wholly foreign" to the contemporary First Amendment.[29] But it incorporates equality values in ways of some significance. Asking how the First

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politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

23. See, e.g., Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 21 (1975) (arguing that equality is central to the First Amendment); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 201–02 (1983) (identifying equality as one of a few important values for the First Amendment).

24. See, e.g., Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 557–58 (1963) (protecting the free association rights of members of an NAACP chapter falsely alleged to harbor Communists); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460–66 (1958) (protecting the free association rights of private individual members of the NAACP); Hague v. Comm. for Indus. Org., 307 U.S. 496, 516 (1939) (upholding the speech rights of labor organizers branded by the mayor as Communists); Vincent Blasi & Seana V. Shiffrin, The Story of *West Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought, *in* Constitutional Law Stories 409, 419–22 (Michael C. Dorf ed., 2d ed. 2009) (describing the persecution of Jehovah's Witnesses between Minersville School District v. Gobitis, 310 U.S. 586 (1940), and *Barnette*).

25. See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 444–45, 449 (1969) (protecting a Ku Klux Klan rally); Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324–25 (7th Cir. 1985) (protecting "pornography" as defined in a city ordinance).

26. Buckley v. Valeo, 424 U.S. 1, 44–45 (1976) (per curiam).

27. Citizens United v. FEC, 558 U.S. 310, 352–53 (2010).

28. See supra note 4; see also supra note 20 and accompanying text.

29. *Buckley*, 424 U.S. at 48–49 ("[T]he 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 . . . .").

Amendment might advance equality raises deeper questions about the relationship between different forms of equality.

In addition, the project at hand raises questions about the relationship of equality, however defined, to free speech values. Is "equality" extrinsic to free speech or intrinsic to it? The Supreme Court in *Mosley* suggested that its version of equality is intrinsic to the First Amendment, that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[30] If the First Amendment is being asked to pivot toward other versions of equality, are those versions inherent in it? Or are they extrinsic values that should weigh more heavily against it?

This question involves the structure of free speech rights.[31] The First Amendment is a particular articulation of a free speech right. Other free speech rights exist in other countries around the world.[32] They have a common structure. They are what some scholars have called special rights—that is, rights that pertain to certain activities and not to others.[33]

A free speech right has a particular scope of operation, with the implication that activities within the scope of the right are distinguishable from activities outside its scope.[34] Thus, only certain activities count as "speech" in the term "freedom of speech," and only certain government actions implicate freedom of speech. Also, as a general matter, the activities within the scope of the right are afforded more robust protection than activities outside its scope.[35] Thus, in American constitutional law,

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30. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

31. See Leslie Kendrick, Free Speech as a Special Right, 45 Phil. & Pub. Aff. 87, 91–110 (2017) [hereinafter Kendrick, Special Right] (outlining a framework for free speech as a special right).

32. See, e.g., Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11, §§ 1, 2(b) (U.K.); Charter of Fundamental Rights of the European Union arts. 11, 52(1), 2000 O.J. (C 364) 1; Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221.

33. See, e.g., Ronald Dworkin, Religion Without God 131 (2013) ("Freedom of speech is a special right: government may not infringe that special freedom unless it has what American lawyers have come to call a '*compelling*' justification."); Kendrick, Special Right, supra note 31, at 89–91; see also Frederick Schauer, Must Speech Be Special?, 78 Nw. U. L. Rev. 1284, 1306 (1983).

34. See Kendrick, Special Right, supra note 31, at 91; Frederick Schauer, Free Speech on Tuesdays, 34 Law & Phil. 119, 124–25 (2015) [hereinafter Schauer, Tuesdays] ("[S]aying that there is a right to free speech presupposes something remarkable about speech.").

35. See, e.g., Kent Greenawalt, Speech, Crime, and the Uses of Language 10 (1992) ("As far as speech is concerned, the minimal principle of liberty establishes that the government should not interfere with communication that has no potential for harm. To be significant, a principle of freedom of speech must go beyond this, positing [more robust] constraints on the regulation of speech . . . ."); Thomas Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204, 204 (1972) (arguing that "[i]t is the existence of such cases [of immunity for harm-causing activities] which makes freedom of expression a significant doctrine"); Frederick Schauer, The Second-Best First Amendment, 31 Wm. & Mary L. Rev. 1, 2 (1989) [hereinafter Schauer, Second-Best] ("I start with the

certain forms of regulation trigger strict scrutiny if they target speech and rational basis review if they do not.[36]

Special rights, then, can be described in terms of their distinctiveness and their robustness. Distinctiveness relates to the substance of the right—the aspects that set it apart from other activities and thus define its scope. Robustness relates to the amount of protection afforded to activities that fall within the scope of the right.[37]

The project of remaking the First Amendment could target either its scope or its strength—either its distinctiveness or its robustness. If it targeted the scope, it would argue for reformulating the very values that make freedom of speech distinctive in the first place.[38] Those values should include political or social equality, and the scope of the right should be reframed accordingly. If it targeted the strength of the right, it would argue that the values advanced by free speech should stay more or less the same, but we should reconsider how those values trade off against equality. In this approach, the scope of the First Amendment's operation might change little, but it would provide less robust protection for activities within its scope.

So, for example, to say that campaign-finance regulation is outside the scope of the First Amendment is to reformulate what counts as a First Amendment issue in the first place. This would be to redefine the scope of the right by redefining the values served by it.[39] Alternatively, one could say that campaign-finance regulation is within the scope of the First Amendment, but speech protection in that arena must give way to concerns about corruption or political equality. This would reformulate

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premise . . . that the first amendment's protection of freedom of speech and press is interesting and important because, and only because, it immunizes from governmental control certain acts that would not be so immune were their regulation measured merely against a rational basis standard.").

36. Compare Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015) (applying strict scrutiny to a law targeting speech by subject matter), and Police Dep't of Chi. v. Mosley, 408 U.S. 92, 99–101 (1972) (same), with Williamson v. Lee Optical, Inc., 348 U.S. 483, 486–87 (1955) (applying rational basis review to a business regulation).

37. It is not necessary for a special right to convey additional protection in order for it to be properly classified as a special right. See Kendrick, Special Right, supra note 31, at 109. Nevertheless, even on such a view, the robustness of the right—the strength of its protection—is an important feature to define, even if the conclusion is that the right conveys no more protection than would exist in its absence.

38. Cf. Ronald Dworkin, Sovereign Virtue: The Theory and Practice of Equality 121 (2000) (arguing for a reassessment of liberty as "an aspect of equality rather than, as it is often thought to be, an independent political ideal potentially in conflict with it").

39. See, e.g., Deborah Hellman, Money Talks but It Isn't Speech, 95 Minn. L. Rev. 953, 956 (2011) ("[N]one of these connections between money and speech provide sufficient reason to treat restrictions on giving and spending money as restrictions on speech."); Wright, supra note 13, at 609 ("*Buckley* and *Bellotti* create an artificial opposition between liberty and equality. The first amendment tradition of leading cases and scholarly writings shows that the ideals of political equality and individual participation are essential to a proper understanding of the first amendment.").

the robustness of the protection afforded by the First Amendment, rather than its scope.[40]

Some might call this a distinction without a difference. Perhaps the scope of a free speech right is intrinsically connected to its strength. On this view, it is not a coincidence that the United States recognizes a broad free speech right that offers highly robust protection.[41] Meanwhile, Canada and the European Union are more likely to conclude that certain activities are simply not free speech issues, while at the same time constraining recognized free speech rights through proportionality and balancing.[42] Although these regimes are characterized by some correspondence between scope and robustness, it is not clear that this must be so. A right like Robert Bork's political speech right, for example, would have a narrow scope with strong protection within the scope.[43] A Blackstonian right against prior restraint would have a broad scope in that it would pertain to a wide array of subjects. But it would be relatively weak in protection: It would protect only against prior restraint and not against subsequent punishment.[44]

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40. See, e.g., Richard L. Hasen, Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform, 8 Harv. L. & Pol'y Rev. 21, 35 (2014) ("[S]cholars must do more work defining and defending governmental interests that justify reasonable (but only reasonable) campaign finance regulations.").

41. See Frederick Schauer, The Exceptional First Amendment 2–3 (Harvard Univ. John F. Kennedy Sch. of Gov't Faculty Research Working Paper Series, Paper No. RWP05-021, 2005), https://papers.ssrn.com/abstract=668543 (on file with the *Columbia Law Review*) (arguing that the "American protection of freedom of expression is generally stronger than that represented by an emerging multi-national consensus").

42. See sources cited supra note 32; see also James M. Boland, Is Free Speech Compatible with Human Dignity, Equality, and Democratic Government: America, a Free Speech Island in a Sea of Censorship?, 6 Drexel L. Rev. 1, 23 n.132 (2013) (noting that the guarantees in the Canadian Charter of Rights and Freedoms are expressly subject to balancing); Stephen Gardbaum, The Myth and the Reality of American Constitutional Exceptionalism, 107 Mich. L. Rev. 391, 401–02 & n.42 (2008) (noting that most Western countries, including Canada and Germany, permit regulation of hate speech); Sean P. Flanagan, Note, Up in Smoke? Commercial Free Speech in the United States and the European Union: Why Comprehensive Tobacco Advertising Bans Work in Europe, but Fail in the United States, 44 Suffolk U. L. Rev. 211, 222–23 (2011) (noting that European Union member nations must balance commercial speech restrictions against the speakers' rights).

43. See Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 27–28 (1971) ("The category of protected speech should consist of speech concerned with governmental behavior, policy or personnel . . . ."). For consideration of other narrow but robust conceptions of speech protections, see, e.g., Vincent Blasi, The Checking Value in First Amendment Theory, 1977 Am. B. Found. Res. J. 521, 526–27 [hereinafter Blasi, Checking Value] (analyzing the "value that free speech . . . can serve in checking the abuse of power by public officials" and its implications for the scope of First Amendment protection); Frederick Schauer, Categories and the First Amendment, A Play in Three Acts, 34 Vand. L. Rev. 265, 273–74 (1981) (describing "definitional-absolutist" theories that limit protection to certain categories of speech but call for absolute protection within those categories).

44. 4 William Blackstone, Commentaries *151–153 ("Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the

One might also think that the distinction between the scope and the strength of the right does not matter because both lead to the same result. Whether campaign finance were excised from the First Amendment or balanced away, the result would be a First Amendment jurisprudence more amenable to equality values. But the difference in structure matters. It matters because, one way or another, a society must articulate the values that define freedom of speech. Those values will determine when freedom of speech is implicated and when it is not. To say that equality is one of those values is quite different from saying that free speech values trade off against equality. It is the difference between saying that equality is intrinsic to free speech or extrinsic to it. It is the difference between saying that free speech stands for equality or gives way to it.

Ultimately, discussions of the First Amendment and equality can encompass both approaches: scrutiny of the scope of the First Amendment and its robustness. But the former is more intriguing than the latter. A free speech right that incorporates equality as a matter of first principles is more radical than recalculating yet again the balancing that came out one way in *Austin v. Michigan Chamber of Commerce* and another in *Citizens United*.[45] Can the First Amendment incorporate equality values—different equality values from those it has embraced over the last half century?

## II. EQUALITY AS A FREE SPEECH VALUE

Although First Amendment law has not prioritized social or economic equality over the last decades, freedom of speech is accommodating enough that it could. The structure of free speech rights shows why this is so. Because freedom of speech is a special right, the activities to which it applies are distinctive as compared with those to which it does not. There are both descriptive and normative aspects to this distinctiveness.[46] On the descriptive side, the very term "freedom of speech" suggests that the right pertains in some way to what we would call "speech" as a matter of everyday language. This descriptive distinctiveness is important: If "freedom of speech" is completely unrelated to the phenomenon we call "speech," then we should really call it something else.[47]

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freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.").

45. Compare Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 654–56 (1990) (upholding a Michigan statute regulating independent expenditures by corporations against a First Amendment challenge), with Citizens United v. FEC, 558 U.S. 310, 365 (2010) (overruling *Austin* and striking down such a regulation).

46. Leslie Kendrick, Use Your Words: On the "Speech" in "Freedom of Speech," 116 Mich. L. Rev. 667, 687 (2018) [hereinafter Kendrick, Use Your Words].

47. Kendrick, Special Right, supra note 31, at 89; Kendrick, Use Your Words, supra note 46, at 697; see also Schauer, Tuesdays, supra note 34, at 122–25 ("[U]nless there existed something qualitatively or quantitatively distinct about the regulation of speech, talking about a right to free speech . . . would be an error."). Some will argue that the United States is constrained by a constitutional text that privileges "freedom of speech"

At the same time, descriptive distinctiveness, if necessary, is not sufficient. One might identify a distinctive class of phenomena, but it would not be worth singling out for a special right unless it had some normative significance. For instance, "sports" might be distinctive phenomena in the world, but "freedom of sports" would require some sort of normative justification.[48] Similarly, "speech" is a category of phenomena in the world, but one cannot postulate "freedom of speech" from that fact. One must explain why "freedom of speech" is important, and that requires some value that it serves.[49] The term "freedom of speech" suggests some category of speech-related activities that has distinctive normative significance. It is this normative significance that provides the justification for recognizing something called "freedom of speech."

The justifications offered, however, have varied. In our own place and time, a few have predominated: democratic self-governance, autonomy, truth-seeking.[50] Even among and within these three, palpable differences

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and that principles of constitutional interpretation, such as originalism, dictate how to understand it. See Matthew D. Bunker, Originalism 2.0 Meets the First Amendment: The "New Originalism," Interpretive Methodology, and Freedom of Expression, 17 Comm. L. & Pol'y 329, 342–53 (2012) (analyzing a number of Supreme Court First Amendment opinions reflecting originalist thinking). This project considers free speech rights as a normative matter, rather than as a matter of constitutional interpretation. Nevertheless, the speech clause is notoriously impervious to originalist and textualist tools, and many who view themselves as engaging in constitutional interpretation invoke values of the kind discussed here. See Ashutosh Bhagwat, Posner, Blackstone, and Prior Restraints on Speech, 2015 BYU L. Rev. 1151, 1180 ("What is clear—indeed the only thing that is clear—is that any firm statements about the original intent of the First Amendment should be met with extreme skepticism . . . ."); Leo E. Strine, Jr. & Nicholas Walter, Originalist or Original: The Difficulties of Reconciling *Citizens United* with Corporate Law History, 91 Notre Dame L. Rev. 877, 888 n.82 (2016) ("[O]riginalists of all stripes tend to agree . . . that the First Amendment is resistant to historical inquiry."). Indeed, just as a free speech right is a normatively capacious concept, the American "freedom of speech" has shown itself to be equally versatile, as illustrated below. See infra notes 70–86 and accompanying text.

48. The Brazilian Constitution states that "[i]t is the duty of the State to foster the practice of formal and informal sports, as a right of each individual." See Constituição Federal [C.F.] [Constitution] art. 217 (Braz.), translated in Constitution of the Federative Republic of Brazil 147 (Istvan Vajda et al. trans., 3d ed. 2010). I thank Fred Schauer for the reference.

49. Schauer, Second-Best, supra note 35, at 5 ("A theory of free speech is thus a theory that posits a rationale, or justification, or goal, in terms other than free speaking, and then maintains that freedom to speak, or write, or communicate, will promote that posited rationale, justification, or goal.").

50. See, e.g., Frederick Schauer, Free Speech: A Philosophical Enquiry 15–86 (1982) [hereinafter Schauer, Philosophical Enquiry] (identifying major rationales for freedom of speech); Kathleen M. Sullivan & Noah Feldman, First Amendment Law 5–10 (6th ed. 2016) (describing the major justifications for freedom of speech); Robert Post, Reconciling Theory and Doctrine in First Amendment Jurisprudence, 88 Calif. L. Rev. 2353, 2356 (2000) (identifying the marketplace-of-ideas and self-government rationales for free speech); Seana Valentine Shiffrin, A Thinker-Based Approach to Freedom of Speech, 27 Const. Comment. 283, 283 (2011) (discussing autonomy-based theories of free speech and offering a thinker-based approach).

of emphasis lead to divergent conceptions. A narrow democratic-self-governance right, for example, looks quite different from a broad democratic-self-governance right,[51] which in turn looks different from an autonomy right or a truth-seeking right.[52] Modern jurisprudence, which tends to draw on all these justifications, has primed us to think of them as an ecumenical and undifferentiated whole.[53] But the reasons they offer are quite different, and the scope of each, if taken seriously, would be different as well.

Beyond these three, the current age has offered many other justifications for freedom of speech.[54] Some have suggested that it serves as a safety valve for social unrest.[55] Some have said that it helps to build civic courage.[56] Some have argued that it serves a checking function on abuses of power by the government,[57] that it fosters imagination,[58] or that it is necessary for participation in the making of culture or meaning.[59] These are all quite different claims for the normative value of freedom of speech.

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51. Compare Bork, supra note 43, at 25–29 (arguing for a narrow right that would not protect art or literature), with Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245, 255–57 (arguing for a much broader political speech right including protection for literature and the arts).

52. See, e.g., Schauer, Philosophical Enquiry, supra note 50, at 45 ("The argument from democracy does not dissolve completely into the argument from truth. The self-government model reminds us that when we are dealing with governmental policies, . . . we are playing for higher stakes."); David S. Han, Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech, 87 N.Y.U. L. Rev. 70, 73 (2012) (arguing that an autonomy-based First Amendment protects autobiographical lies). For a powerful critique of the protection of lies from an autonomy perspective, including a nuanced account of autobiographical lies, see Seana Valentine Shiffrin, Speech Matters 116–27 (2014) [hereinafter Shiffrin, Speech Matters].

53. See Sullivan & Feldman, supra note 50, at 5 ("These values have animated much of the Court's reasoning in free speech cases, though not always articulately and not always consistently.").

54. See generally Kent Greenawalt, Free Speech Justifications, 89 Colum. L. Rev. 119 (1989) (providing a comprehensive survey of free speech justifications).

55. See Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[T]he path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies . . . ."); Thomas I. Emerson, The System of Freedom of Expression 106–08 (1970) (framing Brandeis's concurrence as a precursor to recognizing the "functions of freedom of expression in mediating between stability and change").

56. See *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring) ("[The Founders] believed liberty to be the secret of happiness and courage to be the secret of liberty."); Vincent Blasi, The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney v. California*, 29 Wm. & Mary L. Rev. 653, 682–83 (1988) (discussing the influence of Brandeis's civic-courage language on the development of the modern First Amendment).

57. See Blasi, Checking Value, supra note 43, at 527.

58. See Jed Rubenfeld, The Freedom of Imagination: Copyright's Constitutionality, 112 Yale L.J. 1, 30–48 (2002) (describing how the First Amendment "protects the freedom of imagination").

59. See John Fiske, Television Culture 236–39 (1987); Jack M. Balkin, Commentary, Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society, 79 N.Y.U. L. Rev. 1, 3 (2004) ("The purpose of freedom of speech . . .

If one widens the lens and considers freedom of speech over time, the justifications become even more diverse. John Milton's defense of a free press in *Areopagitica* is the most significant articulation of a freedom of speech from the early modern era and remains a touchstone of free speech discourse today.[60] The justifications he offers, however, are bound up in his theology, which was idiosyncratic for its own time and is essentially alien today.[61] Concerned with ensuring access to knowledge for those capable of spiritual enlightenment and fatalistic about the dangers of knowledge for those incapable of redemption,[62] Milton's view may strike contemporary readers as deeply inaccessible and wholly foreign to free speech principles—and that is before considering how famously intolerant he was of Catholics.[63] If this view has anything in common with contemporary speech theories growing out of political liberalism, that is a product of convergence on shared conclusions from wildly divergent starting points, an illustration of overlapping consensus at work.

This is not surprising. Freedom of speech has great normative flexibility. The communicative power that makes "speech" distinctive as a phenomenon makes freedom of speech extremely useful to any number of normative frameworks.[64] It is not infinitely flexible: A person who above all things values maintaining peak physical shape would be unlikely to recognize a special role for free speech in this normative framework. But any normative framework in which communication could play a distinctive role has the raw materials for something that could plausibly be called "freedom of speech." A society could place the highest premium on insult and intimidation and find that freedom of speech

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is to promote . . . a culture in which individuals have a fair opportunity to participate in the forms of meaning making that constitute them as individuals.").

60. See John Milton, Areopagitica 13–14 (Grolier Club 1890) (1644) (urging Parliament to reconsider its order requiring printing licenses). For an important view on Milton's relationship to the First Amendment, see Vincent Blasi, A Reader's Guide to John Milton's *Areopagitica*, the Foundational Essay of the First Amendment Tradition, 2017 Sup. Ct. Rev. 273, 298–312 (describing the continuing relevance of some aspects of *Areopagitica*); see also Vincent Blasi, John Milton's *Areopagitica* and the Modern First Amendment, Comm. Law., Winter 1996, at 1, 12–19.

61. See Milton, supra note 60, at 56 ("He that can apprehend and consider vice with all her baits and seeming pleasures, and yet abstain, and yet distinguish, and yet prefer that which is truly better, he is the true wayfaring Christian.").

62. See, e.g., id. at 68–69 ("[T]o all men such books are not temptations, nor vanities; but usefull drugs and materialls wherewith to temper and compose effective and strong med'cins, which mans life cannot want. The rest, as children and childish men, . . . well may be exhorted to forbear, but hinder'd forcibly they cannot be . . . ."); id. at 84 ("And were I the chooser, a dram of well-doing should be preferr'd before many times as much the forcible hindrance of evill-doing. For God sure esteems the growth and compleating of one vertuous person, more then the restraint of ten vitious.").

63. See, e.g., id. at 174 ("I mean not tolerated Popery, and open superstition, which as it extirpats all religions and civill supremacies, so it self should be extirpat, provided first that all charitable and compassionat means be us'd to win and regain the weak and the misled . . . .").

64. Kendrick, Use Your Words, supra note 46, at 696–97.

has a special role to play within that normative framework.[65] A society could commit itself to the circulation of information on the price of shampoo, and recognition of a freedom of speech would facilitate that goal.[66] More plausibly, a society could care about deliberative democracy,[67] development of moral agency,[68] or many other values and determine that freedom of speech has something special to offer. Because the label "freedom of speech," as a conceptual matter, plausibly describes any number of communication-related values that could arise in any number of systems, a "free speech right" is a normatively capacious concept.

None of this is to say that all free speech rights are equally good. Their value and plausibility will depend largely on the value and plausibility of the normative frameworks of which they are a part. But free speech rights are more versatile than we might assume. Thus, although the First Amendment has not prioritized political or social equality over the last few decades,[69] it is normatively capacious enough that it could. We might remember this when our own set of free speech justifications seems, for better or worse, timeless and immovable.

Because free speech rights are normatively versatile, justifications for free speech rights have changed over time, even within our own society's immediate past. To note just one example, in the late nineteenth and early twentieth centuries, classical liberals who embraced robust liberty of contract valued free speech as one facet of individual liberty.[70] The relationship between free speech and economic power posited by these thinkers was quite different from what current reformers have in mind.

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65. Id. at 699.

66. See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976) ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."); id. at 765 ("[T]he allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable."). For questioning of this normative framework, see id. at 787 (Rehnquist, J., dissenting) ("I had understood this view [of the First Amendment] to relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo.").

67. See, e.g., Jürgen Habermas, Three Normative Models of Democracy, *in* The Inclusion of the Other 239, 239–52 (Ciaran Cronin et al. trans., Ciaran Cronin & Pablo De Grieff eds., 1998) (1996) ("[T]he procedures and communicative presuppositions of democratic opinion- and will-formation function as the most important sluices for the discursive rationalization of the decisions of a government and an administration bound by law and statute.").

68. See, e.g., Shiffrin, Speech Matters, supra note 52, at 85–88.

69. See supra note 15 and accompanying text.

70. See generally Stephen M. Feldman, Free Speech and Democracy in America: A History 153–290 (2008) (providing a historical treatment of these thinkers); Mark A. Graber, Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism 18–49 (1991) (same).

Herbert Spencer equated interference with speech with interference with the free market: "[A]s interference with the supply and demand of commodities is mischievous, so is interference with the supply and demand of cultured faculty."[71] Political scientist John W. Burgess regarded economic and expressive freedom as aspects of liberty. Indeed, for Burgess, economic freedom was a prerequisite to expressive freedom. This meant, among other things, that corporations should be unregulated:

> [Modern political science] absolutely demands that all institutions, through which new truth is discovered and the ideals of advancing civilization are brought to light and moulded into forms for application, shall be so far free from governmental action as to secure and preserve, at least, perfect freedom of scientific thought and expression.[72]

Similarly, Yale sociologist William Graham Sumner argued that a "society based on contract . . . gives the utmost room and chance for individual development."[73] On views like Burgess's and Sumner's, economic deregulation fosters—and is indeed a necessary precursor to—free inquiry, free expression, and the development of the individual.

Not only did this formulation link freedom of speech with a libertarian economic view, but it also expressly dismissed intellectual equality along with economic equality as desirable goals. Sumner argued that the "work of civilization" was to expand opportunity and that "[e]very improvement in education, science, art, or government expands the chances of man on earth."[74] He went on, however:

> Such expansion is no guarantee of equality. On the contrary, if there be liberty, some will profit by the chances eagerly and some will neglect them altogether. Therefore, the greater the chances the more unequal will be the fortune of these two sets of men. So it ought to be, in all justice and right reason. The yearning after equality is the offspring of envy and covetousness, and there is no possible plan for satisfying that yearning which can do aught else than rob A to give to B; consequently all such plans nourish some of the meanest vices of human nature, waste capital, and overthrow civilization.[75]

Freedom of contract, then, created opportunities of the mind, which would be utilized in an uneven fashion, which would then exacerbate inequality. This was acceptable, however, because "if we can expand the chances we can count on a general and steady growth of civilization and advancement of society by and through its best members."[76]

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71. Herbert Spencer, Facts and Comments 83 (1902).

72. John W. Burgess, Private Corporations from the Point of View of Political Science, 13 Pol. Sci. Q. 201, 211 (1898).

73. William Graham Sumner, What Social Classes Owe to Each Other 26 (1883).

74. Id. at 168.

75. Id.

76. Id.

I mention these thinkers simply to make the point that not only *can* freedom of speech incorporate economic and social goals, but it *has* done so—in ways hostile to the project in mind today. These thinkers are just examples in the long and complex history of economically informed conceptions of free speech. Professor Laura Weinrib, for instance, has compellingly shown how the ACLU first embraced and then abandoned a conception of free speech centered around labor interests.[77] In the mid-twentieth century, some economists argued that the marketplace of ideas is just another market and that all markets should be equally free.[78] Some contemporary libertarians have expressly endorsed the First Amendment as a means of achieving the same legal ends that were once accomplished through liberty of contract.[79]

Nor is the relationship between free speech and economic goals always skewed in one direction. Certain aspects of First Amendment doctrine incorporate economic equality values. *Marsh v. Alabama* and traditional public forum doctrine are instances in which the Court reshaped property and speech rights to provide rights of access and basic speech opportunities.[80] While some decisions in this vein—such as *Logan Valley*

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77. See Laura Weinrib, The Taming of Free Speech: America's Civil Liberties Compromise 1–13 (2016); see also Jerold S. Auerbach, The La Follette Committee: Labor and Civil Liberties in the New Deal, 51 J. Am. Hist. 435, 435–36, 458–59 (1964) ("Throughout the twenties [the ACLU] resolutely defended the rights of labor . . . . Before long, however, the New Deal reawakened their fear of a leviathan state which would manipulate the national emergency to justify repression.").

78. See, e.g., R.H. Coase, The Market for Goods and the Market for Ideas, 64 Am. Econ. Rev. (Papers & Proc.) 384, 389 (1974); Aaron Director, The Parity of the Economic Market Place, 7 J.L. & Econ. 1, 6–9 (1964) (critiquing the dichotomy between "the liberty of owning property and freedom of discussion" and arguing that "the political economists have shown better insight into the basis of all freedom than the proponents of the priority of the market place for ideas"); Ideas v. Goods, Time, Jan. 14, 1974, at 32, 32–33 (describing Professor Ronald Coase's criticism of the distinction between the market for goods and the market for ideas).

79. See, e.g., Janice Rogers Brown, Lecture, The Once and Future First Amendment, 2007–2008 Cato Sup. Ct. Rev. 9, 18–22 ("[T]he more familiar argument made for intellectual freedom applies with equal potency to economic freedom. . . . Like the path to hell, the way is broad and paved with good intentions. You can begin by undermining property, or objective moral value, or the family, or by attempting to control ideas directly."); cf. Richard A. Epstein, Lecture, The Monopolistic Vices of Progressive Constitutionalism, 2004–2005 Cato Sup. Ct. Rev. 11, 14–18, 29–32 (critiquing the Progressives' twofold project of narrowing the Court's broad definition of liberty and increasing the Court's deference to state police power).

80. See Marsh v. Alabama, 326 U.S. 501, 509 (1946) ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position."); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

*Plaza*,[81] *Red Lion*,[82] or *Austin*[83]—have been overruled or cabined, their existence illustrates that the relationship between speech and property has been multidimensional. Meanwhile, certain decisions during the civil rights era reshaped speech and property rules to address social equality.[84] Some of these decisions have had lasting impact: It is no accident that *New York Times Co. v. Sullivan*, which defines defamation standards for public figures,[85] and *NAACP v. Alabama*, which sets the standard for burdens on free association,[86] both responded to Alabama's punitive treatment of civil rights organizers.

Despite surface inattention to social and economic equality, then, the First Amendment has been deeply entangled with these questions, as a matter of both theory and doctrine. This means the project of incorporating equality into the First Amendment begins not with a clean slate but with a long history, much of which pulls in the opposite direction. Yet past variations suggest that new variations are possible. The variety of relationships

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81. Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 324–25 (1968) (recognizing a First Amendment right of access to picket at a privately owned shopping center), overruled by Hudgens v. NLRB, 424 U.S. 507 (1976).

82. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390–92, 400–01 (1969) (upholding FCC rules regulating broadcasters' treatment of public issues in part because of "the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views"); see also Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637–41 (1994) (declining to extend the holding of *Red Lion* to cable television).

83. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990) (upholding a corporate general funds ban in elections because of the distortive nature of corporate resources), overruled by Citizens United v. FEC, 558 U.S. 310 (2010).

84. See, e.g., Bouie v. City of Columbia, 378 U.S. 347, 361–62 (1964) (reversing the convictions of African American "sit-in" demonstrators on grounds of statutory construction); Robinson v. Florida, 378 U.S. 153, 155–57 (1964) (concluding that the appellants' trespass convictions reflected a state policy encouraging restaurant segregation and therefore violated the Fourteenth Amendment); Barr v. City of Columbia, 378 U.S. 146, 150–51 (1964) (reversing the breach of peace convictions of several African American "sit-in" demonstrators because their actions were "polite, quiet, and peaceful"); Griffin v. Maryland, 378 U.S. 130, 135–37 (1964) (holding that the arrest for trespass of African American demonstrators by a deputy sheriff constituted state enforcement of a private policy of racial segregation, thus violating the Fourteenth Amendment); see also Beauharnais v. Illinois, 343 U.S. 250, 258–59 (1952) ("Illinois did not have to . . . await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community." (footnote omitted)). See generally Risa Goluboff, Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s (2016) (discussing the Supreme Court's contemporaneous shift in attitude toward the speech, property, and due process values implicated by vagrancy laws).

85. 376 U.S. 254, 271, 279–80 (1964) (describing the advertisement at issue as "an expression of grievance and protest on one of the major public issues of our time").

86. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 451– 54, 460–63 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . .").

already posited between free speech and economic and social structure is a testament to the normative capaciousness of free speech rights.

## III. FREE SPEECH AS AN ENGINE OF EQUALITY

The question remains, however, what is to be gained by refashioning the First Amendment in the name of equality. One might simply believe that an ideal free speech right ought to incorporate equality values. If so, the questions identified earlier will arise: what version of equality applies and whether equality is itself a component of free speech or an independent value that overrides it—whether freedom of speech stands for equality or gives way to it.[87] Whatever structure the right takes, it must fit within a larger normative framework that others could endorse and must plausibly describe something called "freedom of speech."[88] And while freedom of speech is a normatively capacious concept, proponents of reform may meet with resistance arising from the fact that, of the many relationships free speech could have with equality, a particular relationship has prevailed in our society over generations.[89]

I take it, however, that the primary motivation for reconsidering the First Amendment is not a matter of ideal theory. The goal of seeking a more egalitarian First Amendment is, first and foremost, to achieve a more egalitarian society. I doubt whether this tail can wag that dog.

I register this doubt at both a conceptual level and a more pragmatic one. Conceptually, I have said that free speech rights are normatively capacious—they have found justification within any number of normative frameworks, including those prioritizing autonomy, democratic governance, truth-seeking, economic equality, economic liberty, social equality, social Darwinism, early modern Protestant theology, and so on.[90] I have argued that the freedom of speech is a plausible special right within so many different normative frameworks because it offers something that many frameworks are likely to find useful—heightened protection for whichever communicative functions facilitate their particular priorities.[91] In this regard, free speech is likely to be special enough to warrant singling out within any number of normative frameworks. It serves the normative value in question in a distinctive way, and that makes it worth talking about on its own and prevents its collapsing entirely into the larger value.[92]

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87. See supra text accompanying notes 38–40.

88. See supra notes 46–49 and accompanying text.

89. See Seidman, supra note 9, at 2231 ("[T]hroughout American history, the speech right has, at best, provided uncertain protection for progressives.").

90. See supra Part II.

91. See supra text accompanying notes 64–68; see also Kendrick, Use Your Words, supra note 46, at 697.

92. See Kendrick, Use Your Words, supra note 46, at 697–98 ("Various activities may be important [within a larger normative framework], just as different systems of the human

But the freedom of speech is unlikely to *define* what larger value or values a society embraces. It can adapt to a variety of normative frameworks, but when up against a strong preference for a different framework, a particular conception of free speech seems unlikely to matter much. Speech is special, but it is not that special.

Over the twentieth century, the First Amendment demonstrated little ability to influence dominant political and economic views, rather than be influenced by them.[93] Protection for Socialist dissidents came after the Red Scare.[94] The Supreme Court did not oppose McCarthyism until long after McCarthy's demise, and when it did so, it mostly "nibbled at the fringes of the loyalty-security program."[95] The Court's most robust pronouncements on content neutrality were not made in crisis—"the Court protected the free expression rights of the Ku Klux Klan after the defeat of massive resistance to *Brown*, not before, and certainly not during the Klan's heyday in the 1920s when the organization's membership peaked at over four million."[96] One counterexample, protection for flag burning, contradicted majority preferences on that particular issue but was—reluctantly—embraced by the Supreme Court as the necessary by-product of a larger content-neutrality doctrine that was generally uncontroversial.[97]

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body are important . . . . The cardiovascular system serves the body in a particular way. Likewise, one may claim that the communicative mechanism of speech serves a larger value in a particular way.").

93. See, e.g., Scott L. Cummings, The Social Movement Turn in Law, 43 Law & Soc. Inquiry 360, 371 (2018) (noting an "impressive body of court impact studies" showing that "court decisions generally, and Supreme Court decisions in particular, failed to translate into robust social change on the ground"); Frank H. Easterbrook, Abstraction and Authority, 59 U. Chi. L. Rev. 349, 370 (1992) ("The Court's role in civil liberties (with the exception of its holdings about race relations) has been that of a follower, not a leader. It extirpates in the name of the Constitution practices that have already disappeared or dwindled among the states."); Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. 1, 6 (1996) (arguing that, on both civil rights and civil liberties such as free speech, the Supreme Court largely either follows national consensus or resolves issues on which the populace is fairly divided but rarely takes a truly countermajoritarian position); cf. Jack M. Balkin & Reva B. Siegel, Principles, Practices, and Social Movements, 154 U. Pa. L. Rev. 927, 947 (2006) ("Courts play an important and creative role in [the development of public opinion], but it is largely a reactive role. Courts respond to social disruption by social movements rather than initiate it themselves . . . .").

94. See Klarman, supra note 93, at 12–13 ("The Court began to extend serious First Amendment protection to political radicals only in the 1930s—that is, *after* the first Red Scare had safely passed. . . . [Later decisions protecting Jehovah's Witnesses and labor unions] hardly qualified as [countermajoritarian] by the time of the Second World War.").

95. L.A. Powe, Jr., Does Footnote Four Describe?, 11 Const. Comment. 197, 203 (1994).

96. Klarman, supra note 93, at 36.

97. For an illustration of how long the Supreme Court wrestled with flag desecration before Texas v. Johnson, 491 U.S. 397 (1989), see John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1482 (1975) ("On three occasions . . . the Supreme Court, on one narrow ground or another, has avoided definitively ruling on the constitutionality of convictions for politically inspired destruction or alteration of the American flag.").

The First Amendment has mostly stayed within the bounds of what larger political preferences made possible. Thus Judge Learned Hand worried about the propensities of "Tomdickandharry, D.J.,"[98] while Justice Cardozo observed, "The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by."[99] Much later, Professor Vincent Blasi argued for a pathological perspective on the First Amendment precisely because of its susceptibility to larger political forces.[100] In a 2017 Cato Institute poll, fifty-three percent of Republicans said they favored stripping U.S. citizenship from people who burn the American flag.[101] Sixty-three percent of Republicans agreed with the statement that journalists today are an "enemy of the American people."[102] These are still minority positions within our society, but their appearance now suggests that changes in our political culture affect understandings of the First Amendment, and not vice versa.

This is not to argue that conceptions of the First Amendment do no work at all. As one critic said in another context, "The Court may be able to catalyze, to unlock, tendencies that are immanent in the public mind."[103]

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One genuine counterexample may be Citizens United v. FEC, 558 U.S. 310 (2010), which many polls show to be disfavored by a majority of respondents. See, e.g., Dan Eggen, Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing, Wash. Post (Feb. 17, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html [https://perma.cc/35PW-C4EC]; Cristian Farias, Americans Agree on One Thing: *Citizens United* Is Terrible, HuffPost (Sept. 29, 2015), https://www.huffingtonpost.com/entry/citizens-united-john-roberts_us_560acd0ce4b0af3706de129d [https://perma.cc/W62M-H43V]. Some polls purport to show otherwise. See Jordan Fabian, Poll: Public Agrees with Principles of Campaign Finance Decision, Hill (Jan. 23, 2010), http://thehill.com/blogs/blog-briefing-room/news/77629-poll-public-agrees-with-principles-of-campaign-finance-decision [https://perma.cc/4ULG-K48K]. If this is an example of a countermajoritarian First Amendment decision, it is not clear how much it is driven by First Amendment commitments rather than larger political commitments on which a narrow majority of the Supreme Court happens to be out of step with the rest of the country.

98. Letter from Judge Learned Hand to Zechariah Chafee, Jr., Professor, Harvard Law School (Jan. 2, 1921), *in* Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan. L. Rev. 719, 770 (1975) ("I am not wholly in love with Holmesy's [clear and present danger] test . . . . Once you admit that the matter is one of degree . . . you so obviously make it a matter of administration, i.e. you give to Tomdickandharry, D.J., so much latitude . . . that the jig is at once up.").

99. Benjamin N. Cardozo, The Nature of the Judicial Process 168 (1921).

100. Vincent A. Blasi, The Pathological Perspective and the First Amendment, 85 Colum. L. Rev. 449, 449–50 (1985) ("My thesis is that in adjudicating first amendment disputes and fashioning first amendment doctrines, courts ought to adopt what might be termed the pathological perspective. . . . The first amendment, in other words, should be targeted for the worst of times.").

101. Emily Ekins, The State of Free Speech and Tolerance in America, Cato Inst. (Oct. 31, 2017), http://www.cato.org/survey-reports/state-free-speech-tolerance-america [https://perma.cc/H89G-D2KZ].

102. Id.

103. Robert G. McCloskey, Reflections on the Warren Court, 51 Va. L. Rev. 1229, 1269 (1965).

But occasional catalyzation "does not mean that opinion is infinitely malleable, that the Court can drag the nation to goals that it is not already disposed to accept."[104] The First Amendment is like a set of gears. It can run more or less smoothly. It can inject resistance or grease the way. But it is not the engine.

Nevertheless, on a more pragmatic level, some argue that the First Amendment should at least foster equality or impede inequality when it can, and that lawyers and scholars should invest in framing arguments toward this end.[105] This position essentially acknowledges the First Amendment's role as a set of gears that makes a difference at the margins. It also acknowledges that free speech rights exist against the backdrop of larger values. The argument is that it is worthwhile to put the gearwork of the First Amendment to work for the larger value of equality.

This is a matter of pragmatism and second-best strategy, on which views will inevitably differ. As just described, however, it is unclear how much work this strategy can achieve if it takes place in a society resistant to the larger project. Moreover, in recent years, the First Amendment has been efficiently employed by many parties and courts in a deregulatory project.[106] One might desire a progressive First Amendment to neutralize this trend. Or one might conclude that this recent history makes the First Amendment a particularly unpromising and unpersuasive avenue for addressing what is in any case really a matter of higher-level values.

## CONCLUSION

Professor Fred Schauer once likened the First Amendment to a pipe wrench. Commenting on the use of the First Amendment to advance a variety of ends that, descriptively speaking, would not historically have been recognized as related to free speech, Schauer said,

> Suppose you need to drive a nail into a board but have no hammer. You do, however, have a pipe wrench. What do you do? . . . Especially if the task is genuinely important, we will whack away at the nail with the pipe wrench. This will take longer than it otherwise would take with a hammer, the nail will probably not go all the way into the board, and the wrench will likely be damaged in the process. But it would be better than nothing.

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104. Id.

105. See, e.g., Catherine L. Fisk, A Progressive Labor Vision of the First Amendment: Past as Prologue, 118 Colum. L. Rev. 2057, 2059–60 (2018); Genevieve Lakier, Imagining an Antisubordinating First Amendment, 118 Colum. L. Rev. 2117, 2120–21 (2018); Bertrall Ross, Partisan Gerrymandering, the First Amendment, and the Political Outsider, 118 Colum. L. Rev. 2187, 2194 (2018).

106. See, e.g., John C. Coates IV, Corporate Speech & the First Amendment: History, Data, and Implications, 30 Const. Comment. 223, 248–65 (2015) (analyzing court decisions empirically to show "how pervasively and systematically corporations have been using the First Amendment to achieve de- or re-regulatory goals").

> . . . Like the pipe wrench, the First Amendment is frequently called on to do a job for which it is poorly designed. The job frequently gets done but, as with driving a nail with a pipe wrench, the job gets done poorly and the tool is damaged in the process.[107]

For some, using the First Amendment to advance equality may look like Schauer's pipe wrench: using the First Amendment for a job to which it is not accustomed, for reasons extrinsic to what makes it significant in the first place.

I invoke the metaphor for a different point: It presupposes the job. If a person wants to pull a nail out of a board, that person will use whatever tool is available. If a dominant segment of society, or of judges, is interested in deregulation, they will use whatever tool is available, be it the First Amendment or something else. Providing someone with a tool even more ill-suited than a pipe wrench may slow down the job, but it will not alter it. Nor will making the First Amendment slightly better at fostering equality do much in a society that does not value that goal.

Professor Zechariah Chafee said that "in the long run the public gets just as much freedom of speech as it really wants."[108] Likewise, the public gets the kind of freedom of speech it really wants. A more progressive First Amendment would incorporate equality values into the right itself, or it would give way to those values more readily. But doing either of these successfully requires endorsing equality values in the first place. No First Amendment, not even the best First Amendment, can do that on its own.

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107. Frederick Schauer, First Amendment Opportunism, *in* Eternally Vigilant: Free Speech in the Modern Era 175, 175 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

108. Zechariah Chafee, Jr., Free Speech in the United States 564 (1941).