HISTORIANS and legal scholars acknowledge that there have been incidents and periods in our history in which freedom of speech has been denied, but these events are usually described as aberrations and blamed on some overzealous individual or group that was out of step with American traditions. It is commonly assumed in the courts and law reviews that there were no significant court decisions on freedom of speech before the First World War, and that shortly thereafter speech was legally protected by the Supreme Court and has remained so ever since. Popular literature extends these views posited in the legal literature to embrace the idea that freedom of speech is a cornerstone of the Constitution and the basis of our country that has been faithfully enforced by the courts throughout our history.

However, despite persistent but nonspecific references to "our traditions" in legal and popular literature, no right of free speech as we know it existed, either in law or practice, until a basic transformation of the law governing speech in the period from about 1919 to 1940. Before that time, one spoke publicly only at the discretion of local, and sometimes federal, authorities, who often prohibited what they, the local business establishment, or other powerful segments of the community did not want to hear.

From the adoption of the First Amendment (1791) to the beginning of the basic legal transformation (1919), a variety of social and religious activists demanded recognition of freedom of speech. The most significant of these—the abolitionists, the anarchists, the Industrial Workers of the World (IWW, or Wobblies), the Socialist party, and the early labor and women's movements—were sometimes successful in speaking, gathering, and distributing literature publicly. Federal and state courts, however, repeatedly refused to protect any form of speech.

The transformation of the law of free speech between 1919 and 1940 resulted primarily from the activities of the labor movement, the first mass-
based movement posing a credible challenge to the existing order that demanded freedom of speech. The labor movement viewed free speech as a necessary component of the right to organize unions; and the seminal Supreme Court decisions constitutionally protecting free speech came in the late 1930s as part of a general social, political, and legal shift in favor of labor that included, in the legislative arena, the adoption of the National Labor Relations Act (NLRA). The primary periods of stringent enforcement and enlargement of speech rights by the courts, the 1930s and the 1960s, correspond to the periods in which popular movements demanded such rights.

This history and the social role of the law regarding freedom of speech are presented, first, in a brief history of the law and practice from 1791 to 1940; second, in an analysis of legal decision making in two Supreme Court cases that best illustrate the basic change in speech law; and, third, in a discussion of the contemporary social and ideological role of freedom of speech.

A BRIEF HISTORY OF FREE SPEECH IN THE UNITED STATES, 1791 TO 1940

Liberty . . . does not reside in laws, nor is it preserved by courts. Yet the ordinary citizen is so neglectful of the protection of his (or her) own liberties that the legal profession almost alone concerns itself with their interpretation. This is unfortunate—for lawyers are not commonly lovers of liberty.

—Leon Whipple (1927)

For all that has been written about freedom of speech, there is little that acknowledges the pre–World War I history or recognizes the profound change in the law in this century, and even less that attempts to analyze the change. But many primary and secondary sources document the specific incidents, practices, and court rulings that comprise this history. The incidents and periods discussed here, while they concern a variety of speech, press, and religious activities, do not constitute a comprehensive treatment of speech. A particular aspect—speaking, gathering, and distributing literature in public places—has been emphasized because it is the subject of the Supreme Court cases that best illustrate the transformation in the law and because this aspect played a major role in the events leading to the transformation.

THE TRANSFORMATION IN LEGAL DOCTRINE

In 1894, the Reverend William F. Davis, an evangelist and longtime active opponent of slavery and racism, attempted to preach the Gospel on Boston Common, a public park. For his first attempt, Davis was incarcerated for a few weeks in the Charles Street Jail; the second time, he was fined and appealed the sentence.

The hostility of the Boston authorities toward Davis probably stemmed from his espousal of the Social Gospel, a popular religious trend of the time that emphasized social responsibility and often condemned the corruption of city officials. In any event, Davis believed there was a "constitutional right of citizens to the use of public grounds and places without let or hindrance by the City authorities."

The Supreme Court of Massachusetts disagreed. In an opinion by Oliver Wendell Holmes—later a justice of the Supreme Court of the United States known for his decisions protecting freedom of speech—the court upheld Davis's conviction based on a city ordinance that prohibited "any public address" on public grounds without a permit from the mayor. Holmes, like almost all state and lower federal court judges, viewed such an ordinance as simply a city regulation of the use of its park, which was within the city's rights as owner of the property. Davis had no basis, in the Constitution or elsewhere, to claim any limits on this property right:

That such an ordinance is constitutional . . . does not appear to us open to doubt. For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.

The Supreme Court of the United States unanimously affirmed, quoting Holmes's analogy to a private house. In the only reference to the Constitution, the Court said it "does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the Constitution and laws of the State." Nor did the Court find any constitutional or other limit on the mayor's authority to deny permission selectively or for any reason: "The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."

Forty years later, the labor movement, like Reverend Davis, believed that the government should hold and maintain public streets, sidewalks, and parks for the use of the people. Labor organizers had regularly been denied freedom of speech, except in cities with progressive or socialist mayors. After Congress passed the NLRA in 1935, the Congress of Industrial Organizations

* There were intervening related decisions; these cases and the process of change are discussed in later portions of this chapter.
(CIO) sought to explain its provisions and the benefits of unions and collective bargaining to working people throughout the country. Nowhere was their reception more hostile than in Jersey City, New Jersey, the turf of political boss Frank Hague.

The CIO planned to distribute literature on the streets and host outdoor meetings, but permits for these activities were denied by Hague. Hague was an early supporter of the less militant American Federation of Labor and of the New Deal, which provided him with resources for distribution to local communities and political allies. But by the mid-1930s he had firmly allied himself with the manufacturing and commercial establishments. He made it clear that labor organizers were not welcome in Jersey City, and many were cast out of town, usually by being put on a ferry to New York. Local businesses were promised that they would have no labor troubles while he was mayor; his response to the CIO was: "I am the law."

The CIO brought suit against Hague, resulting in a Supreme Court ruling in favor of the CIO. The Court said:

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. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

This was a direct repudiation of both the doctrinal basis and the result in Davis, and it first established the basic concept of free speech now taken for granted. However, the Court did not explicitly overrule Davis, discuss the lack of free speech prior to its decision, or even acknowledge that it had made a fundamental change in legal doctrine. Rather, the opinion was an inspiring exposition of a right to freedom of speech based on natural law. Like all natural-law-based principles, it is essentially timeless and without a social context.

In the quoted passage, the streets and parks have "immemorially" been held for the people and used for speech "time out of mind," and the right of free speech stems "from ancient times." The Court apparently was somewhat defensive and wished to emphasize this point, since it is repeated three times in the crucial passage of the opinion. But there is no indication as to what time or place the Court was referring; it certainly had never been so in the United States before this very case, as the Court had itself ruled in Davis. One can almost feel sorry for Boss Hague: like most of his contemporaries, even those who never reached the level of boss, and city administrators throughout American history, Hague prohibited speech he or the local establishment did not want to hear, surely unaware that he was tampering with rules "from ancient times."

The Court made an essentially political and social judgment to change the law, but it was presented as based solely on required, preexisting, and legal principles, and directed at a scapegoat rather than at a systematic social practice.

**BEFORE THE TRANSFORMATION**

Davis is the only Supreme Court decision addressing these basic free-speech issues before the transformation began, but state and lower federal court decisions, as well as the practice throughout the country, confirm that there was no tradition of or legally protected right to free speech as we know it prior to the transformation. The supposed existence of such a tradition and such rights is a longstanding myth.

**The Constitution and the Early Popular Understanding of Freedom of Speech.**

The Constitution, as ratified in 1787, does not mention freedom of speech, although historians and legal scholars generally agree that the Bill of Rights, in the form of amendments adopted four years later, was promised and necessary to secure ratification.

There is considerable controversy, however, about how the framers of the Constitution and the population generally viewed freedom of speech before and during the constitutional drafting and ratification process. The traditional view that freedom of speech was widely supported—which has been translated into the current popular notion that free speech was the founding principle of our country—is usually documented, if at all, by reference to eloquent but largely rhetorical writings in this century by Harvard law professor Zechariah Chafee, Jr. This view has been challenged based on convincing historical research, principally by historian Leonard Levy.

The controversy has suffered from a lack of concreteness: freedom of speech as we know it consists of several specific concepts and rules guaranteeing, most basically, the ability, without restraint, punishment, or content-based limitation, to criticize government and public officials and private institutions and individuals; to express one's views in public places; and to associate with others for political purposes. While the Constitution and the First Amendment were popularly understood to embody basic notions of political freedom, including at least a repudiation of judicial or other actions that prohibit in advance publication by the press (called prior restraints), the other aspects of free speech as we know it developed throughout our two-hundred-year history.

For example, English and American law at the time of the Constitution essentially rendered criticism of the government or its officials a criminal
act. This offense, called seditious libel, was based on the conception of a
monarch and government as divine and above reproach. The truth of a
criticism was considered a basis for aggravation rather than mitigation of the
crime because a correct criticism was more likely to create discord and
contempt for the government. While seditious libel is completely incom-
patible with our current conception of free speech, it was a crime in every
state at the time the Constitution was adopted. Furthermore, Levy's review
of the writings and speeches of the framers of the Constitution and the leaders
of the Revolution shows that none of them—including even Thomas Jef-
ferson and Thomas Paine—opposed criminalization of seditious libel. Some
of the framers advocated reforms of the law of seditious libel, including
adoption of truth as a defense and the determination of libel by the jury,
but still favored the criminalization of criticism of the government and its
officials.¹¹

Levy suggests, rather convincingly, that the First Amendment, alone
among the provisions of the Bill of Rights in being explicitly directed at and
limiting only Congress, was not viewed by its framers as changing existing
law and merely constituted a reservation to the states of the power to regulate
speech and press. The seeds of popular belief in free speech as we know it
came later, perhaps in response to the Sedition Act of 1798 (discussed below).

In any event, the experience of revolution and the emergence of the new
nation generated a wave of intolerance immediately before and after the
adoption of the Constitution. To some extent this is understandable and
typical of revolutions that have occurred elsewhere: after a violent struggle
and in the wake of victory, there is a yearning for consensus, or at least
conformity that appears to reflect consensus. But the very nature of the new
nation seems to have accentuated rather than restrained this process. Belief
and pride in the attainment of freedom were turned against itself; noncon-
formity and dissent were greeted with extreme, legally sanctioned, and some-
times violent intolerance.

Although the issue of the relationship of the colonies to England was
hotly and publicly debated before and during the war, any sign of even an
early questioning of independence tended to be viewed as disloyalty. Many
people had sentimental, familial, and economic allegiances to England,
which was often also their birthplace. Because they believed or hoped dif-
fferences could be settled without war, they were treated as traitors, regardless
of whether they had actually acted or sided with England during the Rev-
olution. They were subjected to special taxes, loyalty oaths, banishment,
and violence; and laws in most states prohibited them from serving on juries,
voting, holding office, buying land, or practicing certain designated profes-
sions. The pacifism of the Quakers was also regarded as treasonous. Their
religious services were banned, and they were frequently imprisoned, ban-
ished, and subjected to mob violence.¹² This pattern of repression based on
a false equation of disloyalty with ancestry, religion, or expression of op-
position to established policy would be repeated throughout this history.

The Federalists—Our First Party. While the ink on the First Amendment
was barely dry, the Federalist party attempted to silence its opponents with
prosecutions for the common-law offense of seditious libel. In a turnabout,
the Republicans later used the same device to prosecute Federalists, including
a minister who criticized Jefferson in a Thanksgiving Day sermon.¹³

The Federalists, undaunted by the First Amendment to their Constitution,
became dissatisfied with the ineffectiveness of these seditious libel prose-
cutions due to doubts raised about whether federal courts have common-
law jurisdiction. In 1798, they pushed through Congress, by a narrow margin,
the Sedition Act, which made it a crime to

... write, print, utter or publish ... any false, scandalous and malicious
writings against the government of the United States, or either House of
Cong... or the President with the intent to defame ... or to bring
them into contempt or disgrace.¹⁴

Although the act also contained two protective devices—truth was made a
defense, and the jury was to decide whether the words were seditious—
Federalist judges quickly negated their effect. They refused to distinguish
between statements of fact and opinion, and they ruled that the defendant
must prove the truth of every minute detail to establish the truth defense.
Overall, they treated the First Amendment as if it only codified preexisting
law and prohibited only prior censorship, which had been prohibited in
England since 1695 and in the colonies since 1725.¹⁵

The most prominent person prosecuted under the Sedition Act was Mat-
thew Lyon, a member of Congress critical of the Federalists. Lyon was
imprisoned and his house sold to pay his fine (nevertheless he was reelected in
the next election). The longest prison term, two years, was served by a
laborer for erecting a sign on a post that read, in part, NO STAMP ACT, NO
SEDIVION ... DOWNFALL TO THE TYRANTS OF AMERICA, PEACE AND
RETIREMENT TO THE PRESIDENT. The act was "never invoked against alien
enemies, or possible traitors, but solely against editors and public men whom
the Federalists under President Adams desired to silence or deport in order
to suppress political opposition."¹⁶

The act and consequent prosecutions were extremely unpopular, and
convictions were difficult to obtain without manipulation of the composition
of juries (which, as a result, were comprised almost entirely of Federalists)
and active bias by Federalist judges. "Popular indignation at the Act and the prosecutions wrecked the Federalist Party."  

Jefferson pardoned all those convicted, and the government repaid their fines. The Supreme Court never reviewed any of the common-law or statutory sedition cases, but several legal doctrines that restricted expression were adopted by the lower courts and would be repeatedly resurrected later. The two foremost were the "bad-tendency" doctrine, which allowed prosecution for words that could, in however remote or indirect a fashion, contribute to disorder or unlawful conduct sometime in the future; and the "constructive-intent" doctrine, which ascribed to the speaker or writer the intent to cause such remote and indirect consequences. Perhaps most important, in this infancy of the Constitution, the law proved to be a willing partner in repression.

The Mob as an Expression of Public Opinion, 1830–1860. During the early 1800s, the relatively new and abstract ideas of liberty and democracy that had fueled the Revolution seemed less important than pressing social problems primarily related to urban centralization and immigration. Democracy came to be viewed as sanctioning, or even requiring, the use of any means necessary to thoroughly and quickly implement the will of the majority. Again, the perceived righteousness of American democracy became its undoing, as the majority claimed "their final right to settle with the minority."  

Any person who differed from the majority—by ancestry, religion, appearance, or disagreement with majority positions—was suspect and blamed for social problems, which usually took the heaviest toll on them. The goal was to eliminate differences, which were perceived as the cause of social disorders; the means was mob violence. "The early governing autocrats had tried to limit liberty by stifling interpretation of the Constitution or by appeals to English precedents. The people simply appealed to force."  

And the government, including the courts, offered no protection.

Discrimination against minorities was not unusual. In New York, Masons were prohibited from serving on juries until 1927; in many states Jews were excluded from juries, professions, and public office until the mid-1800s; and blacks were still slaves. But the broad range of "native American" movements during this period unleashed a ferocious reign of terror against each wave of new immigrants and, not coincidentally, cheap labor. In this nation of immigrants, "native" was defined, it would appear, not as the original population (American Indians) but on a continuum, so that groups could claim nativity vis-à-vis all other groups of more recently immigrated ancestry.

Among the Native American persecutions, none was more ferocious than the persecution of Irish Catholics, which included the random killings and raids of the Know-Nothing party. The Irish, as so many other minorities, absorbed the Native American ideology rather than develop a tolerance born of experience. Later, when they ascended to power in parts of California, they persecuted the Chinese.

Mormons, seen as dangerous first for their savvy land purchases and later for their practice of polygamy, were banished, randomly beaten, and killed in several states. In Missouri the governor ordered them "exterminated," and men, women, and children were massacred in a series of pogroms. They moved to Illinois, where their leader Joseph Smith, was murdered by a mob while in jail. They then moved to Utah, where they became the natives and proceeded to persecute others, including blacks.

Social reformers of this period, including people favoring abolition of slavery, free education, birth control, and temperance, were treated similarly. Statutes in every southern state forbade any speech or writing that questioned slavery. These were uniformly enforced by the courts; such speech or writing was held possibly to lead to slave insurrections and was therefore prohibitive based on the bad-tendency doctrine.

Alongside this legal suppression, citizens' committees and vigilante activities were widespread and unchecked by legal authorities. There were many lynchings and beatings of abolitionists, and the citizens' committees kept track of even the mildest expression of antislavery views. A slaveholder in Grayson County, Virginia, who defended a minister's sermon against slavery, was tarred and feathered by the local committee. When he sought warrants for the arrest of some committee members he recognized, the committee threatened his lawyers and the judge, and disrupted a hearing. Subcommittees were subsequently formed throughout the county to report any "suspicious opinions," and the courts were instructed not to act in cases of crimes against abolitionists. It became common in the South after 1840 to repudiate the notion of natural rights and the Declaration of Independence, which were both seen as based on Jefferson's "radicalism."

There were no similar statutes and few lynchings in the North, but mobs accomplished the same goals. Most notable were riots in Philadelphia and Illinois, where Elijah Lovejoy, the editor of an antislavery newspaper, was murdered by a mob.

In 1837, after a series of lengthy and embarrassing petitions against slavery were presented to Congress, it banned presentation of all such petitions in order that "the agitation of this subject should be finally arrested, for the purpose of restoring tranquility to the public mind." Basic notions of freedom and democracy—and the First Amendment right "to petition the Government for redress of grievances"—were, it seems, secondary in importance to the tranquility of a public mind that apparently was undisturbed by widespread mob violence and slavery.
The Early Labor Movement. The labor movement was accustomed to hostility from the legal system; in the early 1860s, the courts generally regarded unions and strikes as criminal conspiracies. By the 1870s, the labor movement began to focus on freedom of speech, which it viewed as a necessary component of the right to organize. Peaceful labor demonstrations were regularly and often violently broken up by the police. For example, during the depression of 1873–1874, a large group of unemployed workers demonstrating in New York were attacked by police. The city had granted a permit but revoked it minutes before the demonstration. Demonstrators, unaware of the revocation, were beaten with clubs by patrols of police, who rushed into the crowd. Two meetings in a private hall called to protest the police action at the demonstration were also broken up by the police. By a contemporary account, “the aggrieved working men and their sympathizers felt as though they had no rights which the municipality was bound to respect.”

The Anarchists. Beginning in 1887, Emma Goldman and other anarchists toured the country speaking on a range of topics, from politics to literature and the arts. They were regularly prohibited from speaking, on streets or in public or private halls, or limited to certain topics. The process became so routinized that Goldman, who called it a struggle for “liberty without strings,” incorporated it into her condemnations of governmental power and coercion. Usually, radicals, liberals, and some conservatives would rally to support her right to speak.

For example, in 1909 Goldman was to deliver a lecture entitled “Henrik Ibsen as the Pioneer of Modern Drama” at Lexington Hall in New York City. The police, present in the private hall leased by Goldman, said she could speak so long as she addressed the topic. However, the first time she mentioned “Ibsen,” a police sergeant mounted the speaker’s platform and said she was deviating from the topic. Her protestations that she must mention Ibsen’s name to discuss Ibsen and drama were to no avail. The large crowd, at first amused by the absurdity of the police order, was roughly cleared from the hall with the use of clubs.

The “Free-Speech Fights” of the IWW. From 1909 to 1915, the IWW conducted a nationwide campaign to challenge denials of the right to speak on public streets, sidewalks, and parks. Seeking to reach mainly migratory workers in the only places possible, the Wobblies saw themselves in a struggle for the use of the streets for free speech and the right to organize. This struggle became the focal point for employer resistance to the Wobblies’ organizing efforts.

The strategies for the free-speech fights derived from earlier successful efforts by members of the IWW, Socialist party, and Socialist Labor party. In 1908, they had together won the repeal of a ban on street speaking in Los Angeles by repeatedly violating the ban until the jails were filled. This was systematized in 1909 by drawing on hundreds, and sometimes thousands, of workers from around the country with announcements in the Wobbly newspaper, Industrial Worker.

Each person would mount a soapbox and begin a speech with the usual Wobbly greeting, “Fellow workers and friends.” These four words ordinarily sufficed to result in arrest, after which the next person would mount the soapbox. The jails would soon be filled, as would schools and other buildings used for the overflow. The struggle was seen as political, not legal, and early on elected committees decided not to “waste” their limited resources on lawyers’ fees.

The first major fight, in Missoula, Montana, was led by Elizabeth Gurley Flynn. In 1909, the Wobblies were speaking on the streets and distributing literature to protest employment agencies that charged unemployed workers a fee for nonexistent jobs. When the agencies and local businesses persuaded the city council to pass an ordinance banning street speaking, the Industrial Worker issued a national call, and a “steady stream of Wobblies flocked into Missoula, by freight cars—on top, inside and below.” As the jails filled, the Wobblies received support from a variety of sources, including Senator Robert LaFollette, university professors, and townpeople worried about the costs of incarcerating so many persons. The authorities eventually relented: all of the criminal charges were dropped, and, as Flynn later wrote, “We returned to our peaceful pursuit of agitating and organizing the I.W.W.”

Beginning the next year, twelve hundred people were arrested in a Spokane, Washington, free-speech fight that lasted several months. In response to Wobbly street speaking, also directed primarily against corrupt employment agencies (which had, for example, sent five thousand fee-paying workers to a company that employed only one hundred), the city council prohibited “public meetings on any of the streets, sidewalks, or alleys.” A local court upheld the ban while carving out an exception for the Salvation Army. The free-speech prisoners were beaten in jail, and some were placed in chains and forced to work on a rock pile. Three died in an unheated school that was used after the prisons had been filled. When the police shut down the Industrial Worker office and arrested Flynn (then noticeably pregnant) though she had not violated the ordinance, the fight became “front-page news in every newspaper in the country.” and hundreds more headed for Spokane. The ordinance was repealed, the Industrial Worker was allowed to publish, nineteen employment agencies lost their licenses, and two particularly brutal prison guards were fired. After another successful fight the following year
Fresno, California, the Wobblies were often able to win the de facto right to speak and organize with only a threat of a national call in the Industrial Worker.

Employers on the West Coast then organized the Merchants and Manufacturers Association to oppose free speech for the Wobblies, and they openly advocated a tactic that was first widely used in the Fresno fight: vigilantes, working with the police, would routinely beat the street speakers and throw them out of town. This became the regular practice, with the vigilante mobs often headed by leading business and banking figures. The most brutal actions occurred in San Diego in 1912, where anti-Wobbly vigilantes included leading members of the chamber of commerce and real-estate board, as well as a variety of merchants and bankers. These vigilantes regularly attacked the Wobblies as they entered town on freight trains, and made them kiss the flag and walk through gauntlets of men swinging clubs. One Wobbly was shot to death; others were tarred and feathered or had "IWW" branded on their bodies. However, throughout this and other, frequent attacks, the Wobblies persisted nonviolently and were almost always successful, including major victories in Cleveland, Denver, Detroit, Philadelphia, Omaha, Kansas City, Des Moines, San Francisco, Vancouver, Hawaii, and Alaska.

The Industrial Worker summed up the Wobbly experience with the legal system: "A demonstration of working men in the interests of the constitutional right of freedom of speech is judged a 'riot' by the courts; but violence and terrorism on the part of the capitalists and their tools is 'law and order.'" While the Wobblies did not achieve widespread or legal protection of the freedom to speak, they did achieve major successes and brought the issue to the public consciousness. They also made it quite clear that continued refusal to allow and protect free speech would lead to major confrontations into which significant segments of society would be drawn to support the labor movement as well as free speech.

The Women's Movement. Advocates of women's rights were particularly harassed by local and federal officials. In the early 1900s, Margaret Sanger and Emma Goldman were frequently arrested and sometimes fined or imprisoned for distributing leaflets with information on birth control. Newspapers that offended the postmaster—which included almost anything on the subject of sex or women—were denied the use of the mails. The publisher of a socialist newspaper in Oklahoma received a six-month sentence, under a federal obscenity statute, for publishing an ad for a pamphlet that criticized the popular view of women as sex objects and explained "why the Socialists believe women are human beings." This conviction was affirmed on appeal, and in a later case federal censorship of the mails was approved by the Supreme Court.

In 1917 participants in the women's suffrage movement came to the White House seeking President Wilson's endorsement of a constitutional amendment granting women the right to vote. When their efforts failed, they set up a picket of six women with banners at the White House gates. The women were convicted of "obstructing traffic," which they had not done, and imprisoned for three days after refusing to pay fines. During the weeks that followed, others were similarly convicted and sentenced for obstructing traffic or disorderly conduct, and some were sent to a distant prison. Months later, more women were arrested in a public park across from the White House, many of whom were mistreated in jail and staged hunger strikes in protest.

The repressive measures of this period were investigated by the U.S. Commission on Industrial Relations, a body with business and labor representatives established by Congress in 1912 to investigate the conflict between labor and capital and related causes of social unrest. The commission concluded that:

[O]ne of the greatest sources of social unrest and bitterness has been the attitude of the police toward public speaking. On numerous occasions in every part of the country, the police of cities and towns have either arbitrarily or under the cloak of a traffic ordinance, interfered with, or prohibited public speaking, both in the open and in halls, by persons connected with organizations of which the police or those from whom they receive their orders, did not approve. In many instances such interference has been carried out with a degree of brutality which would be incredible if it were not vouched for by reliable witnesses.

... [T]he long list of statutes, city ordinances, and military orders abridging freedom of speech and press ... have not only not been interfered with by the courts but whenever tested have almost uniformly been upheld by State and Federal courts.

The courts justified these decisions with both an expanded notion of the "police power," which gave the states enormous powers of repression in the name of preservation of safety and order, and the bad-tendency doctrine, whereby almost any expression of a different view was depicted as undermining law and order. Leon Whipple, a leading historian of civil liberty in the United States, described this mode of thought well:

... It proceeds from preserving the peace to preserving the status quo. This force for safety soon translates safety into "law and order" and this into
“the established order.” It changes health into comfort, and comfort into peace of mind, which means no agitation, no freaks, no tampering with things as they are.  

The Transformation: 1919–1940

The Espionage Act of 1917 made it a federal crime to “willfully make or convey false reports or false statements with intent to interfere with the operation or success of the [armed forces of the United States] or to promote the success of its enemies,” to “willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty,” or to “willfully obstruct ... recruiting or enlistment.” The next year, more offenses were added, including “uttering, printing, writing, or publishing any disloyal, profane, scurrilous, or abusive language, or language intended to cause contempt, scorn, contumely or disrespect as regards the form of government of the U.S., the Constitution, the flag, the uniform of the Army or Navy, or any language intended to incite resistance to the U.S. or promote the cause of its enemies.”

These acts, designed for use against opponents of American participation in World War I, constituted yet another example in this repressive history. However, for the first time, they prompted some justices of the Supreme Court to raise First Amendment problems with the criminalization of dissent; this was the beginning of the transformation of speech law, which proceeded case-by-case over the course of the next twenty years.

The judicial response to the Espionage Acts began with business as usual. A Second Circuit decision, *Masses Publishing Co. v. Patten*, approved of the postmaster’s refusal to deliver a newspaper to its subscribers because it expressed negative opinions about the purposes and conduct of the war. This and over two thousand criminal prosecutions were justified with the bad-tendency and constructive-intent doctrines. Professor Chafee examined these prosecutions in detail and concluded that

> [T]he courts treated opinions as statements of fact and then condemned them as false because they differed from the President’s speech or the resolution of Congress declaring war. . . . [I]t became criminal to advocate heavier taxation instead of bond issues, to state that conscription was unconstitutional . . . , to urge that a referendum should have preceded our declaration of war, to say that war was contrary to the teachings of Christianity. Men have been punished for criticizing the Red Cross and the Y.M.C.A. . . .

None of the Espionage Act convictions was reversed by the Supreme Court on First Amendment grounds, but the first signs of change came in

the opinions of Justices Louis Brandeis and Oliver Wendell Holmes. In 1919 Justice Holmes articulated his “clear-and-present-danger” test in *Scheneck v. United States*. This was seemingly at least a partial repudiation of the bad-tendency doctrine, and it was set out in a unanimous opinion.

However, the *Scheneck* test, which is still with us today, hardly provides a precisely defined or clearly applied standard. While the *Scheneck* opinion was widely hailed by liberal commentators, its exaggerated importance was evident in the decision itself. All that Scheneck, a Socialist party leader, had done was distribute a leaflet to draftees criticizing the war, challenging the draft as unconstitutional, and urging them to challenge their conscription on legal grounds and by legal means. There would seem to be no danger, since the courts could adjudicate such challenges, and whatever consequences there might be were neither clear nor present. Yet, Holmes’s opinion affirmed the conviction, and it would be regularly cited in later cases to justify convictions for mere dissent.

Holmes’s votes with the majorities in two subsequent affirmances of convictions further undercut the meaning and importance of the *Scheneck* test: one involved the author of critical articles on the constitutionality of the draft and the purposes of the war, and the other sent Eugene Debs to prison on a ten-year sentence for a speech at a socialist rally in which he mildly condemned the war as a contest between competing capitalist classes. The *Debs* case raised a public outcry because of the stature of Debs and the fact that his supposed crime was an attempt to cause insubordination in the military and to obstruct recruiting, although he did not speak to soldiers or urge resistance to the draft. While in prison, Debs received more than 920,000 votes for president as the Socialist party candidate in the election of 1920, more than he had received in any of four prior elections.

Holmes and Brandeis began their famous series of dissents in *Abrams v. United States*. In that case, the conviction of mainly Russian-born and Jewish defendants for aiding the Germans was based on a leaflet that condemned U.S. military intervention in the Soviet Union in 1918. The majority of the Court held that the actions advocated, such as a general strike, would affect the war effort against Germany even though that intent, as required by the Espionage Act, was clearly not present. In this and subsequent cases, Brandeis and Holmes masterfully set out in dissents and concurrences the fundamental social, historical, and political bases for free speech that have survived to this day. Quoting Justice Brandeis:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberate forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of
happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infrac- tion; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they exulted silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.\footnote{47}

After World War I and the Russian Revolution, various forms of American radicalism blossomed, and there was a period of hysterical reaction, usually referred to as the "Red Scare." On the state level, there were new sedition, criminal anarchy, and syndicalism laws; thirty-two states forbade the flying of a red flag; and the New York legislature expelled five socialists. Socialist Victor Berger was twice denied a seat in the House of Representatives; the federal government deported many aliens for their beliefs; and in 1920 the attorney general (assisted by a young federal agent named J. Edgar Hoover) conducted the infamous Palmer raids. Private institutions and individuals, often acting with the government, engaged in similar repression. Harvard alumni and Justice Department officials sought to have Professor Chauncey fired for his criticism of the Abrams decision in a law review article; charges that he was "unfit as a law school professor" were rejected, but only after a hearing at the Harvard Club.\footnote{49}

Holmes and Brandeis continued their articulation of a broad-based right of expression, although, as in Schenck, the votes they sometimes cast affir- ming convictions conflicted with their eloquence.\footnote{49} In 1925 a majority finally said the First Amendment was applicable to the states.\footnote{50} However, the breakthrough in results came in 1931 in Stromberg v. California,\footnote{51} where the Court reversed a state conviction for displaying a red flag at a Young Communist League summer camp. That same year the Court first prohibited prior restraints by the states on the press.\footnote{52}

Subsequently, freedom of expression was enlarged throughout the decade. The leading decisions spanned only five years (1936–1940), during which time the Court (in addition to Hague) invalidated a state tax on the press, reversed a conviction for a peaceful assembly, reversed a conviction for an attempt to promote "resistance to lawful authority" by distribution of a pamphlet advocating a separate black nation in the South, invalidated the conviction of a Jehovah's Witness for violating an ordinance requiring a permit for distributing literature, invalidated an ordinance banning all leafletting, protected a Jehovah's Witness's right to solicit door-to-door without a permit, and protected the right to picket.\footnote{53} Probably the most libertarian decision in the Court's history, in its reasoning if not also in its result, came in 1943, when it invalidated a state compulsory flag-salute law.\footnote{54}

In these cases, the bad-tendency and constructive-intent doctrines and the notion of seditious libel were repudiated, and a multifaceted right of expression was established. As the decade wore on, the natural-law-based rationale of Hague was emphasized, and the rich history of the struggle for free speech was transformed into a natural right from ancient times, guaranteed by the Constitution and enforced, with some unfortunate exceptions, by the courts.

**The Free-Speech Movement**

It is so common to view free speech as a legal rather than political issue that we tend to overlook the fact that there was—and is today—a free-speech movement that played an important role in the struggle for free speech.

While the political and religious groups and activists who were denied freedom of expression usually viewed it as secondary in importance to their substantive demands, they and many others organized efforts to more effect- ively raise the free-speech issue. There were a number of ad hoc groups, such as the Free Speech Committee, which held a meeting of two thousand people in 1909 following a series of incidents highlighted by the refusal to allow Emma Goldman to speak on Ibsen's writings in New York. About the same time, the IWW started its free-speech fights, which combined labor organizing with the free-speech demand, and Theodore Schroeder formed the Free Speech League, which primarily produced theoretical writings. In the early 1930s, the International Labor Defense focused on various civil liberties issues predominantly in the South (and brought national and international attention to the Scottsboro case).

Though surely significant, none of these efforts was broadly based, able to command consistent national attention, or systematic in its strategies or approach to the free-speech issue. What the free-speech movement lacked was a mass base, a national organization, and effective organizing; it found all three in the labor movement, the National Civil Liberties Bureau (which became the American Civil Liberties Union in 1920), and Roger Baldwin.\footnote{55}
Baldwin, whose upper-middle-class family could claim an ancestor on the Mayflower, was a pacifist with a strong commitment to personal freedom and social justice. His philosophic and political thinking was deeply affected by Emma Goldman and other anarchists, although he did not oppose all forms of government. He also differed from the anarchists in his approach; as he told me, “I was essentially a pragmatist. I did things that I thought would work. Emma was essentially an idealist, and she did things that she thought were right.”

In 1917 Baldwin and Crystal Eastman, a leader of the American Union Against Militarism (AUAM), convinced the board of AUAM to form an adjunct, called the Civil Liberties Bureau, that would be primarily concerned with the prosecutions and treatment of conscientious objectors during World War I. The bureau was generally greeted with hostility, including a denunciation in the New York Times for “antagonizing the settled policies of our government,” which caused controversy within AUAM and resulted in its separation from AUAM a few months later. As an independent entity, the National Civil Liberties Bureau (NCLB) was headed by Baldwin and included on its board several nationally known reformers, socialists, and lawyers, including Clarence Darrow and Norman Thomas.

The NCLB immediately took on the toughest civil liberties issues of the day: protection of conscientious objectors and the Espionage Act prosecutions. The federal government responded by raiding the NCLB office and seizing all its files. Also in this initial period, Baldwin served a year in jail for draft resistance, after which he remarked, “I am a graduate of Harvard, but a year in jail has helped me recover from it.”

When he returned to the NCLB, Baldwin insisted on a new approach that emphasized labor-related civil liberties issues and an alliance with the labor movement. The NCLB issued a pamphlet on the IWW, which, though containing a disclaimer, clearly indicated where the organization stood on the conflict between labor and capital:

[There have been] deliberate misrepresentations by employing interests opposed to organized labor, who have... paint[ed] the I.W.W. as a terrorist organization of “anarchists.” They thus frighten the public into an alliance with them instead of with labor. ... [V]iolence has been much more commonly used against the I.W.W. than by it; ... the violence used by employers is open, organized, deliberate and without any excusable provocation; ... the I.W.W. have almost never retaliated even in the face of outrages ranging from murder to mass deportations. ... [T]he disloyalty and treason charges against the I.W.W. are based on] simply the ordinary activities of labor-unions struggling to get better wages and conditions. ...  

This pamphlet was banned from the mails and almost led to an Espionage Act prosecution, but, in one of the few successful legal challenges of the period, the NCLB won a court order overturning the ban.

Baldwin led the NCLB through a reorganization in 1920 that emphasized the alliance with labor. The NCLB had long tried to unite liberal and left groups around the free-speech issue, but many identified the NCLB with pacifism or even disloyalty, and its strong image provoked criticisms from the left and right. The reorganized NCLB, to be named the American Civil Liberties Union, would, according to the reorganization memorandum written by Baldwin, institute a “dramatic campaign of service to labor” with a National Executive Committee composed of a core of labor leaders and labor sympathizers. One major tactic would be IWW-type free-speech fights where employers or local governments denied labor organizers free speech. “A few well-known liberals, for instance, going into the strike districts of western Pennsylvania and exercising their right to speak in defiance of sheriff-made law ought to dramatize the situation effectively.” And so it did; there were successful labor-related free-speech fights sponsored and supported by the ACLU in the 1920s and 1930s in Connecticut, New Jersey, Pennsylvania, and West Virginia.

The new National Executive Committee, all of whose members were prolabor, consisted of a core of labor leaders and many well-known socialists, communists, and liberals. They had succeeded in uniting a coalition of labor and the left, which sought and found support from all levels of society.

Baldwin told me he viewed the free-speech issue as primarily political and only secondarily legal, and as inseparable from the rights of workers to organize and bargain collectively. The reorganization scheme was aimed at increasing the power and political effectiveness of the ACLU.

[Organization was the basis of our service in the ACLU. We] as an organization were powerless and therefore we had to attach ourselves to the defense of movements that had power. ... If we had been a legal aid society helping people get their constitutional rights, as such agencies do their personal rights, we would have behaved quite differently. We would have stuck to constitutional lawyers [and] arguments in courts. We would not have surrounded [the NCLB and the ACLU] with popular persons. But we did the opposite thing. We attached ourselves to the movements we defended. We identified ourselves with their demands. ... [and] we depended on them... for money and support.

Thus constituted and directed, the ACLU proceeded to challenge and organize around, for example, antievolution statutes in the Scopes case, the Espionage Act prosecution of Communist Benjamin Gitlow, the Sacco-
Vanzetti prosecutions—and, in 1937, the antilabor and antifree-speech actions of Boss Hague.

LEGAL DECISION MAKING: EXPLAINING THE TRANSFORMATION

The fundamental conflict between the Davis and Hague decisions raises the basic questions about legal decision making: How do judges make decisions? How and why does the law change?

An appropriate starting point is the explanations given by the justices themselves: that their decisions were determined by legal reasoning and analysis. Indeed, if the law is separate from political and social forces, as it purports to be, there should be a coherent legal explanation. The primary source of law in these cases was, of course, the Constitution, but the operative constitutional provisions, the First and Fourteenth amendments, were identical in both cases. Hague held that the First Amendment, prohibiting any “law abridging freedom of speech” and operating against the states through the Fourteenth Amendment, establishes an individual right to speak on public streets, sidewalks, and parks; Davis, with the same provisions in effect, held the opposite.

It might be argued that there was a legal barrier to enforcement of the First Amendment against the states prior to the Supreme Court’s incorporation of the First Amendment into the Fourteenth Amendment in 1925. But this only begs the question; the same provisions were in effect since the Civil War, and thereafter an incorporation decision could have been made whenever the Court chose to make it. In fact, the Court had clear opportunities and discussed the issue even before the Davis case. The incorporation of the First Amendment was not a legally required or determined phenomena; rather, it was, chronologically and actually, a manipulation of legal doctrine that was part of the transformation, more an effect than a cause.

Another possible legal explanation might be found in the prior decisions that interpreted the general language of the First Amendment. However, in both periods there were precedents and reasoning supporting each side. Moreover, since precedents and reasoning can be distinguished, modified, or discarded, they do not require any particular rule or result. This is particularly clear in Hague, since Davis was a direct precedent that the Court chose to avoid. There is no legal explanation for that choice; the law merely provides a variety of stylized rationalizations for justifying choices made on other grounds. This would still be true had the Court decided to follow Davis, because that would also be a choice nowhere required in the law, and the question would still be why the Court made that choice.

Other possible explanations focus on the character, intelligence, and historical sophistication of Justice Holmes; perhaps Holmes was simply smarter or more in touch with the framers of the Constitution than other judges. There is, however, no basis for assuming that Holmes had any less character or intelligence when he wrote the Davis Massachusetts opinion than when he dissented as a Supreme Court Justice in Abrams. Nor could any connection with the framers offer a sensible explanation, since the framers wrote and passed the Sedition Act and conceived and articulated the bad-tendency doctrine.

There is no legally required rule or result, and despite endless attempts by judges and legal scholars to find transcendental legal principles, there simply are none. But one can make sense of these decisions by examining the social and political contexts in which they were made, and by viewing legal decision making and law as political processes.

Davis asked the Court to overturn a longstanding local practice sanctioned by many lower federal and state court decisions; the Supreme Court, without even a dissent, simply repeated the result and doctrine developed by the lower courts. But society underwent fundamental changes between Davis and Hague. Industrialization, the First World War, the Depression, the New Deal, and the left and labor movements led to basic shifts in consciousness and social and power relations. These shifts affected judges as well as society generally, and some of the judges, though from the same strata of society as the judges of the Davis era, came to see the justice of at least some progressive demands. Justice Holmes’s reassessment of speech rights would seem to exemplify this kind of change. In the early 1920s, he revised his thinking about freedom of speech, and the author of the Davis opinion in the Massachusetts Supreme Court became the U.S. Supreme Court’s foremost spokesman for free speech. This was not the result of more legal research or any legal principle but of his and society’s altered consciousness.

Such a social change is transmitted to and affects individuals in various ways—through mass media, public and private associations, professional groups, and peer pressures. Such influences on Holmes probably included a particularly critical meeting with Professor Chafee, who was very upset about the Debs decision. The judges, like Holmes, who came to place considerable value on freedom of speech (and it was surely not all of them) did so because they, as people living and working in society, were affected by historical and social changes and the events and people surrounding them. Due to the peculiar nature of our legal system and the socialization, education, and experience of our judges, these judges would generally express this new consciousness in legal terms, and many of them would honestly deny its newness and honestly believe it stemmed from legal analysis.
Furthermore, Davis was an isolated individual, while the left and labor movements were broad-based, national, and politically powerful. A significant measure of sympathy, understanding, and legitimacy flows from power; demands and speakers that were once regarded as extremist become legitimate as they crystallize into a movement that gains numbers and power. Whipple, in his examination of freedom of speech as practiced from colonial days to the First World War, concluded that "whoever has power, economic or political, enjoys liberty." 67

The power of such a movement also places judges in a bind. Though most were likely to be hostile or ambivalent toward the labor and left movements and their demands, the demand for free speech had clear historical roots and was seen as appropriate by many people. To deny this demand, a judge would have to risk fomenting a major confrontation in a period already fraught with the possibility of revolution. Moreover, it would be clear that if labor could not speak and organize legally, it would do so illegally and perhaps adopt a strategy similar to the IWW free-speech fights, which won considerable support for the IWW as well as for the Constitution. Although some judges might welcome the confrontation, others—even those born and raised on Wall Street—would find it preferable to bring these activities within and under the control of the established order, as Congress had done with the NLRA.

The power of this movement and the precedents favoring local control over speech would also raise institutional concerns. To uphold the right of free speech would require contradicting longstanding precedents and widespread practice. On the other hand, to deny a demand so widely supported would raise a public outcry, undermine the Court's authority, and perhaps stimulate support for Roosevelt's court-packing scheme announced in 1937. These institutional concerns amount to a choice between rejecting (or avoiding) a precedent and widespread practice and ruling against the mainstream of political thought. That the latter would be a major and perhaps predominant concern is clear if one looks closely at the context: there was a widespread controversy about the courts in this period, and the Court's recent trend was in the direction of the mainstream of society in several related decisions; 68 the law's blatant pro-business slant was seen in some upper-class circles as undermining its power and authority; Congress had enacted the NLRA in 1935, and in 1936 Congress established a committee to investigate "violations of the right of free speech and assembly and undue interference with the right of labor to organize and bargain collectively" (reflecting, among other things, the fact that these two rights were widely viewed as inseparable); 69 and an amicus brief filed by the American Bar Association favored the CIO's position.

The various factors discussed here would not necessarily operate inten-
to be—or confused with—the reality. In fact, not only has the history of free speech been regularly misrepresented; the ability of our people to communicate meaningfully based even on the most libertarian version of free speech accepted by our courts has been greatly exaggerated. Moreover, the courts failed to provide an effective barrier in the most repressive period since the transformation (the 1950s); and in the last fifteen years, the central insights and distinguishing rules of American speech law have been substantially undercut by the Supreme Court without noticeable public debate or interest.

**Since the Transformation**

Throughout the posttransformation period, the basic approach set out in Hague and other cases of that era has been more or less followed depending mostly on the historical context. Thus, in the 1950s, Senator Joe McCarthy, the House Un-American Activities Committee, and many others resurrected the pretransformation tradition, and the judiciary essentially collapsed. Unpopular ideas and associations again became illegal; dissenters were jailed and lost jobs. The courts abridged in the face of a reactionary media blitz, leading Justice Hugo Black to say:

> It has been only a few years since there was a practically unanimous feeling throughout the country and in our courts that this could not be done in our free land... [The ultimate question is] whether we as a people will try fearfully and futilely to preserve democracy by adopting totalitarian methods, or whether in accordance with our traditions and our Constitution we will have the confidence and courage to be free.

On the other hand, during the 1960s, the civil rights movement demanded and obtained stringent enforcement and enlargement of speech rights. This is best exemplified by the Supreme Court decisions expanding the rights to picket, protecting the press, and protecting even a demonstration with signs inside a public library.

However, even in the most libertarian periods, freedom of speech has been exclusively defined by the historically and culturally specific set of speech rights developed in the transformation period (mainly the 1930s), whose scope and importance in contemporary society are regularly exaggerated. First, the speaker, demonstrator, and writer must cope with the clear-and-present-danger standard and First Amendment balancing tests (in which the interest in speech is "balanced" against competing concerns). The clear-and-present-danger standard can easily be used, as it was in the opinions that first articulated it, to justify repression and punishment of dissent—to allow the bad-tendency doctrine in by the back door. Since the scope of the dangers referred to has never been meaningfully defined (or even limited to unlawful activities), the clear-and-present-danger formulation amounts to the notion that speech loses its protection when it becomes persuasive or effective concerning something a judge views as dangerous. First Amendment balancing tests, while purporting to require particular, legally determined results, provide, in the words of Professor Thomas Emerson, only "various considerations [that] can be enumerated but not weighted. There is no standard of reference upon which to base a reasoned, functional determination." This often reduces to a question of whether the speech at issue, given all the circumstances, will likely or potentially cause disruption, which means "harmless" and "futile" speech is protected while speech that is effective, persuasive, or apt to provoke a response is not. These rules tend to allow expression only if it is abstract and ineffective.

The effectiveness and usefulness of our speech rights are also diminished by the reality that effective communication in modern society is expensive. People of ordinary means must rely on the Constitution for a means of communication and organization. People with power and money do not need to picket, demonstrate, or distribute leaflets on the street. The mass media continuously express their perspectives, both explicitly and implicitly, by "more respectable"—and more effective—means.

But most basically, freedom of speech as we know it simply does not provide people of ordinary means entrance to society's dialogue on the issues of the day. Rather, they—we—are allowed to demonstrate, picket, hand out literature, gather in the streets, sing, chant, yell, and scream—all of which effectively amounts to a *display of displeasure or discontent*, without the means to explain why we are displeased much less to actually participate in any social dialogue. This display often will not even gain a spot on the local news unless some violation of the law, injury, destruction of property, or stunt accompanies it. If it does appear, it will usually be unexplained, without description of its context, and frequently misrepresented. Our ability to communicate is haphazard, burdensome, lacking an effective means to explain or persuade; and our messages are filtered, edited, and censored by media organizations mostly interested in pleasing the public and making profits rather than communication, education, or social dialogue. It should not be surprising that so many Americans—across the political spectrum—perceive themselves and their views as excluded from public discourse.

Essentially, the law and society have frozen the scope and nature of our speech rights at levels appropriate to the 1930s, when specific audiences, like factory workers, were geographically centered, and speaking, gathering, and distributing literature in public places were the primary means of communication. The speech rights conceived in that period do not provide access to our current means of communication. Technological, social, and cultural changes have rendered the fruits of the free-speech struggle somewhat ob-
solete. Television, radio, newspapers (increasingly concentrated and limited in number and diversity), and direct mail now constitute the battleground, and the marketplace of ideas. In the absence of mass-based demands, we have allowed no meaningful inroads into these media for people or groups without substantial money or power.

The scope and reality of our speech rights as a means of communication and persuasion are thus limited by these legal, economic, and practical barriers. I would not relinquish these rights—with considerable patience and persistence, they can and have been meaningful, and often they are all we have. But the ordinary person or group of ordinary persons has no means, based in the Constitution or elsewhere, to engage meaningfully in that dialogue on the issues of the day that the First Amendment is so often heralded as promoting and guaranteeing.

THE RECENT RETRENCHMENT

In recent years, free-speech law has shifted drastically further from its transformation-period emphasis on enhancing the ability of ordinary people to express themselves meaningfully. While some previous rulings protecting speech have been (narrowly) reaffirmed, the media and public have been inexplicably silent as the Rehnquist-Burger Court has experimented with what may be a dismantling of the basic system of free speech. There has been a conservative speech retrenchment in recent years with three major elements: the Court has increasingly narrowed and restricted the free-speech rights available to people of ordinary means, enlarged the free-speech rights of wealthy people and corporations, and erected a free-speech barrier to public access to the media and to important electoral, economic, and social reforms.

At the forefront of the Court’s speech rulings over the last fifteen years has been a systematic restriction of the range of places and contexts in which speech is protected. The Court has overruled earlier decisions protecting leafleting in shopping centers; upheld a blanket prohibition of posting signs on any city-owned buildings, poles, or other property; approved limits on expression at state fairs, residential neighborhoods, open portions of military facilities maintained like civilian communities, and areas near foreign embassies; limited access for competing viewpoints to a government-sponsored fundraising drive and an administrative communications network; cast serious doubt about expression at airports and other terminals; imposed content limits on speech by public employees; and approved censorship of school newspapers.

These decisions have been largely based on a new principle created by the Court that generally allows expression only in places and contexts the Court decides are “public forums.” The majority opinions and results in these cases are reminiscent of the Davis case, repudiated in the transformation era—particularly the emphasis the Court has placed on the government’s authority to wholly or selectively restrict access for the purpose of expression to governmental property and facilities that are otherwise open to the public or to government approved speech.

In recent cases the Court has also cast serious doubt on the content barrier—the cornerstone of our speech law that prohibits the government from limiting speech based on its content. The Court has held that a restriction on speech based on content can be constitutional if the purpose is directed at other, legitimate “secondary effects,” like traffic congestion or litter. This new doctrine was initially applied to speech that is only marginally protected, but one of the recent cases signals a willingness among at least three of the conservative justices to apply it to all speech.

The opinions distinguishing forums from nonforums and allowable from prohibited content restrictions are tedious and draw vague lines that lack any substantial basis or connection to free-speech principles; it is clear only that previously protected speech is no longer protected. The underlying free-speech concerns are hardly discussed, except in frequent dissents by Justices Brennan and Marshall, who recently characterized one of the new developments in speech law as “ominous.”

These speech cases are consistent in their basic approach to individual rights and the Constitution with the Court’s limiting decisions in a variety of other areas. The fundamental focus of the conservative justices is not whether constitutional rights have been violated or an injustice has been done but whether that bad result was the specific motivation or purpose of the unconstitutional conduct. Thus, exculpatory evidence destroyed by a prosecutor in violation of a defendant’s clear constitutional rights will not be remedied unless the prosecutor’s purpose was to wrongfully convict the defendant; a city’s acquiescing to the wishes of a white neighborhood to close a main street to an adjoining black neighborhood will not be remedied unless the purpose is to keep out the traffic of black people as opposed to keeping out traffic that happens to be black; and there is no remedy for constitutional violations by police officers if they “reasonably” believed their conduct was lawful. Now free speech can be denied if the purpose is not to deny free speech. Such malicious purposes can seldom be proved, of course; benign motives are available to explain malignant acts, and in many of these cases, the Court does not even look at or require an explanation if malice cannot be proved or a benign purpose can be imagined.

Simultaneously and without apparent concern for motives, the Court has expanded the free-speech rights of wealthy people and corporations. The Court has extended free speech protections to corporations, as if they were people, even as to issues unrelated to their businesses; invalidated as a vio-
...ation of free speech a Florida statute providing a limited right to reply in a newspaper to candidates who have been criticized, and invalidated as violations of free-speech limits on the amount of money an individual can spend to support a candidate. In the public access cases, television networks and local stations and large newspapers—owned by fewer and fewer large corporations with little experience or concern with journalism or public discourse—claim absolute protection not only from government censorship (protection that is appropriate) but also from any claims to access by the people. Although they monopolize the idea marketplace, the courts have protected them against claims to access as if they were individuals handing out leaflets on a street corner. Limited rights to access, such as a right to reply, are common in Western Europe, and they would probably improve quality and audience interest as well as enhance democracy.

The conservative shift over the last decade has included a decrease in popular access to media and increased "privatization" of the means of communication. This trend is exemplified by the downfall of the "fairness doctrine" and the privatization and exclusiveness of cable television (which involves a tremendous waste of resources as an additional set of wires is crisscrossing the American landscape to transmit a medium whose technological hallmark is the lack of any necessity for wires) and newer technologies, such as fiber optics. This has all occurred even as the content of our major media has degenerated; the corporate standards bearers of free speech acknowledge and sometimes glorify their avoidance of ideas or controversy. A much broader range of people and ideas must gain access to our media.

We are moving toward a regime in which the Constitution yields substantially enlarged rights and power for corporations and wealthy individuals, but the ordinary citizen has no enforceable constitutional rights unless he or she can prove the government has acted maliciously and the government cannot suggest an alternative, plausibly benevolent purpose. The essence will be enhanced governmental power to suppress and impose its will on the people. The rationale and rallying cry for this new regime will be, as it was for the Reagan decade, freedom—a magnificent word and idea being steadily reduced to its opposite.

THE IDEOLOGY OF FREE SPEECH

As we stray further from the ideal of free speech we celebrate, it becomes easier to see the ideological aspects of free speech in the United States. The struggle for free speech up to the transformation, waged largely by progressives and finally realized by the labor, civil rights, and other progressive movements, has been falsely redefined as a set of preexisting natural rights whose essence and history are legal rather than political. A false pride in the legal system has displaced a source for genuine pride in the people, who fought business interests and the government—including the courts—to achieve recognition of free speech.

This recast version of freedom of speech serves in our society to validate and legitimize existing social and power relations and to mask a lack of real participation and democracy. In all capitalist countries, a sharp distinction is drawn between a person's "private" and "public" life. In the public sphere, which includes selection of government officials and political expression, basic concepts of freedom, democracy, and equality are applicable. However, in the private sphere, which encompasses almost all economic activity, we allow no democracy or equality and only the freedom to buy and sell. Fundamental social issues, such as the use of our resources, investment, the environment, the work of our people, and the distribution of our goods and services, are all left to "private"—mainly corporate—decision makers.

The ideology of free speech is basic to widespread acceptance of this public/private split. Whatever the state of our economy and people, this ideology tells us that we are free and our society is democratic because we can vote and we have free speech. Like all effective ideology, this reflects as well as distorts reality. Thus, while freedom of speech is essential to any free and democratic society, so is the ability to participate meaningfully in the formulation of social policies and priorities and the provision of basic needs for shelter, health care, nutrition, education, and meaningful work.

But voting in elections increasingly dominated by fleeting, contentless media images and free speech that allows no meaningful entry into the social dialogue are presently the only ways to participate in societal decisions that affect our lives. We have drawn the line defining the "private" sphere with a uniquely broad brush. Wider participation, on issues like workplace governance, plant closings, and environmental protection, already exists in a variety of forms in many countries. After two hundred years—and with democracy fueling revolts around the world—American democracy must mean more than voting every four years in elections devoid of content or context and the right to picket when you're really upset.

The ideological development and use of free speech in the United States have rendered this hard-won principle of liberation also an instrument of delusion: its reality is far less impressive than its rhetoric; its attainment and continued vitality depend more on popular movements than judges or courts; and its seeming embodiment of individual power and democracy masks powerlessness and society's refusal to allow real participation in the decisions that affect our lives. Our celebration of free speech should be tempered by the realization that its continued vitality even here is not at all assured, and
channeled into efforts to protect transformation-era speech rights and to expand public access to the media and participation and democracy regarding the decisions that affect our lives.

NOTES


5. The leading cases are collected and discussed in Rabban, supra note 2.


8. Hague v. CIO, 307 U.S. 496 (1939). Of the seven justices participating, five concurred in the substantive aspects of Justice Owen Roberts's plurality opinion, which is considered the opinion of the Court for present purposes.

9. The Court said it did not have to "determine whether . . . the Davis case was rightly decided" because Davis did not apply for a permit and the purpose of the Davis ordinance was not "directed solely at the exercise of the right of speech and assembly" but also included regulation of the park for the "public convenience." However, while these facts are correct, the Davis court clearly based its decision on the property rights of the city, a basis the Hague court rejected. Moreover, both ordinances set up permit systems that the Court had already invalidated only months earlier, Lovell v. Griffin, 303 U.S. 444 (1938), and the Hague ordinance was ruled void on its face because individuals have a constitutional right to speak and assemble on public streets, sidewalks, and parks. The decisions are inconsistent. See also Janison v. Texas, 315 U.S. 413 (1942).


16. Whipple, supra note 2, at 21, 26—27.

17. Chafee, supra note 2, at 27.

18. Whipple, supra note 2, at 49.

19. Id., at 51.

20. Id. at 57—63, 71—73.


23. Whipple, supra note 13, at 93—100; Nye, supra note 21, at 145—50.

24. XII Register of Debates 28 (1837); Nye, supra note 21, at 41—85.

25. Quoted in Whipple, supra note 2, at 222.


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50. Gitlow v. New York, 268 U.S. 652 (1925). Technically, this was dictum, since it was not necessary to the decision.
51. 283 U.S. 359 (1931).
54. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). The justices were probably affected by the widespread news in this period (withheld from the public earlier) of the Holocaust in Germany, to which they seemed to refer: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." Id. at 641.
55. See generally Johnson, supra note 48; Drumm, supra note 26; Auerbach, Labor and Liberty and "The Depression Decade," both supra note 2; Peggy Lamson, Roger Baldwin: Founder of the American Civil Liberties Union (Boston: Houghton Mifflin Co., 1976). In this account, I have also relied on a personal interview with Baldwin. At ninety-seven and only several months before his death, he still exhibited the clarity and vigor he brought to the free speech issue. The interview was conducted on May 5, 1981, at Baldwin's home in New Jersey. I appreciate the assistance of my friend Candace Falk, who had me invited to an interview of Baldwin originally planned to cover only her book, Love, Anarchy, and Emma Goldman (New York: Holt, Rinehart and Winston, 1984).
57. Johnson, supra note 48, at 48.
59. Johnson, supra note 48, at 74-78.
60. NCLB memorandum, "Proposed Reorganization of the Work for Civil Liberty," December 31, 1919, quoted id. at 146.
61. See Auerbach, Labor and Liberty, supra note 2. See also Paul Murphy, "Communities in Conflict," in Reitman, supra note 2.
62. The labor leaders included James Maurer (president of the Pennsylvania Federation of Labor), Henry Linville (president of the Teachers Union of New York), Duncan McDonald (president of the Illinois Federation of Labor), A. J. Muste (National Organizer for the Amalgamated Textile Workers Union), Julia O'Connor (National Organizer for the Telephone Operators Union), and Rose Schneiderman (Women's Trade Union League). Not all of organized labor was part of this effort; generally, the more progressive unions participated. Many unions also used their own lawyers instead of or in addition to the ACLU lawyers. Other committee members included Jane Addams, Albert DeSilver (codirector with Roger Baldwin),
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72. Barenblatt v. United States, 360 U.S. at 147 (dissenting).
74. See Dennis v. United States, 341 U.S. 494 (1951); Emerson, supra note 2, at 112-21.
76. Emerson, supra note 2, at 117. See also Dorsten, Bender, and Neuborne, supra note 2, at 58.
85. First Nat. Bk. of Boston v. Bellotti, 435 U.S. 765 (1978); Miami Herald v. Tornillo, 418 U.S. 241 (1974); Buckley v. Valeo, 424 U.S. 1 (1976). This phenomenon is not limited, of course, to the courts. For example, President...
Reagan justified his veto of the Children's Television Act of 1988, which limited some advertising techniques directed at children, with appeals to freedom of speech.


87. In feminist analysis, the public-private split is drawn differently; the public sphere includes all work outside the home.