The Idea of Political Freedom

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OVER THE LAST TWO centuries, our conception of state power has shifted. In the nineteenth century, we conceived of the state as an artificial entity constructed by the members of society to serve distinct and limited purposes. The Constitution, according to this view, was an instrument of creation. It brought the state into being, and the constraints it imposed on the state derived from this constructive endeavor. The first and foremost question of constitutional law was one of authority: is the state empowered to act?

In the twentieth century, particularly after the New Deal, the state was conceived in more organic terms: as a structure of existence immanent within the community whose welfare it sought to further. Authority was presumed, and the principal constitutional inquiry was whether the state had violated some specific prohibition. In that respect, the First Amendment, the subject of this chapter, is exemplary. It declares that "Congress shall make no law abridging the freedom of speech, or of the press." In the twentieth century, this provision of the Bill of Rights became one of the focal points of constitutional litigation and was forged into a powerful tool for invalidating state and federal regulations even when authority was otherwise manifest.

Today, any transgression of the First Amendment prohibition is construed to mean that the state exceeded its authority. In the nineteenth century, however, the question of authority arose not from the application of a specific prohibition, but from an understanding of the inherent limits on the state's authority to pursue certain ends. Those limits were intrinsic or internal to the authority itself; they were derived from the very purposes for which states were created. The limits imposed on state authority by the First Amendment, by contrast, are extrinsic. They place limits on state power even when it was assumed that the law in question served public purposes.

The doctrine of "enumerated powers," so prominent in nineteenth-century

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constitutional litigation, was an attempt to preserve the intrinsic limits of state authority. It required the Supreme Court to locate a grant of authority in the Constitution that would allow Congress to enact the measure in question. The doctrine of "substantive due process" was of like effect, though it had its greatest force in the context of state and local legislation. Admittedly, the states possessed a power—the police power—that the federal government lacked, but in the nineteenth and the early twentieth century, the Supreme Court understood that power in much the manner of the enumerated powers of the federal government—that is, as a species of constructed, as opposed to organic, authority. Although the states could enact measures to further the "health, welfare, or morals" of the public, each of the seemingly expansive terms in this formula became a narrow pigeonhole restricting the scope and permissible purpose of any law.

In the most famous substantive due process case of all—*Lochner v. New York* (1905)—the Supreme Court struck down a New York statute imposing a ceiling on the hours worked in bakeries, on the ground that the state had exceeded the limits on its authority. Justice Rufus Peckham's majority opinion acknowledged that protecting the health of workers—the only justification for the law that he could countenance—was a permissible end for the state, yet he thought the relationship between that end and the means adopted by the legislature to achieve it was unacceptably incongruent. If restricting the number of hours worked in bakeries, were an acceptable means of protecting the health of workers, there would be, he feared, no effective limit to the power of the state. As the basis of this decision, Peckham relied on the Due Process Clause, which prohibits the state from depriving any person of "life, liberty, or property without due process of law." The Due Process Clause was not treated, however, like the First Amendment, as a prohibition, but more in the nature of the Ninth Amendment, as a codification of the general idea that the rightful reach of the state over the individual is limited (Fiss 1993, 158–60).

The distinction between the authority and prohibition inquiries that distinguish the nineteenth and twentieth centuries represented not only a difference in constitutional method, but also, and perhaps more fundamentally, a difference in the understanding of liberty. From the authority perspective, liberty was what remained to the individual once the state had reached the outer bounds of its authority. Liberty was a residue. This kind of liberty might be characterized as a prepolitical or natural liberty because it belonged to the individual standing outside of, or apart from, the organized political community. It was the liberty an individual might enjoy in the state of nature imagined by the social contract theorists of the eighteenth century and before.

From the perspective of the First Amendment, another type of liberty emerges: a right that the individual enjoys as a member of the community and that is essential to the effective functioning of that community. The extent of the state's capacity to regulate speech is drawn not along the lines of the in-

trinsic limits of its authority, or at the outer boundaries of the individual's domain of natural freedom, but rather in a fashion calculated to further the functioning of the political system. Speech is protected on the theory that free and open debate on public issues is an essential precondition of democratic self-government. Accordingly, the freedom the First Amendment has given rise to might well be conceived as a political freedom: first, because it belongs to individuals as participants in the political system, and second, because it serves the needs and interests of that system.

Driven by the imperatives implicit in the idea of political freedom, the Supreme Court has over the course of the twentieth century invalidated many laws that manifestly serve public purposes and that were otherwise within the scope of state authority. The Court saw itself as a bulwark of our political freedom. Even more remarkably, given the nineteenth-century understanding of constitutionalism and its emphasis upon limiting the state, the idea of political freedom led the Court to call upon the state to act affirmatively to protect and even enrich public debate.

FREE SPEECH AS A NATURAL LIBERTY

The intellectual traditions out of which *Lochner* arose have great resiliency, and, as illustrated by the 1969 decision *Stanley v. Georgia*, continued to surface in the application of the First Amendment. In these cases, state regulation was deemed to have intruded into a domain that naturally belonged to the individual, and the Amendment was used as a formal basis to invalidate state action in a manner reminiscent of *Lochner.* The specific content of First Amendment law and the idea of political freedom played no role in the Court's analysis.

The petitioner in *Stanley v. Georgia* was convicted for possessing obscene films in the privacy of his home. In defending the constitutionality of the state law underlying the prosecution, Georgia drew on precedent that allowed it to criminalize the production and public distribution of obscene material. The state acknowledged a difference between these public activities and the mere possession of obscenity in the privacy of one's home but defended its authority in terms of "the right to protect the individual's mind from the effects of obscenity" (*Stanley*, 565).

Justice Marshall's opinion for the Court flatly denied that this was a permissible end of government. The state, he said, "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts" (*Stanley*, 566). Put differently, the state had exceeded the limits on its authority and intruded into a domain of liberty—in this instance not freedom of contract, but rather, in Marshall's terms, the individual's "right to read or observe what he pleases" (*Stanley*, 568). Marshall also rejected the

state's attempt to justify the statute on grounds that might be regarded as more legitimate, such as preventing destructive sexual behavior or crimes of sexual violence. In much the spirit of Peckham's analysis in *Lochner*, Marshall feared that to allow these admittedly public purposes to justify the application of coercive state power would destroy all sense of limits upon government authority.

In reaching this conclusion Marshall and the modern Court may have been giving expression to the two ideologies—liberalism and capitalism—that have shaped so much of our constitutional history and that have nourished the ideal of the limited state. These ideologies have helped keep alive the notion of the state as a structure of power with internal limits. Even more plausibly, the persistence of the authority question may also be seen as a response to a uniquely dangerous twentieth-century phenomenon—totalitarianism (Primus 1996 and 1999). Although Thurgood Marshall and many of the other justices who served during the last half century were not likely to be drawn to the conception of state power underlying *Lochner*, Hitler's Germany, Stalin's Soviet Union, and Mao's China surely represented powerful negative examples. For them, the challenge was to acknowledge the state as an organic entity, an expression of the political community, without tolerating excesses made vivid by the specter of totalitarianism.

Jed Rubenfeld has proposed an antitotalitarian principle to explain Supreme Court decisions invalidating laws that criminalize abortions and prohibit the distribution of contraceptives. The state, he argues, should not be able to write the script of a woman's life by denying her the capacity to have sex without having children (Rubenfeld 1989). More recently, Rubenfeld applied this principle to the Takings Clause. He argued that the state would be "taking," as opposed to merely "regulating," property when it actually tried to *use* the property of a citizen (Rubenfeld 1993). The totalitarian state is one that refuses to recognize any intrinsic limits on its authority and intrudes into domains that properly belong to the individual. This same fear of totalitarianism can explain the Court's judgment in some free-speech cases such as *Stanley v. Georgia*, and could also account for the continued vitality of the authority question in the twentieth century.

Although *Stanley v. Georgia* involved conduct occurring in the home, and for that reason might be seen simply as a case about privacy rights, much like decisions regarding contraceptives or abortion, the concern for limits on state authority that is evident in that decision extends far more broadly, and has in fact informed a number of cases involving regulation of speech in public places. One such case arose from the effort of a state to establish a code of etiquette in the public square. The Supreme Court responded to that effort in *Chaplinsky v. New Hampshire* (1942) with the famous "fighting words" doctrine. The Court did not deny the communicative character of certain offensive or derisive utterances, but rather, by linking the speech to the disruption

of the public order, framed the question of constitutionality as an inquiry into the grounds for state authority.

The statute at issue in *Chaplinsky* provided that "no person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name" (*Chaplinsky*, 569). The authority of the state to enact such a code of etiquette, even for public places, was open to question. What business does the state have in setting the terms of public interactions? In order to answer that question, the Supreme Court began its analysis by adopting the interpretation of the New Hampshire court that confined the statute to words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" (*Chaplinsky*, 572). It was the risk of a breach of the peace, the Supreme Court concluded, that permitted the state to prohibit Chaplinsky from calling a law enforcement official with whom he was engaged in an argument "a God damned racketeer" and "a damned Fascist" (*Chaplinsky*, 569). New Hampshire was not trying to establish a code of etiquette, but rather to avoid breaches of the peace, which was clearly within its authority.

The Court's recent response to the regulation of commercial advertising provides another instance in which a concern about state authority has shaped the development of free-speech law in a public context. Surely, a statute prohibiting misleading or false advertising would serve a manifest public purpose—to preserve the integrity of the market and the capacity of consumers to make meaningful choices. It would thus fall within the authority of the state. Likewise, few would dispute the authority of the state to ban advertising in order to depress the demand for an illegal substance, such as cocaine. On the other side of the line, a state law that prohibited advertising about a product or activity of unquestionable legality seems excessive. Imagine, for example, a law that prohibited any form of advertising about the price of computers. In such a case, all of the justices would probably agree that the state had exceeded its authority. What have divided the Court in recent years, in cases such as 44 *Liquormart v. Rhode Island* (1996) or *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York* (1980), are advertising regulations aimed at suppressing demand for products—for example, alcohol or electricity—that remain legal and unrationed, but the consumption of which many believe should be discouraged.

A controlling majority of the justices believe that such regulations on commercial speech are invalid, or at least presumptively invalid. They deny that the state has any authority to suppress the demand for a product that has not itself been declared illegal. Another bloc is hesitant to require the state to ban a product as a precondition for banning its advertisement. The purposes served by an outright prohibition—for example, public health—may be more effectively served by a strategy that reduces the public desire to use or want such a product. Yet even for this particular group of justices, the forcefulness of their inquiry

into the instrumental connection between means and ends reflects doubt as to the warrant for state authority. Is the ban on advertisement at issue a reasonably effective mechanism for suppressing demand, or does it serve other, improper ends, such as protecting one group of competitors over another?

Still another branch of First Amendment jurisprudence informed by the concern for the limits on state authority can be found in the Court's effort—largely taking shape in the late 1950s and 1960s—to protect artistic activity. This area of the law returns us to *Stanley v. Georgia*, but outside the context of a private home. Imagine a state law that prohibited the sale or distribution of abstract expressionism. Of course, any such enactment would smack of totalitarianism and would be deemed far beyond the scope of state authority.

A more plausible regulation might seek to restrict public dissemination of sexually explicit material. Policy makers have offered a wide variety of rationales to justify such laws. They prevent sexual violence, avoid affronts to public sensibilities, prevent the objectification of women, and shield children from material that might disrupt the normal development process. These rationales, especially when taken collectively, help to build the warrant for state authority so lacking in *Stanley v. Georgia* and my abstract expressionism example. Yet doubts generated by a fear of totalitarianism persisted and put the state to the task of producing justifications for the regulation of artistic expression. These doubts also account for the boundaries the Supreme Court has placed on the regulation of obscenity; namely, that the materials subject to prohibition appeal to a prurient interest in sex, be patently offensive, and lack serious aesthetic, social, or political value (*Miller v. California* [1973]).

In an important article published in 1971, Robert Bork struggled with the regulation of art and analyzed it in terms of the First Amendment theory of Alexander Meiklejohn. According to Meiklejohn, the value of speech derives from the contribution it makes to democracy (Meiklejohn 1960 and 1961). Robust debate advises citizens of the available political alternatives and the arguments for and against each. Meiklejohn conceived of free speech as an adjunct to the right to vote. On various occasions, critics challenged Meiklejohn with the example of art: if the goal of the First Amendment is strictly political, then why protect art? Professor Bork dismissed Meiklejohn's famous answer—that we need to read *Ulysses* in order to vote—as a principle with no limits. Such an instrumental argument would lead, Bork feared, to an "analogical stampede," since nearly any human activity could be swept within its reach (Bork 1971, 25).

Unprepared to abandon the Meiklejohn theory, Bork felt—at least in 1971, before he was nominated to the Supreme Court and buckled under questioning from the Senate Judiciary Committee—that he had no alternative but to leave art outside the protection of the First Amendment. As a result, he proposed a principle that would limit First Amendment protection to speech explicitly about government—speech related to a political campaign, or praising or criticizing a government policy or agency.

Many, including myself, believe that there is much more truth to Meiklejohn's instrumental rationale for protecting art than Bork had allowed. Putting that objection aside, however, Bork could be faulted also for overlooking the possibility of protecting art through an inquiry into authority. Short of embracing the totalitarian state, or identifying some very specific threat to the public welfare, it is hard to understand what reason the state would have for regulating the production or distribution of art. Bork's lapse can readily be explained by the fact that his First Amendment analysis formed part of a broader argument that repudiated *Lochner* and, more pointedly, the 1965 decision of *Griswold v. Connecticut*, which invalidated a state ban on dissemination of information on contraceptives. *Griswold* was the indispensable precursor of the soon-to-be-decided *Roe v. Wade* (1973), which struck down laws that criminalized abortions.

The use of the First Amendment to protect a right not to speak provides a final example of the authority question at work. This branch of First Amendment doctrine has its roots in *West Virginia State Board of Education v. Barnette* (1943), which denied the state the power to compel schoolchildren who were Jehovah's Witnesses to salute the flag. In this case, decided at the height of the Second World War, the interest of the state in compelling the activity—the promotion of patriotism—was understandable, and the absence of authority in the classic nineteenth-century sense was far from manifest. To justify its decision, which banned the state from compelling flag salutes, the Court invoked principles, almost religious in nature, holding the conscience of the individual to be inviolate.

The lack of state authority to coerce speech became clearer in *Wooley v. Maynard* (1977), a striking contemporary use of this doctrine. In that case, New Hampshire imprinted the state motto, "Live Free or Die," on each and every license plate. The state prohibited those who might be offended by carrying such a message on their cars—for example, Jehovah's Witnesses—from obscuring the words. The Supreme Court held New Hampshire's policy to be unconstitutional. In the Court's eyes, the state was simply using individuals and their property to propagate its own views. The state would be condemned on much the same terms Rubenfeld had proposed in his analysis of the takings clause and abortion decisions: by using individuals as instruments of its policy, the state was acting much like a totalitarian government. All sense of limits was gone.

THE POLITICAL CONCEPTION OF FREE SPEECH

In the various branches of First Amendment law that I have identified—the rule of *Stanley v. Georgia*, "fighting words," commercial speech, art, and the right not to speak—the authority question played an important role. Whether

out of fear of the excesses of totalitarianism or out of respect for traditional liberal or capitalist principles, the Court operated on the assumption that the state, even a democratic state responsive to majority wishes, has intrinsic limits to its authority. The task remained of identifying those limits.

For the most part, however, the authority question has played a relatively minor role in the evolution of First Amendment doctrine in the twentieth century. Most free speech decisions were handed down in the period following the New Deal and the Second World War, at a time when state power was conceived as immanent within the community it served. As a result, the Court's analyses typically began with the assumption that the law served proper public purposes; the principal question then became whether the law violated the prohibition of the First Amendment.

Central to this enterprise has been a functional interpretation of the First Amendment—largely adumbrated by Alexander Meiklejohn in 1948, and before him by Justice Brandeis in *Whitney v. California* (1927)—that conceives of freedom of speech an instrument of democracy. It is posited that free and open discussion of issues of public concern is an essential precondition for exercising the power of self-government in an intelligent and reflective way, and that freedom of speech, like freedom of the press, is protected for this reason. Under this theory, the First Amendment protects the right of individuals or organizations to participate in public debate—to express their views freely—in order to maintain and strengthen the power of self-determination of the collectivity. Speech serves democracy, and because of this instrumental relationship, speech takes on a distinctly political cast.

Although prepolitical or natural liberty derived from authority limitations has played a role in the evolution of First Amendment doctrine in the twentieth century, from a historical perspective it has a vestigial quality. Distinctly twentieth-century developments—above all, the emergence of the totalitarian state—may have revived a concern with the authority question, but the persistence of that concern should be seen as the continuation of a nineteenth-century tradition in First Amendment garb. The political conception of free speech, by contrast, had an entirely different trajectory. The twentieth century largely belonged to the political. The idea of political freedom grew in importance and centrality throughout the twentieth century, and it did so because our commitment to democracy also grew.

The enfranchisement of women and blacks and the elimination of literacy and property qualifications for voting were a reflection and affirmation of our growing democratic commitment, as were the Second World War and, arguably, the cold war. At the end of the twentieth century, democracy had a claim to our allegiance that far transcended any such claim it might have had at its beginning. In 2000, in contrast to 1900, we assumed that the only legitimate form of government is a democratic one—any deviation requires explanation. It was thus only natural that the conception of free speech that views

speech as an instrument of democracy achieved an increasingly prominent place in First Amendment jurisprudence, and that it achieved an affirmative or compelling quality in much the same way that democracy itself did.

If, as I suggested, *Stanley v. Georgia* might be taken as the symbol of natural liberty, *New York Times v. Sullivan* should be seen as representing the idea of political freedom. The decision was handed down in 1964, during one of the fiercest and most inspiring democratic struggles of the century. The case arose from a libel proceeding brought by a police commissioner of Montgomery, Alabama, against the *New York Times* for publishing an advertisement on behalf of Martin Luther King Jr. and his followers. The advertisement, which appeared in the *Times* in 1960, at an early phase of the civil rights era, charged the Montgomery police with launching a wave of terror against Dr. King and student protestors. Titled "Heed Their Rising Voices," it sought financial contributions from the readers of the *Times*.

An Alabama jury had rendered a $500,000 verdict against the *Times*. The Supreme Court set aside this verdict and announced what has become known as the "actual malice" standard for libel cases: false statement of facts about public officials—in this instance, that Dr. King had been arrested seven times, when in truth he was arrested only four times—are actionable only if it can be shown that the speaker knew the statement was false or spoke with reckless disregard for the truth. Commissioner Sullivan could make no such showing.

In thus protecting a carelessly uttered falsehood, the Supreme Court was not making a point about the limits of state authority; clearly there was sufficient public purpose to warrant a state to protect its officials from the injury to reputation that might come from false statements, even those uttered carelessly. Rather, the Court was affirming the right of Dr. King's supporters, and derivatively, the newspaper that carried their words, to participate in public debate in a swift and forceful manner. The protection of careless falsehoods stemmed from the desire of the Court to make the promise of political freedom real and from a recognition that political activists and the media need a margin of error, or, as Justice Brennan put it in his majority opinion, "breathing space." The Court feared that if political activists and the media could be held liable for carelessly uttered falsehoods, they might be disinclined to exercise their right to participate in public debate altogether, and that if they thus declined to speak we would all suffer. In thus affirming the ideal of political freedom, the Court was unanimous, although Justices Black, Douglas, and Goldberg, anxious to ward off the slightest discouragement to the exercise of political liberty, would have gone further and shielded the speaker from liability even for a deliberate lie.

In justifying the ruling in *New York Times v. Sullivan*, Justice Brennan evoked "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" (*Sullivan*, 270). This phrase has been quoted repeatedly by the Supreme Court and celebrated

on numerous occasions by many scholars, most notably by Harry Kalven Jr., the principal proponent of the Meiklejohn theory of the First Amendment during the 1960s and early 1970s (Kalven 1964 and 1987). (Meiklejohn died in 1964 at age ninety-two; Kalven died in 1974 at age sixty.) Constant repetition may have resulted in Brennan's language seeming limp today, but at the time it powerfully conveyed the affirmative, alluring dimension of political freedom (Brennan 1965). Because the strength of democracy depends on the quality of public debate, a mandate devolves on the Court to enhance the robustness of public debate and thus the vitality of democracy.

In addition to the actual malice standard of *Sullivan* itself, the Court's so-called "strict scrutiny" doctrine likewise reflects the affirmative and compelling character of political freedom. Under this doctrine, it is not sufficient for the state to show that a law threatening the robustness of public debate serves a merely legitimate interest. It must also show that the interest is especially urgent and that the method chosen by the legislature is narrowly tailored to serve that end, so that no more speech is sacrificed than is necessary. In this way, an enormous burden of justification is placed on the state, and it would be fair to comment, as stated in another context, that strict scrutiny is usually "fatal in fact" to a challenged statute (*Adarand Constructors v. Peña* [1995], 237). Under a regime that protects natural liberty only, however, the imposition of such a stringent burden would be inexplicable, for the police power requires only that the law serve a legitimate, as opposed to a compelling, end.

The Court's concern with political freedom likewise finds expression in its singling out the content of speech for special First Amendment protection. In early cases, the Supreme Court made no distinction between state laws that curtailed a speaker's access to the public and those that regulated the content of speech. Whenever a law impaired the vitality of public debate, a very heavy burden of justification fell upon the state. In the 1939 decision *Schneider v. State*, for example, the Court struck down ordinances that prohibited leafleting or handbilling on public streets, even though such regulations kept the streets of the city free of litter, thus serving both aesthetic and health purposes. Although the Court acknowledged that these interests were legitimate, it concluded that they were insufficiently weighty to justify interference with a liberty that Justice Roberts, the author of the Court's opinion, described as lying "at the foundation of free government by free men" (*Schneider v. State*, 151).

Starting in the 1970s, the Supreme Court erected a sharp distinction between access regulations (variously called "time, place, and manner regulations") and content regulations. Aside from the time-honored categories of state censorship of obscenity and libel, the regulation of speech on the basis of its content has become a sufficient condition for strict scrutiny. In most instances, it has also become a necessary condition for such exacting review. The only exception to this rule appears to consist of laws banning all speech in

a particular place—for example, in front of the Supreme Court. In my view, the rule that makes content regulation a necessary condition for strict scrutiny seems misguided, for the very reasons articulated in *Schneider*. Yet the heavy emphasis upon content regulation as a trigger of strict scrutiny represents another manifestation of the allure of political freedom, for such a concern stems from a fear that the state is somehow suppressing an idea or otherwise skewing public debate. In guarding against content regulation the Court is seeking to preserve the integrity of public debate and thus the conditions for true collective self-determination.

In addition to the doctrine of strict scrutiny and the actual malice requirement of *New York Times v. Sullivan*, the rules crafted by the Court in the last half century under a doctrine called "First Amendment Due Process" also reflect the affirmative dimensions of the idea of political freedom. First Amendment Due Process consists of a number of special procedural rules that seek to protect against interferences with public debate. Three are of special interest. These rules are buried in the technical interstices of the Court's work, but they play a crucial role in the protection of speech and thus reflect an understanding of the integral connection between robust public debate and democracy.

One strand of First Amendment Due Process emerges in cases where the Supreme Court, contrary to normal appellate procedure, undertakes an independent assessment of the facts underlying a free speech claim. The practice has its roots in the case of *Fiske v. Kansas* (1927). The state statute in question proscribed criminal syndicalism—advocacy of violence to effectuate political or economic change—and it was applied to the speech of an organizer for the Industrial Workers of the World, one of the most radical labor unions of the period. In the course of a state criminal trial, the prosecution cited the preamble of the organization's manifesto, which spoke of class struggle and the necessity for workers to organize and "take possession of the earth and the machinery of production, and abolish the wage system" (*Fiske*, 383). The Supreme Court looked at the preamble and concluded that, contrary to the view of the state courts, it provided an insufficient factual basis for concluding that the defendant had violated the criminal syndicalism statute. In proceeding in this way, the Court undoubtedly drew some of its guidance from Justice Brandeis, who in a companion case, *Whitney v. California*, linked free speech to democracy and laid the foundation for the injection of the idea of political freedom into the First Amendment jurisprudence.

Traces of First Amendment Due Process are also evident in the "prior restraint" doctrine, which creates a doubly strong presumption against the validity of injunctions aimed at speech. All restraints against political speech are disfavored, but those imposed by injunctions, as opposed to other legal instruments such as criminal statutes or damage awards, are especially suspect. In the modern period, the rule against prior restraint received its most dramatic statement in the Pentagon Papers case (*New York Times vs. United*

States, 1971), in which the Court denied the Nixon administration an injunction against publication of a Department of Defense study of United States involvement in Vietnam up to 1968. The study was classified "Top Secret" but had already been leaked to the press. In denying the injunction, a majority of the Court made clear that its action in no way precluded a criminal prosecution (*New York Times v. United States* [1971]).

The "overbreadth doctrine" represents yet another example of First Amendment Due Process. Although it first emerged in 1940 in *Thornhill v. Alabama*, which involved state interference with labor picketing, it received its most emphatic statement during the political struggles of the civil rights era. In the 1965 case of *Dombrowski v. Pfister*, civil rights activists in Louisiana had been charged with violation of a state law that had made it a criminal act to organize or participate in subversive activities. Rather than defend themselves in state criminal proceedings, the accused brought suit in federal court for an injunction against the enforcement of the statute, which would, of course, bring the state court prosecution to an end.

In sustaining the federal court injunction, the Supreme Court did not decide that the plaintiffs were acting within the permissible parameters of the First Amendment. They in fact may have been engaged in the kind of subversive advocacy that can be constitutionally proscribed. Rather, the Court found the statute invalid because it swept within its scope speech that was clearly constitutionally protected—it was overbroad. In voiding the statute on this ground, the Court was, in effect, granting the plaintiffs the power to vindicate the rights of others. In other words, the Court departed from its usual practice of only judging a particular application of a statute, and instead issued an injunction against all possible applications. The Court justified this procedural innovation in the name of "the transcendent value to all society" of constitutionally protected free speech (*Dombrowski*, 486).

THE DUTY OF THE STATE TO PROTECT FREE SPEECH

The affirmative character of political freedom operated as a premise underlying First Amendment Due Process, the doctrine of strict scrutiny, and the actual malice rule. Sometimes the premise was articulated, as in *Dombrowski* and *Sullivan*, both written by Justice Brennan. Sometimes, as in the Pentagon Papers case, it remained implicit. In either instance, the idea of political freedom formed the justification for rules that enhance protection for speech. There is, however, another branch of First Amendment jurisprudence that took shape in the course of the twentieth century in which the imperative or positive quality of political freedom was more formally recognized. I am here referring to the affirmative obligation imposed upon the state to protect speech. This obligation is unintelligible in the context of natural liberty,

which, after all, consists of nothing more than what is reserved to the individual after the state has reached the limits of its authority. It fits comfortably, however, with the notion of political freedom and represents perhaps its most distinctive achievement.

Historically, this branch of First Amendment law can be traced to the period following the Second World War and, more particularly, to the dissent of Justice Black in *Feiner v. New York* (1951), which gave rise to the protection against the "heckler's veto." The importance of this idea was first underscored by Harry Kalven (Kalven 1965, 140–41) and is now firmly a part of the First Amendment lexicon and treated as majority doctrine. Feiner was the prototypical soap-box orator. Standing on a street corner in Syracuse, New York, he addressed a group of seventy-five to eighty persons, urging them to attend a meeting of the Young Progressives of America. He denounced various public officials, including President Truman and the mayor of Syracuse, and spoke forcefully for the cause of civil rights. As he put it, "The Negroes don't have equal rights; they should rise up in arms and fight for their rights" (*Feiner*, 330). The listeners that gathered filled the sidewalk and eventually spilled into the street. They soon became restless, pushing and shoving one another. One onlooker said to a policeman, "If you don't get that son of a bitch off, I will go over and get him off there myself" (*Feiner*, 330). The police asked Feiner to stop speaking, and when he refused, they arrested him. Feiner was later charged with disorderly conduct, which, under state law, followed from a refusal to heed a police order to disperse.

In an opinion by Chief Justice Vinson, the Court upheld Feiner's conviction and treated the police directive to Feiner as a reasonable attempt to maintain order. As Vinson put it, "This Court respects, as it must, the interest of the community in maintaining peace and order on its streets" (*Feiner*, 320). What Vinson overlooked was the impact this state action, however authorized it might have been, would have upon public debate. It would, in essence, provide hecklers with a veto. This point was not lost on Justice Black, who read the First Amendment as a command to protect public debate. As he saw it, the police should not have capitulated to the threat posed by the heckler, but rather made "all reasonable efforts" to protect the speaker. "Their duty," Justice Black said, referring to the police, "was to protect petitioner's right to talk, even to the extent of arresting the man who threatened to interfere" (*Feiner*, 327).

During the civil rights era, the rule denying hecklers a veto became deeply woven into our political and legal culture. It was well understood that the police had an affirmative responsibility to protect civil rights demonstrators from being silenced by angry, hostile mobs. As the hecklers grew in both number and hostility, so did the responsibility of the state. In *Williams v. Wallace* (1965), for example, Judge Frank M. Johnson Jr. ordered the state police to provide sufficient protection to Dr. King and his legion so that they could

march on the state highway from Selma to Montgomery. In a number of decisions during this same time—*Edwards v. South Carolina* (1963), *Cox v. Louisiana* (1965), and *Gregory v. City of Chicago* (1969)—the Supreme Court set aside convictions of civil rights activists that were largely predicated on the hostile reaction such speech would elicit from whites.

Today street corners are not a significant site of communicative activity. Public debate is largely shaped by the mass media—newspapers, magazines, and above all, television. Protest activity that occurs on the street is largely staged for the evening news. Yet the principles derived from Feiner's poignant encounter on the streets of Syracuse have continuing vitality insofar as they point to the affirmative obligation of the state to protect and promote free and open discussion. In Feiner's case, that affirmative obligation required the police to protect his right to speak by arresting the heckler. In the context of the mass media, it meant that the state had to require the media to cover events or present views that they might otherwise slight due to market or other considerations. It required the state to curb what I describe elsewhere as managerial censorship—namely, decisions media managers might make in pursuit of legitimate goals, such as maximizing profits, but which impair the flow of politically meaningful information to the public (Fiss 1999).

In 1969, when the idea of political freedom implicit in *Sullivan* held full sway, the Court in *Red Lion Broadcasting v. FCC* (1969) unanimously sustained the FCC's attempt to curb managerial censorship by instituting the fairness doctrine. That doctrine required broadcasters to cover issues of public importance in a balanced and fair way. It also gave electoral candidates an opportunity to respond to editorials and provided a right of reply to individuals who might be personally attacked in a program. In upholding the FCC's fairness doctrine, the Supreme Court shifted the focus from the speakers—the mass media—to the listeners, and in so doing they were guided by the need of citizens to hear all sides.

In the years immediately following this decision, a period of American history characterized by attacks on "big government" and the resurgence of laissez-faire economics, the validity of the fairness doctrine fell into doubt and the *Red Lion* decision lost its generative force (*CBS v. Democratic National Committee* [1973]; *Miami Herald Publishing Co. v. Tornillo* [1974]). In 1981, the Supreme Court upheld a regulation requiring broadcasters to provide access to candidates for federal elective office (*CBS v. FCC* [1981]). Yet that case stuck out as a lonely exception. In 1987, the FCC itself repudiated the principal branch of the fairness doctrine (*Syracuse Peace Council v. WTVH* [1987]; *Syracuse Peace Council v. FCC* [1989]), and soon thereafter President Reagan vetoed a Congressional attempt to reinstate it. The fairness doctrine has never been reinstated, but a 1992 measure by Congress brought the principles of *Red Lion* once again into play, this time in the context of cable television.

By the 1990s, television had become the most significant means by which

the public learns of political issues and becomes acquainted with political candidates. Moreover, cable operators had obtained an increasingly large share of the television market—60 percent in 1992. Congress feared that a further decline in the over-the-air broadcasting component of the television industry might result in its eventual collapse, and thus leave a good number of American homes—some 40 percent in 1992—with no television at all. Although some of the persons who depended on over-the-air broadcasts were simply not willing to pay the fees for cable service, many lived in communities not served by cable or could not afford cable fees. In response to these developments, in 1992 Congress enacted a law that required cable operators to carry a certain number of over-the-air broadcast channels as part of their offerings to subscribers. Congress hoped this would ensure the continuing viability of the broadcast industry and thus provide all Americans with access to television and the information it provides.

In the 1997 *Turner Broadcasting v. FCC* decision, a narrow majority of the Supreme Court upheld these so-called "must carry" requirements. Writing for himself and three other members of the Court, Justice Kennedy relied on antitrust principles in upholding the 1992 law. He thought the statute would counter predatory practices by cable operators that disfavored over-the-air broadcasters. The danger of such predatory practices arose, he felt, from the fact that many cable programmers, an alternative source of television programs, were owned by cable operators.

In a concurring opinion providing the crucial fifth vote needed for a majority, Justice Breyer eschewed the antitrust rationale. Drawing on *Red Lion* and Brandeis's concurrence in *Whitney v. California*, Breyer defended the law in terms of political freedom. His concern was wholly with the consequences to democracy of a collapse of the over-the-air broadcasting industry. He worried that such a development would leave as many as 40 percent of American homes without television. Breyer argued that in enacting the 1992 law, Congress, much like the policeman following Justice Black's mandate to protect the speaker, might have imposed upon the speech interest of the cable operators, but only to enrich public debate and further democratic self-government.

In *Feiner*, the heckler did not have much to say. Presumably he did not like Feiner's message, but rather than wait his turn to speak, he threatened to stop Feiner from speaking if the police did not. Such a threat hardly contributes to public debate. In this regard, Breyer's *Turner Broadcasting* concurrence moved beyond Black's *Feiner* dissent, for the speech interests put in jeopardy by the 1992 Cable Act are significantly greater. Requiring cable programmers to carry the programs of over-the-air broadcasters necessarily entailed a displacement of a number of programs developed by cable programmers. As a result, the First Amendment interests of the displaced cable operators and the consumers who might have viewed those programs would be adversely affected. Breyer understood, however, that some sacrifice of those interests was

necessary to further the larger democratic purposes of the First Amendment. If the state did not intervene and the broadcast industry collapsed, the First Amendment interests of all the homes without cable would suffer immensely. As he put it, speech was on both sides of the equation.

In its willingness to sacrifice what might be deemed genuine First Amendment interests, Breyer's concurrence in *Turner Broadcasting* represented a more powerful expression of the generative character of political freedom than Black's dissent in *Feiner*: the state may act to promote political freedom even if some speech interests are sacrificed. In January 2000 Justice Breyer applied this same approach to sustain a Missouri law that imposed limits on financial contributions to candidates for state office (*Nixon v. Shrink Missouri Government PAC* [2000]). In *Turner Broadcasting* and this more recent campaign finance case Justice Breyer expressed these views in a separate concurrence. In *Turner Broadcasting* he spoke only for himself, though in *Shrink Missouri Government* he gained the support of Justice Ginsburg.

It is important to note, however, that in another respect the question before the Court in *Turner Broadcasting* and *Shrink Missouri Government* was narrower than the one in *Feiner*. The immediate question before the Court in *Turner Broadcasting* and *Shrink Missouri Government* was one of permissibility—was the action taken by the state to enhance public debate consistent with the First Amendment? In *Feiner*, Black did not pause on that issue, perhaps because the speech interests represented by the heckler were so slight; instead he focused entirely on the duty of the state to further public debate. His claim was not simply that the police should have refrained from arresting the speaker, but more significantly, that they must protect the speaker by arresting the heckler. Recall his words: "Their duty was to protect petitioner's right to talk, even to the extent of arresting the man who threatened to interfere" (*Feiner*, 327).

Black's assertion of a duty to protect public debate represents the fullest recognition of the imperatives latent in the idea of political freedom and rests on two propositions. First, private actors—for example, the heckler in a crowd—can threaten public debate just as much as state actors. Second, the state may sometimes be the only power in society capable of keeping these forces at bay. Neither proposition denies that state power might be used for purposes of suppressing public debate. Rather, they reflect the belief that the effect on public debate of censorship by so-called private actors—not just the heckler, but also the managers of the media or the economically powerful—is not qualitatively different from state censorship, and that the threat posed to democracy by such actions might sometimes warrant expanding the regulatory authority of the state.

These ideas became a standard part of First Amendment doctrine during the heyday of *New York Times v. Sullivan* in a series of cases that involved not the mass media, but shopping centers. At first blush, it may seem odd for a

law as grand as the First Amendment to have been tested in such a mundane setting, but not once it is understood that in the decades following *Feiner*, the suburban shopping center—and later, its cousin, the downtown mall—rendered Feiner's street corner obsolete as a political forum. As a result of suburbanization and the reconfiguration of urban spaces, no one remained on the street corner. Because political activists seek to persuade the public—speech is not a cathartic activity—they took their cause to shopping centers and malls.

At first the Court was prepared to let the law follow the speaker (*Amalgamated Food Employees Union v. Logan Valley Plaza* [1968]). In a rather dramatic turnabout in the 1970s, however, the Court refused to guarantee the access of speakers to shopping centers or malls (*Lloyd Co. v. Tanner* [1972]). The Court allowed local governments to guarantee speaker access, but there was no obligation for them to do so. To justify this result, Justice Stewart pointed to the fact that the shopping centers and malls were privately owned and managed. He condescendingly reminded us that "the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property" (*Hudgens v. NLRB* [1976], 519).

Contrary to Stewart's suggestion, the turnabout in Supreme Court doctrine represents not a belated discovery of the so-called state action requirement of the First Amendment, but a weakening of the commitment to the idea of political freedom. The affirmative duty of the state does not require that any of the entities threatening public debate—the hostile crowd, the owners of the shopping centers, or the managers of the media organizations—be treated as the state itself or as agents of the state (though any clever lawyer could find many ways in which these entities are involved with or dependent upon the state). Rather, the simple point, and the one that I believe underlies Black's imposition on the state of a duty to act in *Feiner*, is that sometimes inaction by the state is tantamount to action. A police officer's decision to turn a blind eye to the heckler, and thus to enable him to beat up and silence Feiner, represents an act of the state.

Admittedly, under state law the police have a duty to maintain order, and there may be no corresponding duty for the state to act in the shopping center or media cases. It was not, however, the police's duty to maintain order that transformed the inaction into action. That particular duty is a state law duty, and in any event it does not explain why the heckler, as opposed to the speaker, should be arrested. Although as a purely conceptual matter a duty to act is needed in order to transform inaction into action, that duty does not derive from some specific statute. Rather, it derives from an assessment of the interests that would be harmed by inaction, the opportunity for the state to take action that would prevent those harms, and the interests that might be jeopardized if the state were to decline to act. In assessing the interests that would be harmed by the inaction, it must be emphasized that the metric is decidedly a

federal constitutional one, and that the final tally will reflect, above all, the Court's assessment of the importance or value of political freedom. No wonder the Court's turnabout in the shopping center cases occurred at roughly the same time that the Court retreated from *Red Lion*.

LIBERALISM IN THE SERVICE OF DEMOCRACY

In the shopping center, media, and related cases efforts have sometimes been made to block the affirmative exercise of state power or to deny the state's duty to act by invoking the idea of natural liberty. For example, in the mid-1980s a public utility company successfully attacked a state law that required it to provide a consumers' group access to its billing envelope four times a year, on the theory that the law abridged the company's right not to speak and the principle of *West Virginia State Board of Education v. Barnette* (*Pacific Gas & Electric Co. v. Public Utility Commission* [1986]). Soon thereafter, the FCC used this decision to declare the fairness doctrine unconstitutional (*Syracuse Peace Council v. WTVH; Syracuse Peace Council v. FCC*).

Decisions such as these represent a misappropriation of the idea of natural liberty, which should not be seen as a free-floating anxiety about the welfare of the individual that the justices may invoke whenever they take issue with a regulation. Rather, it is the residue that belongs to the individual after state authority has reached its outer limit. Accordingly, the crucial question should have been whether the challenged regulations served a public purpose. Clearly, they did. They sought to enhance public debate—not only a legitimate purpose, but (from a constitutional perspective) a highly commendable one. The regulations in question sought to strengthen the democratic system and thus stood on grounds very different from those requiring schoolchildren to salute the flag or forcing Jehovah's Witnesses to carry the motto "Live Free or Die" on their automobiles. Specific objections might be raised to such regulations when applied to the media: for example, that they actually impoverished, rather than enriched, public debate by discouraging speakers from taking controversial stands (for fear of provoking a response). But such objections are heavily fact-dependent and do not deny the authority of the state to act at all. They simply claim that the regulations are counterproductive.

For this reason, I contend—in some instances contrary to the Court—that natural liberty is not antithetical to political freedom. The most distinctive achievement of the idea of political freedom lies in its capacity to permit, or even to compel, affirmative action by the state. Properly understood, natural liberty is no bar to such action since the public purpose of the action is manifest. Going further, one can discern in the Court's decision over the latter part of the twentieth century a category of cases in which political and natural liberty supplement one another. This occurred whenever political liberty was

used, in the tradition of the *Sullivan* decision, to impose limits on state authority in order to insure robust public debate. The 1994 decision in *City of Ladue v. Gilleo* represents a striking illustration of this tie between political and natural liberty.

Like *Stanley v. Georgia, Ladue* involved the home, and thus provoked strong suspicion of any state intervention. *Ladue* differed from *Stanley v. Georgia*, however, because the home was used not as a sanctuary for indulging sexual fantasies, but as a site of political protest. A citizen had hung a sign in the window of her house protesting the war against Iraq. The 8½-by-11-inch sign simply read: "For Peace in the Gulf." In protecting this protest activity, Justice Stevens, writing for a unanimous Court, recognized the political character of the speech. Residential signs, he observed, play an important part in political campaigns. Their importance in public debate stems not just from the content of the message, which can of course be conveyed by countless other means (letters, handbills, bumper stickers, etc.). It also arises from the fact, he noted, that residential signs "are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute" (*City of Ladue*, 56).

Although this line of analysis, expressive as it was of the value of political freedom, might have been sufficient to justify protecting the speaker, Justice Stevens did not stop there. He went on to root the decision in the principle of natural liberty as well. Although Stevens acknowledged the role of the state in controlling the use of the public streets, he insisted that "its need to regulate temperate speech from the home is surely much less pressing" (*City of Ladue*, 58). He also recognized that "a special respect for individual liberty in the home has long been part of our culture and law" and observed that "most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8-by-11-inch sign expressing their political views" (*City of Ladue*, 58). In making these observations, Justice Stevens made no distinction between natural and political liberty.

Concern for the impact of the state's intervention on both types of liberty has not been confined to intrusions into the home. Occasionally it has also been present in cases involving attempts to regulate conduct in the public square. *Chaplinsky* could have been one such instance, for the "fighting words" uttered in that case were politically charged. Remember, he called the local marshal a "God damned racketeer" and "a damned Fascist." In sustaining the conviction, however, the Court paid no special heed to the political character of the offensive language. In contrast, the Court grasped the point when an analogous issue surfaced in the early 1970s, after the *Sullivan* decision and the tumultuous and ennobling protest activities of the civil rights era.

In 1968, shortly after the assassination of Dr. King, the concern of many activists shifted from civil rights to the Vietnam War; both the means and

rhetoric of protest activity shifted along with it. When an antiwar activist named David Cohen appeared in the Los Angeles Courthouse wearing a jacket bearing the words "Fuck the Draft," he was convicted under a statute that made it a crime to "maliciously and willfully disturb the peace or quiet of any person [by] offensive conduct." In sustaining the conviction, the state court put a *Chaplinsky*-like gloss on the statute, defining "offensive conduct" as "behavior which has a tendency to provoke others to acts of violence" (*Cohen v. California* [1971], 16).

Justice Harlan wrote the majority opinion in *Cohen v. California* overturning the conviction. He fully understood the exigencies of public debate and the political significance of Cohen's particular choice of words. "Words," Harlan said, "are often chosen as much for their emotive as their cognitive force" (*Cohen*, 26). Harlan saw the expletive as a means of conveying strong emotions—it was like an exclamation point—and recognized that this emotive quality might have been the more important element in the message conveyed. He also feared that penalizing particular words created the risk of suppressing ideas.

In addition to the concerns about political freedom, Harlan fully understood the impact of Cohen's arrest on the scheme of natural liberty, and he was equally repelled by it: "Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us" (*Cohen*, 25). Harlan recognized that the expletive Cohen used might be thought especially offensive, but he bemoaned the possibility of drawing such distinctions. As he put it, "Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual" (*Cohen*, 23).

The dissenters invoked *Chaplinsky* and sought to locate the basis for state authority in the risk of violence raised by the slogan on Cohen's jacket. Harlan strongly disputed this point, insisting that "we have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen" (*Cohen*, 23). Of course, there was no such showing in *Chaplinsky* either—as far as I can tell, the marshal just brushed off the insults leveled at him. Harlan also distinguished *Chaplinsky* on the ground that Cohen's words were not directed to anyone in particular and thus could not be regarded "as a direct personal insult" (*Cohen*, 20). This observation seems valid, but it is not at all clear why a direct personal insult is required to establish the predicate for state authority, which, of course, was the whole point of *Chaplinsky* and the "fighting words" doctrine.

The state court sustained the conviction of Cohen on the ground that wearing a jacket with "Fuck the Draft" on it had a tendency to provoke others to act violently. Harlan did not dispute the existence of this tendency—it could

be present even if the utterance were not a direct personal insult—so much as deny its constitutional sufficiency. In contrast to Justice Frank Murphy, the author of *Chaplinsky*, Justice Harlan was unwilling to accept the mere tendency of words to provoke a violent response as a justification for state authority. Such a reluctance on the part of Harlan and the others who formed the majority in *Cohen* might have been due to a growing disenchantment with state power—not just as a matter of philosophical predilections, but as one of the legacies of the Vietnam War and the decision-making process that resulted in America's involvement in that war. Or it might have stemmed from an understanding of the implications of Cohen's action for political freedom and the view that public debate in a democracy worthy of our admiration must be "uninhibited, robust, and wide-open." The civil rights era was a lesson in the need for political freedom, and the Vietnam War taught us to be skeptical of state authority.

Skepticism is always in season. It may be all the more appropriate when applied to efforts by the state to justify itself, especially in light of Vietnam, Watergate, or the countless other abuses of governmental power here and abroad that have marred the twentieth century. *Cohen* and *Ladue* are a tribute to this skeptical tradition, but only because they worked to further democracy. Denying the power of the state to prohibit the display of a 8½ × 11 sign reading "For Peace in the Gulf" or to prohibit an antiwar protester from wearing "Fuck the Draft" on the back of his jacket acknowledged the limits on state power, yet these rulings also enriched public debate.

This was no small feat. The First Amendment was invoked in each of these cases to save forceful expressions of dissent at moments when the nation demanded loyalty. In the time of war, liberalism, understood as the doctrine that proclaims intrinsic limits on the state, served democracy. But this happy coincidence should not obscure a more profound truth affirmed by the history of the First Amendment in the twentieth century: democracy is not self-sustaining. As Black's dissent in *Feiner* boldly revealed, democracy sometimes needs the help of state action, and when it does, liberalism should not stand in its way. Every state intervention demands public justification, of course, but the pursuit of democracy amply supplies it.

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