2-6-2020

The Disappearing First Amendment (Preface and Chapter 10)

Ronald J. Krotoszynski Jr.
University of Alabama - School of Law, rkrotoszynski@law.ua.edu

The Disappearing First Amendment (Preface and Chapter 10)

Ronald J. Krotoszynski, Jr.

Cambridge University Press
2019

Preface

The Free Speech Clause has enjoyed quite a good run and presently has a rather remarkable – and robust – scope of application. Since the firm ascendency of the Holmes-Brandeis vision of the First Amendment in the mid-twentieth century,[1] the First Amendment has been something of a growth stock. Over time, and with great predictability, the Supreme Court has expanded the First Amendment's scope of coverage. This is particularly true of the Free Speech Clause and the unenumerated right of free association; admittedly, this proposition holds somewhat less true for the First Amendment rights of assembly, petition, and press.

In light of these considerations, one would stand on firm jurisprudential ground to posit that, as a general matter, the scope of expressive freedom in the United States has moved in a single direction – toward an ever broader scope of potential application. The Free Speech Clause has come to encompass more varied kinds of speech (commercial speech, sexually explicit speech, offensive speech, intentionally false speech) and even conduct (for example, selling data related to the prescription practices of physicians in Vermont) with the passage of time. However, there is another story to be told – a story of doctrinal evolution followed by doctrinal retrenchment. And this story reflects a very different trend line involving the consistent diminution of certain First Amendment rights over time.

Of course, other legal scholars have shown how First Amendment rights in some specific areas have declined, rather than expanded, with the passage of time. Steven Gey, for example, called attention to the shrinking public space available for speech activity in the mid-1990s. Erwin Chemerinsky has posited that the Roberts Court is not a "free speech" court at all, citing the Roberts Court's decisions invalidating campaign finance reform measures, withdrawing First Amendment protection from government employees who speak out about a matter of public concern, and the imposition of new limits on the First Amendment rights of faculty and students at the nation's public schools, colleges, and universities.

[1] For a history of the First Amendment before the Supreme Court came to accept the Holmes/Brandeis understanding, see David M. Rabban, Free Speech in Its Forgotten Years (1997).

So too, Helen Norton and Mary-Rose Papandrea have written lucidly, and repeatedly, about the federal courts' failure reliably to protect the speech rights of government workers. Caroline Mala Corbin and Claudia Haupt have all called attention to the growing problem of government compelled speech (particularly for those in licensed professions). Tim Zick has demonstrated how the protection afforded to transborder speech activity has contracted over time. Joseph Blocher, Danielle Citron Keats, Gia Lee, and Lyrissa Lidsky have cautioned about the potential distortionary effects of misattributed government speech on the process of democratic deliberation. Robert Post and Owen Fiss have written quite persuasively and lucidly on growing threats to academic freedom and the formation of collective knowledge.

I have benefited greatly from the important work of these academic colleagues and fellow First Amendment travelers. These names – accompanied by a good number of citations and quotations, both above and below the line – will appear in the pages that follow.

So, what does this book bring to the table? How does it add to our understanding of the areas and ways in which expressive freedoms in the United States have declined, rather than expanded, over the years? In other words (and stated more directly): Why should anyone bother to read this book?

The Disappearing First Amendment does something new – it offers a novel overarching thesis for why speech rights have contracted, rather than expanded, in some, but not all, areas of First Amendment jurisprudence over time under the Burger, Rehnquist, and Roberts Courts. On a first look, the areas in which First Amendment rights have declined seem to be entirely unrelated to each other: access to public property for speech activity, access to private property for speech activity, the speech rights of government employees, the speech rights of faculty and students in public schools, colleges, and universities, transborder speech, newsgathering and reporting activities, professional speech, and limitations on government speech. A common thread exists – a thread that links these disparate areas of First Amendment law, theory, and practice.

The Warren Court decisions that pioneered protection for government employee speech, student speech, and its overall approach to requiring access to government property for speech activity all adopted open-ended balancing tests to weigh a would-be speaker's interest in the government's assistance in speaking, against the government's claim of a managerial necessity in withholding the requested support. These open-ended balancing tests created more speech net. On the other hand, however, the tests also certainly produced inconsistent results across the decentralized system of federal and state courts that would engage in the requisite balancing exercise. Consistency and predictability would suffer when different judges, facing cases with largely identical facts, rendered inconsistent decisions. Inconsistency in the context of free speech cases gives rise, at least potentially, to a risk of content, or even viewpoint, discrimination.

By way of contrast, bright-line, categorical rules generally protect less speech on balance than more open-ended balancing tests but will produce more consistent results across the run of cases requiring judicial decision. For example, a rule that provides that a government employee's speech enjoys no First Amendment protection if it falls within the scope of her employment will generate more consistent results than a balancing exercise that weights the employee's interest in speaking against the government employer's interest in managing the workplace. In sum, a categorical approach to applying the First Amendment will often protect less speech net, but will ensure that litigants receive the same outcome on the same facts. To be somewhat more precise, many of the categorical rules that the Rehnquist and Roberts Courts have adopted in cases where a would-be speaker needs the government's assistance in order to speak actually protect less speech than the open-ended balancing tests that they replaced.

As a normative matter, one can make the case for consistency and predictability over more net speech. After all, fundamental fairness (justice) arguably requires that judges render the same decision in cases presenting substantially identical facts.

In my view, however, the Warren Court has the better of this argument. If, as Alexander Meiklejohn so famously argued, it is essential to the process of democratic self-government "that everything worth saying shall be said,"[2] an approach that empowers more ordinary citizens to speak – and thereby to contribute to the process of democratic deliberation – should be preferred to an approach that generates predictable results but less speech. I will advance this argument, in a sustained way, over the course of the pages that follow.

Categorical rules will often tend to favor the rich and the powerful over the poor and the marginal; rules against speaker, content, and viewpoint-based discrimination all empower those with the means to speak to do so at will – and at whatever volume they wish. In this regard, Greg Magarian characterizes the Roberts Court's freedom of expression jurisprudence as reflecting and incorporating a "managed speech" approach that routinely favors the government and the powerful over the ordinary (much less the marginal).[3] Kathleen Sullivan objects to a "Lochnerian" vision of the First Amendment that presumptively treats any and all government interventions in speech markets as distortionary and misguided.[4]

These class-based critiques of the Roberts and Rehnquist Courts are not wide of the mark – the results in major contemporary First Amendment cases do tend to favor those with the wherewithal to speak over those who require the government's assistance to speak. I am not certain, however, that dislike for ordinary Americans, or a robust regard for the privileged, actually drives the Justices to reach these decisions. Rather than a conscious effort to link property and speech (admittedly a plausible

[2] Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 25 (1948).

[3] Gregory P. Magarian, Managed Speech: The Roberts Court's First Amendment 252–53 (2017).

[4] Kathleen Sullivan, Comment, *Two Concepts of Freedom of Speech*, 124 Harv. L. Rev. 143, 143–46, 155–63 (2010).

explanation), I believe that a fear of transparent exercises of judicial discretion in First Amendment cases animates decisions that reject balancing in favor of categorical rules.

If the appearance of judicial discretion in First Amendment cases is distressing, any approach that incorporates "balancing" or proportionality analysis (to use the term more widely in vogue in the rest of the world[5]) forces judges to pick free speech winners and losers. Moreover, they must do so in a very open and transparent fashion. By way of contrast, bright-line, categorical rules hide judicial discretion more effectively – the rule produces the outcome (not the judge). Of course, this is nonsense – because the Justices of the Supreme Court are themselves responsible for both creation of a legal rule and also for its application, or non-application, in any given case, any judicial decision deciding a contested question of constitutional law involves, of necessity, an exercise of judicial discretion.[6]

The exercise of discretion is far less transparent when a judge cites and mechanically applies a categorical rule than when she engages in a balancing exercise. For conservative jurists, the appearance of consistency in First Amendment cases is a cardinal virtue in fashioning a doctrinal test for assessing the merits of constitutional arguments – and the obvious and transparent exercise of discretion is a mortal sin. The Warren Court, and to some extent, the Burger Court, were far more comfortable living with doctrinal approaches that self-evidently vested discretion with judges than the Rehnquist and Roberts Courts. And cases presenting demands for the government's assistance in exercising First Amendment rights will, of necessity, entail the adoption and application of balancing devices.

Free speech rights have contracted, rather than expanded, in areas where the decision of First Amendment claims requires open-ended balancing of the interests of would-be speakers, on the one hand, and the government, on the other. That is, in any case, the main thesis of this book. Whether or not the pages that follow adequately prove it out will be up to its readers to decide for themselves.

Having shown my hand, allow me to briefly outline how I intend to prove out my main thesis – which, restated and simplified, consists of three main points: (1) Judicial discretion in First Amendment doctrine has the potential to enhance, rather than degrade, the process of democratic deliberation essential to the process of democratic self-government; (2) the Warren Court understood this and, although not always in forceful or maximalist ways, worked to innovate in First Amendment theory and doctrine to enhance opportunities for ordinary citizens to engage in public debate; and (3) the Roberts and Rehnquist Courts consistently have favored certainty, predictability, and consistency over speech when deciding First Amendment questions. After an introduction and overview, set forth in Chapter 1, Chapters 2–8 prove out an empirical claim, namely that First Amendment rights

[5] *See* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015).

[6] *See generally* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995) (discussing a judge's role in creating, maintaining, and applying a legal rule in a particular case).

have declined, rather than expanded, in some important areas implicating expressive freedom.

Chapter 9, which considers the importance of non-judicial actors to the scope and vibrancy of expressive freedoms, admittedly departs from the general approach of the area-specific seven chapters that precede it. The Warren and Burger Courts were not particularly successful in using the First Amendment to curb the pretextual use of admittedly constitutional discretionary police and prosecutor authority to squelch public discourse. To be sure, the Warren and Burger Courts weeded out breach of peace laws that facially targeted speech or made a hostile audience reaction the gravamen of a crime. They did not, however, find a reliable solution to the problem of the misuse of perfectly constitutional criminal laws, such as unlawful assembly, breach of peace, impeding pedestrian or vehicular traffic, and failure to obey a lawful police order. Nevertheless, Chapter 9 fits into the larger overall project of demonstrating how First Amendment rights, at least in some areas, have shrunk rather than grown over the years.

The Disappearing First Amendment also has a doctrinal objective. Even if the current three and four part tests do not empower judges to reliably facilitate, rather than impede, the exercise of First Amendment rights, the existing doctrinal tests could be refined and improved. Even if a return to the open-ended balancing tests favored by the Warren Court is an unrealistic proposal, we can and should make existing doctrinal rules function in more free speech-friendly ways when possible. Accordingly, each substantive chapter offers some concrete ideas and suggestions for modest reforms that would enhance the scope and vibrancy of First Amendment rights in the contemporary United States.

The empirical and doctrinal critiques, however, are in the service of my larger, normative thesis, which is that play in the joints works to facilitate more speech, and in a mass participatory democracy with universal suffrage, more speech is not merely a good thing, it's an essential thing. The 2016 election, with many voters believing blatant falsehoods, demonstrates the critical importance of a freely-operating and vibrant political marketplace of ideas that successfully engages our body politic in the process of democratic deliberation. For example, claims that Pope Francis endorsed Donald Trump for president and that Hillary Clinton ran a child sex-slave ring out of a Washington, DC pizzeria, influenced more than a few voters. With a margin of only 72,000 votes, in three states (Michigan, Pennsylvania, and Wisconsin) out of over 126 million ballots cast deciding the outcome of the Electoral College, it is entirely plausible that false speech, in conjunction with Russian trolling in support of Donald Trump, led to Trump's Electoral College victory. Voters who credit blatant, objective falsehoods – for example, that climate change does not exist – will go on to cast badly misinformed ballots. Democratic self-government will suffer as a result.

The 2016 presidential election clearly proves – if proof were needed – that democratic discourse is crucial to the proper functioning of a democratic polity.

The process of democratic deliberation benefits when more voices, rather than fewer voices, are heard. The First Amendment, properly understood and applied, should provide a constitutional basis for imposing affirmative duties on the state to enable ordinary citizens to be heard and seen – and to engage in a meaningful way with each other about the candidates, the issues, and the values that our government should both reflect and respect. Whatever the faults and limitations of the Warren Court's efforts to use the First Amendment as a source of affirmative duties on the government to facilitate the speech of private citizens, the Warren Court was actively and creatively engaged in trying to identify and sustain the conditions that make effective and successful democratic self-government possible.

Our democracy needs a First Amendment that empowers more people to speak to and with each other – and to do so with greater frequency. In a mass participatory democracy, more speech and more speakers are better than less speech and fewer speakers. The imposition of positive, or affirmative, obligations on government to facilitate private speech will require balancing – and balancing will require judges to embrace discretion. For better or worse, enabling ordinary voters to engage in the process of democratic discourse will require judges to render difficult decisions in close cases.

Balancing exercises, by their very nature, are messy and will not yield consistent results on a predictable basis. In other areas of constitutional law, however, the Supreme Court has learned to live with discretion and the indeterminacy that accompanies it. For example, the main test for ascertaining the adequacy of procedural due process considers the citizen's interests, the government's interests, and the probability of improving the accuracy of factual determinations if the government provided additional process.[7] The *Mathews v. Eldridge* test has all of the infirmities of an open-ended balancing test; it does not, and cannot, produce consistent results on a reliable basis. However, it has the virtue of permitting judges to consider, in any given context, whether the procedures the government used could have been, and should have been, more robust to ensure a factually accurate determination of the claimant's interest in life, liberty, or property.

We should not expect, or demand, perfect play from judges. But open and honest wrestling with how best to accommodate First Amendment claims with the government's legitimate managerial needs constitutes an unavoidable task.[8] We also have learned to live with "play in the joints" in the context of mass benefits programs. The government is not going to decide every claim correctly – but we can live with a certain number of blown calls if, in the vast run of cases, the government usually reaches the correct decision.[9]

Concerns about stealth content and viewpoint discrimination should make us worry a bit about *too much* play in the joints in First Amendment jurisprudence. But

[7] Mathews v. Eldridge, 424 U.S. 319 (1976).
[8] *See* Robert C. Post, Constitutional Domains: Democracy, Community, Management (1995).
[9] *See* Jerry Mashaw, Bureaucratic Justice: Managing Social Security Disability Claims (1983).

in the wider world, where proportionality analysis is quotidian, judges seem to be able to balance private interests, government interests, and general concerns about fairness and means/end fit without endangering the institutional legitimacy of the courts. If Canada's Supreme Court and the German Federal Constitutional Court can balance in free speech cases, without bringing their work into disrepute, then the Supreme Court of the United States should be able to embrace balancing, and the discretion inherent in it, as well.

In sum, and for the record, I do not suggest that the Warren Court was perfect or that the Supreme Court's efforts since Chief Justice Earl Warren left the bench have been terrible. That kind of simplistic "Warren good/Roberts bad" analysis would do very little, if anything, to advance or improve our understanding of how expressive freedoms should work in a polity dedicated to maintaining an ongoing project of democratic self-government. I do believe, and will argue in the pages that follow, that the Warren Court was more willing to innovate, to create, to bend First Amendment rules and theory to support the process of democratic self-government, than its successors have proven to be.

The Warren Court's willingness to engage with difficult questions related to maintaining a public discourse of the quality and depth capable of supporting self-government for the long-term constituted a signal virtue of its (admittedly imperfect) efforts. If our governing institutions derive their legitimacy through the imprimatur of "We the People," provided at regular intervals via the ballot box, that imprimatur can only be as meaningful as the process that informs the act of voting. Accordingly, the quality, scope, and vibrancy of democratic deliberation are essential inputs to a meaningful electoral process.

In sum, the First Amendment should certainly stand as a bulwark against ham-fisted government efforts to suppress particular speakers, ideas, or ideologies that the government dislikes. But, properly understood and applied, the First Amendment also should serve as a basis for imposing duties on the government to empower, rather than impede, citizens who wish to speak and to participate in the ongoing democratic dialectic that informs the act of voting on election day.

10

Conclusion

Enhancing Speech and Promoting Democracy: The Necessary Role of the State in Promoting Democratic Deliberation among Citizen-Speakers

If we genuinely believe that the First Amendment exists to facilitate the process of democratic self-government, then the federal courts need to consider more carefully and more reliably the government's duty to use public resources to support expressive activities related to democratic discourse. The Warren Court understood that equal citizenship required more than simply observing a rule of "one person, one vote" – although the Constitution certainly requires observation of this fundamental principle of political equality in designing electoral districts and conducting elections.[1] The Warren Court consistently worked to deploy the First Amendment as a tool to create and support opportunities for democratic engagement within the body politic; it did not simply embrace a *laissez faire* free market approach to allocating the practical ability to exercise expressive freedoms.

The Warren Court repeatedly used the First Amendment as a source of affirmative, or positive, obligations on the government to facilitate, rather than impede, the exercise of expressive freedoms by ordinary citizens. The Burger Court failed to advance this jurisprudential agenda – but refrained from squarely overruling the Warren Court's jurisprudential and doctrinal innovations. The Rehnquist and Roberts Courts, for the most part, have resiled from this project entirely.

In my view, the Warren Court clearly advocated the better approach and has the better of the normative argument about whether the First Amendment, properly interpreted and applied, has both positive and negative aspects. A serious and meaningful commitment to equal citizenship requires more than merely abstract, or theoretical, equality among speakers. An empty, formalistic equality of opportunity to speak will not ensure, to use Alexander Meiklejohn's wonderful turn of phrase, "that everything worth saying shall be said."[2] Moreover, as Justice William J. Brennan, Jr. posits in *Sullivan*, the process of democratic self-government requires "that debate on public issues [must] be uninhibited, robust, and wide-open."[3] A debate in which only the wealthy and privileged can be seen and heard will grossly disserve the project of democratic self-government.

The problem can be simply stated: Good ideas about governance are not exclusively the province of the wealthy and the connected. Yet, if meaningful access

to the electorate requires great wealth, ideas that merit consideration by the electorate will simply not be heard – much less considered or adopted. In this regard, Meiklejohn argues that the voters must "face[] squarely and fearlessly everything that can be said in favor of [our governing] institutions, everything that can be said against them."[4] This free and open public debate is essential if "the citizens of the United States will be fit to govern themselves under their own institutions."[5]

From one vantage point, the First Amendment serves as a check against government schemes to capture or control the political marketplace of ideas. This negative-checking function constitutes an important part of the First Amendment's work to facilitate democratic deliberation (which, in turn, enables voters to secure government accountability through the electoral process). But to acknowledge this negative role for the First Amendment is not to exhaust all of the normative possibilities. The First Amendment also should protect and advance the process of democratic engagement that makes democratic accountability through regular elections possible. This function involves not merely negative, but also affirmative, duties on the part of the government.

Accordingly, the Supreme Court may well be correct to hold that the First Amendment prevents the government from seeking to equalize all speech and all speakers by leveling-down speakers with the financial wherewithal to disseminate their messages to a mass audience without the government's assistance or support. It is entirely plausible to posit that the dangers of government censorship that arise from such a program of government-mandated equality of result are simply too great to tolerate.[6] Even if this is so, however, the First Amendment, properly defined and applied, should also require that the government suffer inconvenience and shoulder financial burdens in order to empower ordinary citizens to engage in the process of democratic deliberation.[7] In short, a constitutional proscription against silencing some voices should not imply the lack of duty to ensure that other voices can be heard.

If one takes these principles into account, it becomes reasonably clear that the contemporary federal courts are both too lenient and too demanding in applying the First Amendment to safeguard the process of democratic deliberation. They are too lenient in permitting government to adopt policies that chill or prevent speech that requires some sort of government support. Yet, they are also too demanding in disallowing reasonable government efforts to ensure that democracy functions as a fair fight.[8]

A larger normative vision of the First Amendment explains this trend: The Warren and Burger Courts believed that government interventions in speech markets could enhance the marketplace of ideas, whereas the Rehnquist and Roberts Courts appear to be deeply skeptical about government regulation enhancing rather than debasing the political marketplace of ideas. In addition, and relatedly, the Warren Court, and to a lesser extent, the Burger Court, had faith in the ability of federal judges to apply First Amendment rules that featured significant play in the joints – open-ended balancing tests that would require trial judges to sift facts and weigh

circumstances when deciding whether to recognize or reject a First Amendment claim.

Many, if not most, of the Warren Court opinions expanding the scope of First Amendment rights, including landmark decisions that ordered greater access to public property for protest, protected speech by government employees, secured academic freedom for faculty members and students, and safeguarded transborder speech activity, all feature rather open-ended balancing exercises that consider the need for a would-be speaker to enjoy the government's assistance against the government's legitimate managerial concerns. The decisions reflect faith in the ability of the lower federal and state courts to exercise structured discretion in ways that improve and enhance, rather than degrade, the political marketplace of ideas. This approach also has the effect of securing more speech – even if the pattern of winners and losers might entail some debatable outcomes in close cases presenting similar facts.

The Roberts and Rehnquist Courts have taken a radically different approach. Both have abjured open-ended balancing tests that vest great discretion with lower court judges in favor of very formal, categorical, bright-line rules that significantly cabin, if not eliminate, any room for the exercise of discretion to vindicate some First Amendment claims while rejecting other, similar claims. The contemporary Supreme Court consistently displays deep skepticism, if not outright hostility, toward legal tests that merely frame, rather than prefigure, how judges should decide a First Amendment claim.

This approach – favoring categorical rules over balancing tests – makes great sense if a judge believes that government interventions in speech markets generally do more harm than good. A judge who holds this point of view will work to develop hard, fast, categorical rules that, quite literally, wring out discretion from the process of adjudicating First Amendment claims.

So, it is not surprising that the Roberts and Rehnquist Courts have issued First Amendment precedents that reflect a deep-seated and abiding distrust of government, in general, and the federal courts, in particular, to improve on private market ordering of the political marketplace of ideas. In many important respects, the decisions of the Roberts and Rehnquist Courts reflect a strongly held belief that state ordering of speech markets, in any form or guise, is not only inefficient, but affirmatively harmful to the project of democratic self-government.

This larger jurisprudential posture – faith versus mistrust in the ability of federal judges to allocate speech rights wisely and fairly – explains much of the evolutionary change discussed in the preceding pages. When speech claims require judges to balance or ask "to what degree?," the Roberts and Rehnquist Courts tend to exit the field. By way of contrast, however, the Roberts and Rehnquist Courts have embraced with real brio First Amendment rules and doctrines that rely on binary, yes/no kinds of analyses. The categorical rules against content and viewpoint discrimination provide salient examples. This jurisprudential approach certainly limits judicial

discretion, but it also denies the lower federal and state courts the needed flexibility to deploy the First Amendment dynamically and creatively to empower citizens who wish to engage in the process of democratic self-government – but require access to government resources (such as access to public property or government employment) in order to do so.

Over the course of the last nine chapters, this book has developed and advanced three discrete arguments, comprising an empirical claim, a doctrinal claim, and a normative claim. The empirical claim is that in areas where a would-be speaker needs the government's assistance in order to speak (in whatever form), the Roberts and Rehnquist Courts have been decidedly less free speech-friendly than their immediate predecessors, the Burger and Warren Courts. The doctrinal claim is that, in a variety of important areas, First Amendment rules could be strengthened to better facilitate the ability of would-be speakers to participate in the process of democratic deliberation. Finally, as a normative matter, the federal courts should interpret and apply the First Amendment in ways that require the government to facilitate, rather than impede, speech related to democratic self-government – at least when the government can do so without serious disruption or inconvenience to its operations. The balance of this concluding chapter will discuss and develop each of these ideas in turn.

10.1 THE EMPIRICAL CLAIM: SPEECH RIGHTS HAVE CLEARLY DECLINED IN SOME IMPORTANT AREAS OVER TIME

As the preceding chapters have demonstrated, expressive freedoms in many important areas have declined, rather than expanded, under the Roberts and Rehnquist Courts. Access to public property for speech activity provides the most obvious, and disheartening, example.[9] The public forum doctrine and time, place, and manner doctrine, as developed and applied over the past thirty years, have substantially narrowed the government's obligation to facilitate speech activity on public property. As noted before, iconic protests that helped to propel the civil rights movement forward, such as the Selma-to-Montgomery March, will no longer take place in the contemporary United States if the government declines access to public streets and highways. First Amendment law, theory, and practice have moved from an approach that presumed a generalized duty to facilitate collective speech, assembly, association, and petition in public places and spaces to an approach that places the burden on would-be speakers to prove a right of access to particular government property – and then to show that the government's restrictions on access to that property are irrational.

The emergence of dominant social media platforms and search engines, often controlled by monopoly service providers, presents another growing threat to the process of democratic deliberation.[10] The Warren Court, in its pioneering *Logan Valley* decision,[11] used the First Amendment to create easements to private property

for expressive activity. Faced with the growing privatization of spaces and places essential to the process of civic engagement and discourse, the Warren Court held that the First Amendment required a limited right of public access to large-scale shopping centers and malls – places that had come to displace and replace the traditional town square.

Despite the growing threat that private ownership of some of the primary venues in which our democratic politics take place – with the concomitant power to censor speech and speakers that the private companies dislike, on a wholly non-transparent basis – it is virtually unthinkable that the Roberts Court would embrace the constitutional logic of *Logan Valley*. By way of contrast, the Warren Court would have been quite open to the idea that the First Amendment imposes limits on the power of Facebook, Twitter, YouTube, and Instagram to censor speech in their virtual forums – and also to imposing constitutional limits on the ability of dominant search engine providers, such as Google and Bing, to censor results to advance ideological or political objectives.

Unfortunately, other examples exist of receding protection for expressive freedoms. The speech rights of government employees, never particularly robust – even under the Warren Court – have diminished considerably.[12] Under *Garcetti*,[13] a government employee has no First Amendment claim with respect to work-related speech. In other words, government employees who happen to be professionals lose their ability to act as professionals by speaking if the government may both prescribe and proscribe work-related speech by its employees (including public school teachers and possibly including public college and university professors).

Faculty and students on the nation's campuses enjoy diminished claims on the First Amendment as well.[14] To be sure, the Supreme Court has never formally overruled the high watermark decisions of the Warren Court – *Tinker*[15] and *Keyishian*.[16] But, over time, the precedential force of these decisions has been whittled away.[17] They are now more aspirational statements than accurate descriptions of the government's de facto power to regulate the speech of faculty and students on campus. Moreover, regulatory creep has set in, and public school authorities seek not only to censor speech on campus, but to regulate faculty and student off-campus expression as well.

Transborder speech and association have emerged as a growing and important area of expressive freedom. Yet, the relevant precedents that address the ability of US citizens to exercise First Amendment rights abroad remain stuck in a time warp and relate back to the Warren and Burger Courts.[18] To the extent that the contemporary Supreme Court has addressed transborder speech at all, it has sustained content-based speech restrictions on the exercise of speech, assembly, and association rights outside the United States[19] and refused to consider the chilling effect of pervasive surveillance of conversations between US citizens and persons located abroad.[20]

Both professional and amateur journalists have made little headway in using the First Amendment to protect newsgathering activities.[21] At the same time, the federal

government has moved aggressively against journalists in the context of leak and national security investigations. Journalists, and journalism, are quite literally under attack in the contemporary United States. Even so, however, the Supreme Court has not issued a major First Amendment decision on freedom of the press for over a decade – and arguably has failed to do so since the Burger Court era.

Under the guise of regulating the professions, state governments have rendered professionals who require government licenses to practice their discipline sock puppets – mere mouthpieces of the government.[22] The lower federal court response has been, at best, mixed, and the Supreme Court, after suggesting that a rationality test applies to such regulations, has been entirely absent from the field. Meanwhile, government enters the marketplace of ideas, using social media platforms, but fails to disclose its identity as a speaker – essentially seeking to pass off its views as those of a private citizen, rather than the state itself. Once again, the federal courts have done little to arrest this growing trend to use anonymous or pseudonymous government speech to propagandize the body politic.

In sum, the empirical claim – that in areas where a would-be speaker needs the government's assistance in order to speak, the Roberts and Rehnquist Courts have been less speech-friendly than their immediate predecessors – seems clearly established. In many important areas of First Amendment law and practice, expressive freedoms are less secure today than they were forty years ago. And, the trend line is not particularly promising for a course correction. Even if the Roberts Court has not returned to the baseline of decisions such as *Davis v. Commonwealth*[23] and *McAuliffe v. Mayor of New Bedford*,[24] contemporary First Amendment decisions are much more broadly deferential to government's claims of managerial necessity[25] than were the First Amendment decisions of the Warren and Burger Courts. The contemporary Supreme Court seldom, if ever, presses the government to facilitate, rather than impede, the exercise of expressive freedoms by ordinary citizens possessed of limited financial means.

10.2 THE DOCTRINAL CLAIM: THE FEDERAL COURTS CAN AND SHOULD DO BETTER TO ADVANCE EXPRESSIVE FREEDOMS IN THE CONTEMPORARY UNITED STATES

In a wide variety of areas, First Amendment rules could be significantly strengthened to better protect would-be speakers from government efforts to distort the marketplace of ideas. In addition, the federal courts should be wary of reflexively linking the ability to exercise First Amendment freedoms to the ownership of property. As noted, this is not to say that the federal courts should be sanguine about government efforts to silence disfavored speakers – a serious commitment to audience autonomy means that individual citizens, and not the government, should be empowered to choose for themselves what speech and speakers they wish to credit – and which speech and speakers they prefer to ignore.[26]

Unfortunately, this libertarian approach to the First Amendment appears to lead to a kind of indifference to the inability of many ordinary citizens to engage in the process of democratic deliberation. In too many areas of First Amendment jurisprudence, we see an accelerating loss of expressive freedoms in circumstances where the exercise of First Amendment rights requires access to public property or other kinds of government support. If a would-be speaker possesses the property necessary to speak, that speaker's First Amendment rights have never been more robust or secure. In a mass, participatory democracy premised on the equal citizenship, if not equal dignity, of all persons, we should be concerned about linking expressive freedom to the ownership of property.

If one compares and contrasts *City of Ladue v. Gilleo*,[27] which invalidated a city ordinance that prohibited a private land owner from displaying a political sign on her home's front lawn, with *Taxpayers for Vincent*,[28] which upheld, against a First Amendment challenge, a Los Angeles County ordinance that prohibited the use of utility polls for political speech, the centrality of property to the exercise of free speech rights comes into very clear focus. The reason for this, moreover, relates to the contemporary Supreme Court's antipathy toward adopting and enforcing balancing tests: Any requirement for government to use its resources to support private speakers will necessarily require a reviewing court to weigh the interests of the speaker against the government's legitimate managerial concerns.[29]

The rejection of balancing tests, of necessity, leads to outcomes that favor would-be speakers who possess the property (whether in the form of land, cash, or both) necessary to speak. The Roberts and Rehnquist Courts have most predictably and consistently applied the First Amendment to protect the ability to speak of those persons and institutions who can do so without any government assistance. By way of contrast, the Warren Court, and even the Burger Court, were less reticent to read affirmative obligations into the First Amendment; the government had a limited duty to facilitate speech when it had the ability to do so (but not the will).

Preventing government from engaging in content- and viewpoint-based discrimination constitutes an important First Amendment project – and one that prevents the government from distorting, perhaps even capturing, the marketplace of ideas. But only protecting the ability of those with the financial ability to speak when the government would prefer them to remain silent represents an incomplete and myopic vision of the role of expressive freedom in a participatory democracy. Again, the success of democratic self-government requires that engagement among and between citizens be both robust and inclusive. As Meiklejohn explains, "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."[30]

To be sure, selective government subsidies of speech activity can create significant distortionary effects on the marketplace of ideas.[31] And this is a problem that must be taken into account; after all, a system in which government does not provide any

speech subsidies would ensure that all would-be speakers are treated equally (even if equally badly). As Professor Kathleen Sullivan observes, "[i]f government could freely use benefits to shift viewpoints in a direction favorable to the existing regime, democratic self-government would be undermined."[32] She persuasively posits that selective distribution of government subsidies can interfere with a "distributive concern whenever the content of a liberty includes some equality principle or entitlement to government neutrality" and that the "[t]argeting of benefits can destroy such equality and neutrality as readily as can imposition of harms."[33]

But to conclude from this quite legitimate concern about the potential distortionary effects of government speech subsidies that the obvious and only answer is for the federal courts not to require *any* government speech subsidies would be to draw the wrong conclusion. This is so because in the context of the process of democratic self-government, the absence of speech subsidies itself will inevitably produce market distortions that do not rest comfortably with the formal equality that we proclaim for all voters.[34] Speech subsidies can have distortionary effects – but so too can wholly unregulated markets in which the power to speak is a function of one's wealth.[35] As Professor Owen Fiss has argued, "[j]ust as it is no longer possible to assume that the private sector is all freedom, we can no longer assume that the state is all censorship."[36] Accordingly, "[t]he state should be allowed to intervene, and sometimes even required to do so . . . to correct for the market."[37]

In doctrinal terms, the most obvious solution would be for the federal courts to more readily recognize a positive aspect of the First Amendment; the notion that the government has an affirmative duty to facilitate speech related to the process of democratic self-government. If such a doctrinal innovation is too powerful a medicine in a constitutional culture that generally abjures the recognition of positive constitutional rights,[38] the second-best solution would be to deploy the unconstitutional conditions doctrine more aggressively to disallow government efforts to leverage control over its largesse either to squelch or to commandeer speech by private citizens.[39]

Finally, if developing and deploying an affirmative vision of the First Amendment constitutes a bridge too far, less sweeping doctrinal innovations – mere improvements to the existing doctrinal rules – could be implemented instead. More modest reforms of this stripe would not run up against the deeply-seated idea of the First Amendment as a source of negative, rather than positive, rights.

What's more, even relatively modest doctrinal reforms could create more breathing room for speech. To provide an illustrative example, the federal courts could use a functional, rather than historical, approach to determining whether government property constitutes a public forum.[40] So too, they could enforce the rules limiting time, place, and manner restrictions more vigorously – particularly when applying the ample alternative channels of communication requirement.[41]

Whistleblowing speech by government employees could be afforded specific and targeted First Amendment protection. The Press Clause could be deployed to

protect the newsgathering activity so essential to accurate reporting. The Supreme Court could take seriously its claim that the identity of a speaker is irrelevant to the value of the speech to voters – and vigorously protect transborder speech and speakers.

The federal courts could make greater efforts to prevent government schemes to distort the political marketplace of ideas by using involuntary speech proxies (sock puppets) and hiding its identity as a speaker via anonymous and pseudonymous speech. Efforts to establish and enforce social norms that facilitate, rather than impede, collective speech activity in public also are needed; we cannot look exclusively to the federal courts to protect expressive freedoms in the United States. The police and public prosecutors must use discretionary authority in ways that enable, rather than prevent, collective public protest activity.[42]

Finally, it bears noting that requiring the government to facilitate, rather than impede, speech for would-be speakers of average means would not imply, much less require, leveling down the speech rights of others. To be sure, one could posit a theory of freedom of speech in which the government has the ability not only to amplify some voices, but to muffle others.[43] One can imagine a free speech floor without pairing it up with a free speech ceiling. Accordingly, it would be entirely possible for the federal courts to require the government to facilitate private speech related to the project of democratic self-government without permitting it to censor or impede other voices (voices who do not require government assistance in order to be heard).

10.3 THE NORMATIVE CLAIM: FEAR OF JUDICIAL DISCRETION IN FIRST AMENDMENT CASES AND THE SYSTEMATIC FAILURE TO ADVANCE CRITICALLY IMPORTANT FIRST AMENDMENT VALUES

The Roberts and Rehnquist Courts have moved to enhance speech rights in some areas, while failing to expand First Amendment rights in others. The federal courts have readily invalidated government regulations seeking to equalize the marketplace of ideas by leveling some would-be speakers down in order to make it possible for other speakers to be heard in the marketplace of ideas.[44] Several normative theories could potentially explain this doctrinal trend. One could simply argue that the Supreme Court has adopted a Lochnerian vision of the First Amendment; if you own property, you may use it to speak; if you require government assistance to speak, the government has discretion to lend its support or withhold it.[45]

It would be easy to ascribe a nakedly ideological motive to the contemporary Supreme Court and to suggest that its decisions reflect a commitment to the theoretical equality of opportunity, rather than a more meaningful, substantive, form of equality. One could go even further and argue that the Roberts Court's approach to the First Amendment reflects systematic bias in favor of the government, powerful private institutions, and connected individuals – a system of

"managed speech" that "plac[es] a high premium on social and political stability," "encourages a public discussion where a limited number of speakers exchange a limited range of ideas," and that relies on "powerful government and private managers to keep public discussion within responsible boundaries."[46] Such a thesis would be cynical, but the thesis is an entirely plausible one.

In my view, an explanation that relies on class or institutional bias oversimplifies the Supreme Court's probable motive for abandoning the Warren Court's open-ended balancing tests (tests that tended to favor the little guy) in favor of bright-line, categorical rules (tests that tend, more often than not, to empower those who have the resources necessary to speak). A more plausible and nuanced explanation is that the Roberts and Rehnquist Courts' First Amendment decisions reflect a deep-seated and profound fear of judges exercising discretion in free speech cases in a direct and transparent fashion. The ghost of Hugo L. Black still haunts the pages of *U.S. Reports*.

In theorizing and applying the First Amendment, it is quite possible to posit that judicial discretion is problematic because it involves the government selecting free speech winners and free speech losers; such discretion creates a non-trivial risk of the appearance of content and viewpoint discrimination in deciding such cases. Moreover, and at a more general level of analysis, the Roberts and Rehnquist Courts – unlike the Warren Court – took the position, with regard to the First Amendment, that government interventions in the political marketplace of ideas invariably have a distortionary effect.[47]

The Warren and Burger Courts, by way of contrast, were much more open to the idea that government interventions in speech markets could significantly enhance, rather than degrade, the marketplace of ideas. They also seemed to be far more comfortable with lower court judges applying First Amendment rules that required rather transparent exercises of discretion. For example, allocating access to government property on an ad hoc basis clearly involves a great deal of subjective judicial decision-making.[48] So too, deciding how much protection reporters should enjoy when engaging in newsgathering activities involves a significant scope for judicial discretion.[49]

If one takes the view that government discretion – whether held in executive, legislative, or judicial hands – presents a risk to free speech and First Amendment values more generally, it would be quite logical to eschew adopting rules and doctrines that increase, rather than cabin, the role of subjective judicial assessments regarding the relative value or importance of speech. From an anti-discretion vantage point, clear First Amendment rules should be preferred – even if they can lead to arbitrary results.

In many respects, the First Amendment jurisprudence of the Roberts and Rehnquist Courts reflects an effort to severely limit, if not remove entirely, discretion from the federal courts' First Amendment toolkit. By way of contrast, the Warren Court, and to a lesser degree the Burger Court, issued First Amendment decisions

that left considerable play in the joints. *Tinker* provides a relevant example,[50] as do *Brown*[51] and *Pickering*.[52] In many important respects, the reduction in the scope and vibrancy of expressive freedom over time has been collateral damage in the Supreme Court's ongoing effort to renormalize First Amendment law from a jurisprudence that relies on general principles to frame judicial consideration of constitutional claims to a more formal system of rigid rules that dictate clear outcomes.[53]

The government should have to shoulder a duty to facilitate speech related to democratic self-government when it can do so without serious disruption or inconvenience to its operations. But operationalizing this approach will require the federal courts to exercise considerable discretion – the kind of discretion that the Roberts and Rehnquist Courts seem to view as a vice, rather than a virtue, in First Amendment jurisprudence. Yet, because the legitimacy of elections as a means of securing government accountability depends critically on everything that needs saying being said,[54] courts simply must have the discretion to use the First Amendment flexibly to facilitate protest and the public expression of dissent.

Finally, and at the risk of undue repetition, it once again bears noting that requiring the government to facilitate speech for would-be speakers of average means would not imply or require leveling down the speech rights of others. The legitimacy of elections as a means of securing government accountability requires that everything that needs saying actually be said. If one takes seriously both the letter and spirit of *Baker* and *Reynolds*, then the ability to participate in the deliberative process that informs voting should matter as much, if not more, than the act of casting a ballot on election day.

10.4 CONCLUSION

Alexander Meiklejohn famously argued for state subsidies to facilitate participation on a widespread basis in the process of democratic self-government.[55] The Warren and Burger Courts, in some important contexts, took this lesson to heart and required the government to facilitate speech when it had the ability to do so without undue disruption to its own operations. The Roberts and Rehnquist Courts, by way of contrast, have generally given the government very broad discretion to provide or withhold support for private speech as it thinks best. If government may use its largesse to coerce speech or silence from those who require a boon, the marketplace of ideas will surely be the poorer for it.

The ability to speak freely and openly – to exercise agency as a citizen – should not be the exclusive prerogative of those who do not work for the government, attend a public school, college, or university, need a professional license in order to make a living, or require access to government property in order to speak. Nor should the accident of having to cross the nation's international borders present an opportunity to extort speech or silence from citizens. The ability to speak directly, truthfully, and authentically should be the birthright of each and every US citizen; government

efforts to deny or abridge that birthright should be met with firm and steadfast judicial resistance.

Of course, things in the contemporary United States could be much worse. It also bears noting that the freedom of speech is more broadly protected in the contemporary United States than anywhere else in the world. Even so, however, the federal courts can and should do a better job of ensuring that all citizens have a chance to play a meaningful role in the project of self-government by making their voices heard in our collective efforts to hold government accountable through the electoral process.

The government, at the federal, state, and local level, should operate under a general obligation to facilitate, rather than impede, speech associated with the process of democratic deliberation. Taking this approach, however, will require the creation and enforcement of doctrinal tests that require open-ended balancing of competing interests – the interest of a private citizen in speaking must be weighed against the government's claim that legitimate managerial imperatives should excuse it from lending the would-be speaker its assistance. Discretion can be abused and the exercise of discretion in First Amendment cases will subject federal judges to criticism. But in many areas of contemporary constitutional law, notably including procedural due process claims,[56] federal courts seem to be capable of applying fairly open-ended balancing tests without risking the public's confidence in the legitimacy of the Article III courts. If federal judges can balance private interests and the government's interests in the context of procedural due process cases, no good reason exists for why they cannot balance interests in free speech cases too.[57]

In sum, if we are truly committed to the equality of all citizens, we need to be vitally concerned about the ability of all citizens, rich and poor alike, to participate meaningfully in the process of democratic deliberation that informs the casting of ballots on election day. Contemporary First Amendment law, theory, and practice do not adequately take into account this central purpose of the First Amendment. We can do better. The First Amendment should safeguard the essential processes of democracy not only from ham-fisted and obvious government efforts to distort the political marketplace of ideas, but also from more subtle efforts to use levers of government influence over the lives of ordinary Americans to coerce speech and silence from individual citizens.