Another History of Free Speech: The 1920s and the 1940s

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This article offers a theory about theories of the first amendment. It does not propose another general model of the first amendment; there are enough of those already.[1] Instead, this theory is "a device to facilitate analysis" of the cultural background of free speech discourse during two important historical periods, the 1920s and the 1940s.[2]

Although this project requires rounding up the usual suspects, including Supreme Court opinions, I also call in texts from the world of mass culture. As the law professors Anthony Chase and Stuart Macauley argue, a wide variety of cultural products, other than judicial opinions and law-review articles, contain powerful images about law.[3] Use of mass-cultural and elite-legal materials in the same study offers a broader perspective on the major metaphors and symbolic structures that "cultural workers" used to represent freedom of expression during two important periods of first amendment history.[4]

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1. *See, e.g.*, Thomas Emerson, Toward a General Theory of the First Amendment (1966); Lee Bollinger, The Tolerant Society (1986); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245; Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 A.B.F. Res. J. 521. Although he addresses broader questions than the specific meaning of the first amendment, Paul Chevigny's More Speech: Dialogue Rights and Modern Liberty (1988) also offers a general speech theory that is related to the Anglo-American legalism which envelopes first amendment discourse. *See id.* at 18.

2. Fred Block, Revising State Theory 18 (1987).

3. Anthony Chase, *Toward A Legal Theory of Popular Culture*, 1986 Wis. L. Rev. 527; Stewart Macauley, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 1987 L. & S. Rev. 185.

4. The terms, "cultural workers" and "cultural work," especially as they relate to legal writing, are developed in David Papke, Framing the Criminal: Crime, Cultural Work, and the Loss of Critical Perspective, 1830-1900 xv (1987).

Although they are awkward terms—cultural workers are engaged in "the transformation of ideas, attitudes and impressions . . . into cultural products and experiences"—perhaps they can help transcend the boundary between "legal" and "non-legal" texts. In nineteenth-century cultural work, boundaries between "legal"

I also examine an admittedly small sample of texts in terms of the theme of this journal, law and inequality. The relationship between free speech battles and struggles against hierarchies based upon race, wealth, and gender generally has been seen—by radicals, conservatives, and liberals alike—as a close one. Before the Supreme Court began to create a significant body of first amendment writings, people such as the birth control crusader Margaret Sanger, members of the Industrial Workers of the World (IWW), and the anarchist-feminist Emma Goldman fought their own fabled free speech fights.[5] During the twentieth century, efforts to expand classic libertarian interpretations of first amendment law seemed to go hand-in-hand with movements to topple bastions of inequality.[6]

Recently, however, some legal writers, especially those who identify their scholarly projects with struggles against inequality, have warned against instinctual reverence for abstractions like the first amendment or FREE SPEECH.[7] Talk about speech, in this view, must be linked to socio economic, cultural and political contexts in which specific first amendment controversies and political communication are situated. An important strain in feminist legal scholarship, for example, connects first amendment doctrine and popular mystique to protection of businesses devoted to misogynist pornography.[8] And, more generally, Mark Tushnet argues the first amendment "has replaced the due process clause [of the four-

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and "non-legal" texts were more open than in the twentieth; and, one might even say talk about law was, therefore, more "free." *See* Brook Thomas, Cross-Examinations of Law and Literature 15-16 (1987). For a unique, recent example of twentieth-century "legal" writing that draws upon "non-legal" visual imagery, see David Luban, *Legal Modernism*, 84 Mich. L. Rev. 1656 (1986).

5. *See* David Kennedy, Birth Control in America: The Career of Margaret Sanger 72-135 (1970); Melvyn Dubofsky, We Shall Be All: A History of the Industrial Workers of the World 173-97 (1969); Richard Drinnon, Rebel in Paradise: A Biography of Emma Goldman 224-27 (1961).

One of the most prominent free-speech writers of the early twentieth century, Theodore Schroeder, linked insurgent theories of free expression to radical labor politics. For brief overviews that place Schroeder and his Free Speech League in historical context, see Jerold Auerbach, Labor and Liberty: The LaFollette Committee & the New Deal 16-18 (1966); David Rabban, *The First Amendment in its Forgotten Years*, 90 Yale L. J. 516, 520-21 n. 19.

6. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964) (Using libel laws to restrict discussion of issues related to Afro-American civil rights movement); *see also* Margaret Burnham, *Reflections on the Civil Rights Movement and the First Amendment*, in A Less Than Perfect Union 335 (Jules Lobel ed. 1987); *see also* sources cited *infra* note 16.

7. *See, e.g.*, Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw.U.L. Rev. 1212 (1983); Pierre Schlag, *Freedom of Speech as Therapy* (Book Review), 34 U.C.L.A. L. Rev. 265 (1986).

8. Catharine MacKinnon, Feminism Unmodified 206-13 (1987); *see also* Catharine MacKinnon *Feminist Discourse, Moral Values, and the Law—A Conversation*,

teenth amendment] as the primary guarantor of the privileged. Indeed, it protects the privileged more perniciously than the due process clause ever did."[9]

Building upon such critical perspectives, this article samples several types of free speech texts from the decades of the 1920s and the 1940s. After reexamining Supreme Court opinions of the 1920s, it reveals how these classics drew critical scrutiny during the late 1930s and early 1940s and looks at the attempt of one legal writer, David Riesman, to reorient first amendment discourse in light of egalitarian social struggles. The article concludes that prominent free speech texts of the 1940s ultimately turned away from the "realism" of Riesman in favor of refurbishing first-amendment classicism of the 1920s. The survey suggests the importance of the decade of the 1940s, when questions about the relationship between inequality and free speech were pushed aside and more traditional legal formulations came to the fore.

I. Classic Texts and the Fundamental First Amendment Metaphors: 1919-1927

First amendment law was reconstructed, if not invented, between 1919 and 1927. Although extensive free speech literature and a number of important state court decisions appeared before the Justices of the Supreme Court ever wrote much of significance,[10] the dominant history of the first amendment remains closely tied to high court rulings of the World War I era. A famous series of opinions, concurrences, and dissents by Justices Oliver Wendell Holmes, Jr. and Louis D. Brandeis laid the basis for twentieth century free speech discourse.[11]

In general, the Holmes-Brandeis tradition, begun during World War I and carried into the 1920s, involved "seditious" dissent against American "imperialism" during the Great War or

34 Buffalo L. Rev. 11, 74-75 (1985) (MacKinnon's powerful image of a woman's "voice" being "distorted," by a foot on her throat).

9. Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363, 1387 (1984). Tushnet cites, among other cases, Buckley v. Valeo, 424 U.S. 1 (1976) (First amendment bars certain federal restrictions on election contributions because money is "political speech."); First National Bank v. Belloti, 435 U.S. 765 (1978) (first amendment prohibits state law barring corporate expenditures to influence referendum.). My theory about theories also is indebted to David Kairys, *Freedom of Speech*, in The Politics of Law 140 (David Kairys ed. 1982); *see also* Steve Bachman, *The Irrelevant First Amendment*, 7 Communication & The Law 3 (1985).

10. *See, e.g.*, Norman Rosenberg, Protecting the Best Men: An Interpretive History of the Law of Libel 71-206 (1986); Rabban, *supra* note 5.

11. *See, e.g.*, Zechariah Chafee, Jr., Free Speech in the United States (1941). On Chafee's career as a writer and free-speech advocate see Donald Smith, Zechariah Chafee, Jr., Defender of Liberty and Law (1986); Johnathan Prude, *Portrait of a Civil Libertarian*, 60 J. Am. Hist. 633 (1073).

speech connected to criminal conspiracies by groups outside the corporate liberal center.[12] In some measure, then, the nature of the cases presented to the Court helped shape the Holmes-Brandeis approach to first amendment theory. Similarly, only after the *Gitlow* decision of 1925,[13] which held that the due process clause of the fourteenth amendment made the first amendment binding on the states, did the Court begin to get a wider range of appeals about free expression, including cases that more directly raised questions about unequal distribution of wealth and power in the United States.

There is an irony in this historical situation. Important pre-1919 free speech fights, especially those involving feminists like Sanger and Goldman or the labor activities of the IWW, might have presented the Supreme Court with first amendment issues related to gender and class inequalities. But, as the historians Paul Murphy and Richard Drinnon have noted, the absence of any national "surveillance state," along with the non-incorporation of the first amendment, generally kept the national government out of the affairs of social radicals and their cases out of the Supreme Court.[14]

In particular, the early classics of Holmes and Brandeis popularized three powerful metaphors—the marketplace of ideas, clear and present danger, and the deliberative process—that dominated the first amendment canon for many years.[15] Although the libertarian potential of these metaphors appropriately has been a major theme of first amendment scholarship,[16] a growing literature now

12. On the emergence, by 1920, of a "corporate-liberal" center, see Martin J. Sklar, The Corporate Reconstructon of American Capitalism 1890-1916: The Market, the Law, and Politics (1988).

13. Gitlow v. New York, 268 U.S. 652 (1925).

14. Paul Murphy, World War I and the Origin of Civil Liberties in the United States (1979); Drinnon, *supra* note 5.

15. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919) (clear and present danger); Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting) (marketplace of ideas); Whitney v. United States, 274 U.S. 257 (1927) (Brandeis, J., concurring) (deliberative process).

On the social and communicative power of metaphors, see George Lakoff and Mark Johnson, Metaphors We Live By, 139-84, 229-37 (1980); George Lakoff, Women, Fire and Dangerous Things: What Categories Reveal About the Mind (1987). For a brief, but superb, introduction to the study of language and discourse, see Joan Scott, *Deconstructing Equality-Versus-Difference: Or the Uses of Post-Structuralist Theory for Feminism*, 14 Feminist Studies 33, 34-36 (1988). And on the social power of legal language, see Robert Cover, *Violence and the Word*, 95 Yale L. J. 1601 (1986).

16. The classic account is Chafee, *supra* note 11; for more recent interpretations of the expansive potential of first amendment discourse, see, *e.g.*, David Cole, *Agon at Agora: Creative Misreading in the First Amendment Tradition*, 95 Yale L. J. 857 (1986); Steven Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. Pa. L. Rev. 1105, 1185-93 (1989). On the impor-

stresses the limitations of the initial Holmes-Brandeis tradition.[17] Thus Robert Cover, in his history of the first amendment during the 1920s, finds Holmes and Brandeis "prepared to acquiesce in the suppression and condemnation" of "street politics," including union picketing, by American workers' movements.[18] Perceptively reading the Court's labor law opinions alongside its better known free speech decisions, Cover sees a strong disposition, among all justices of the Twenties, toward a relatively quiet marketplace of ideas and an orderly process of public deliberation, even in situations where vast socio-economic inequalities obviously hampered the ability of workers' movements to participate in some intellectual marketplace of any deliberative process.[19]

Moreover, as with all legal texts, those of Holmes and Brandeis admit of several plausible readings, including one that essentially "flips" the free speech emphasis.[20] Without denying the legitimacy of other glosses on these well known texts, including

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tance of rights claims in general to groups struggling against inequality, see Richard Delgado, *The Etheral Scholar: Does Critical Legal Studies Have What Minorities Want?* 2 Harv. C.R.-C.L. L. Rev. 301 (1987); Patricia Williams, *Alchemical Notes: Reconstructing Legal Ideals from Deconstructed Rights*, 2 Harv. C.R.-C.L. L Rev. 401 (1987); Robert Williams, Jr., *Taking Rights Aggressively: The Peril and Promise of Critical Legal Studies for Peoples of Color*, 5 Law & Inequality 103 (1987). *But see* Alan Freeman, *Racism, Rights, and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 Harv. C.R.-C.L. L. Rev. 295 (1988).

17. *See, e.g.*, Fred Ragan, *Justice Oliver Wendell Holmes, Jr., and the Clear and Present Danger Test for Free Speech: The First Year*, 58 J. Am. Hist. 24 (1971); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 Stan. L. Rev. 719 (1975); David Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. Chi. L. Rev. 1205 (1983). As a more libertarian alternative to Holmes' test, a number of commentators favored Justice Learned Hand's "direct incitement" test. *See* Masses Publishing Co. v. Patten, 244 F. Supp. 535 (S.D.N.Y. 1017), *rev'd*, 246 F. 24 (2d Cir. 1917). In 1969, the Supreme Court handed down Brandenburg v. Ohio, 295 U.S. 444 (1969), which may be read as adopting Judge Hand's *Masses* approach with elements of clear and present danger. *See, e.g.*, Harry Kalven, Jr., A Worthy Tradition 124-30 (Jaime Kalven ed. 1988); Staughton Lynd, *A Speech Test for All Seasons?* 43 U. Chi. L. Rev. 151 (1975).

18. Robert Cover, *The Left, the Right and the First Amendment: 1918-1928*, 40 Md. L. Rev. 349 (1981); *see also* James Gray Pope, *Labor and the Constitution: from Abolition to Deindustrialization*, 65 Tex. L. Rev. 1071, 1086-89 (1987); Dianne Avery, *Images of Violence in Labor Jurispudence: The Regulation of Picketing and Boycotts, 1894-1921*, 37 Buffalo L. Rev. 1, 89-98, 115 n. 534 (1989). For one historical view of the consequences of state repression of labor activism during the period when first amendment theories were being constructed, see Mike Davis, Prisoners of the American Dream 45-51 (1986) "It would be difficult to exaggerate the magnitude of American labor's defeat in the 1919-1924 period," argues Davis. "For almost a decade, the corporations were virtually free from the challenge of militant unionism." *Id.* at 51. *See also*, Leon Fink, *Labor, Liberty, and the Law: Trade Unionism and the Problem of the American Constitutional Order*, J. Am. Hist. 904, 918-21 (1987).

19. Cover, *supra* note 18; Avery, *supra* note 18, at 115.

20. *See, e.g.*, Sanford Levinson, *Law as Literature*, 60 Tex. L. Rev. 373 (1982).

Holmes' *Abrams* dissent and Brandeis' *Whitney* concurrence,[21] the early classics in the first amendment canon also can be read as theories about the powers of "the State." The Holmes-Brandeis opinions may be seen as Supreme Court explorations in liberal state theory, especially when it is remembered that several of these texts were written to justify the use of state power *against* free speech claims.[22]

Consider Justice Brandeis' celebrated *Whitney* concurrence of 1927, invariably catalogued as the most advanced free speech text in the Holmes-Brandeis library.[23] In this case, California prosecuted Anita Whitney, under a criminal syndicalism act, for trying to organize a branch of the Communist Labor Party in the state. On appeal, the United State Supreme Court unanimously affirmed Ms. Whitney's conviction.[24] At the same time, however, Justice Brandeis' concurrence reasserted and reaffirmed the liber-

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21. Abrams v. United States, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting). For a detailed examination of the *Abrams* case, see Richard Polenberg, Fighting Faiths (1987). Whitney v. California, 274 U.S. 357, 375 (1927).

22. Although his emphasis is different from my own, Paul Murphy perceptively captures the important interrelationship between the "invention" of national civil liberties and the creation of a national "surveillance state." *See* Murphy, *supra* note 14, at 71-132, 133-78.

The literature on theories of the liberal-capitalist state is immense. See Block, *supra* note 2; *see also* Robert Alford & Roger Friedland, Powers of Theory: Capitalism, the State, and Democracy (1985); Bringing the State Back In (Peter Evans, Dietrich Rueschemeyer, & Theda Skocpol eds. 1985); Martin Carnoy, The State and Political Theory (1984); Gordon Clark and Michael Dear, State Apparatus: Structures and Language of Legitimacy 104-30 (1984); Frances Piven and Richard Cloward, Regulating the Poor (1969); Alan Wolfe, The Limits of Legitimacy (1977); Edward Lehman, *The Theory of the State Versus the State of Theory*, 53 Am. Soc. Rev. 807 (1988); Sheldon Wolin, *Democracy and the Welfare State: The Political and Theoretical Connections Between Staatsrason and Sohlfahrtsstaatrason*, 15 Pol. Theory 467 (1988).

To say that theories of free speech are the flip sides of theories of the state is not a new insight, but too much first amendment discourse ignores the linkage. Even David Rabban's deft analysis of the construction of "modern" free speech theory, *see* supra note 5, ignores the fact that during the same historical era the "modern" American state was being constructed. *See* Stephen Skowronek, Building a New American State (1982). And for a broader perspective on the twentieth century liberal-capitalist state and legal constitutionalism, there is the controversial work of Carl Schmitt on the power of state functionaries to delineate their "friends" and the "enemies" and, by extention, to declare those "exceptions" when constitutional guarantees give way to the needs of the state. *See, e.g.*, *Special Issue on Carl Schmitt*, 72 Telos 3 (1987), (especially Paul Hirst, *Carl Schmitt's Decisionism*, *Id.* at 15, 18-20, 26).

23. On Brandeis' view, see, *e.g.*, Cover, *supra* note 18, at 383-87.

24. 274 U.S. 357 (1927). Despite his much celebrated comments about the state's role in free speech cases, which were joined by Justice Holmes, Brandeis upheld California's finding that Ms. Whitney was engaged in a conspiracy with the IWW. *Id.* at 379. In this sense, one further appreciates Harry Kalven's argument that Whitney anticipates the first amendment cases of the 1940s and early 1950s in which the relationship between the safety of the state and the role of the Communist Party were at issue. *See* Kalven, *supra* note 17, at 157.

tarian position already associated with Holmes and himself. Perhaps most importantly, he downgraded Holmes' mechanistic marketplace of ideas metaphor, of truth and falsehood grinding against one another, in favor of a biological one: the first amendment's organic relationship to the deliberative processes of public politics. The nation's founders, according to Justice Brandeis, were "courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government . . . ."[25]

In addition, Justice Brandeis explored, at some length, the powers of "the State" over expression. To comment on the *Whitney* case, of course, he had to refer to "the state" of California; and in the wake of *Gitlow*, he also needed "the State" to discuss issues related to federalism.[26] But when discussing the first amendment, he represented "the State" the same way many of his contemporaries did, as an abstract political entity that enjoyed ultimate sovereignty.[27] Early on then, Brandeis announced that "free" speech could be restricted when it "would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State can constitutionally prevent . . . ." And, theorizing about original intent, Brandeis argued that those "who won our independence believed that the final end of the State was to make men free to develop their faculties" and to help insure that the "delibrative forces should prevail over the arbitrary."[28] This State oriented discourse, then, focused upon the battle between individuals or groups and the State, rather than upon the clash of different free speech "interests" within American society.

Justice Brandeis' precise language should be considered in light of recent scholarship, in history and political science, about the "keyword," the "State." As historian Daniel Rodgers suggests,

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25. *Id.* at 375. Although it is possible to find differences between Brandeis' (deliberative process) and Holmes' (marketplace of ideas) formulations, the two theories may be collapsed into a single, liberal-pluralist model of complementary marketplaces. *See, e.g.*, Rosenberg, *supra* note 10, at 337-38 n.8; Garry Wills, Nixon Agonistes (1969).

26. *See, e.g.*, 274 U.S. 357, 379 (State of California); *id.* at 377-78 (the [then] 48 states).

27. *Id.* at 373, 374, 378.

28. *Id.* at 375. In a footnote, Justice Brandeis cited two pro-freedom of expression comments by Thomas Jefferson, neither of which, significantly, use the term "the State." *Id.* at 375 n.2. Similarly, in his *Gitlow* dissent, Holmes actually broadened the range of his clear and present danger test. Quoting from his 1919 *Schenck* opinion, Holmes had to drop the word "Congress," the source of restrictive legislation during World War I, and interpolate "[the State]" instead. Did he mean the state of New York, the source of legislation in *Gitlow*? Or was he refering to something more abstract and grand? Gitlow v. New York 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting).

"throughout most of the nineteenth century the hedge of arcane jargon fencing off the law from the discourse of ordinary citizens was not yet very high. Words like 'government' or 'rights' slid easily from political to religious, moral, or economic meanings."[29] But by World War I, when a "modern" national State finally had been constructed, the discourse of professionals, including lawyers and academic political scientists, had "pull[ed] the vocabulary of politics away from day-to-day speech into an empyrean of higher and higher abstractions . . . ."[30]

Mystical "abstractions" such as the State, Rodgers argues, became part of larger discourses of power that lifted political speech out of "the grubby hands of the amateurs."[31] By invoking the vague idea of the State, which was "the antonym of the People," wielders of power could erect "a formidable barrier to popular claims of rights."[32] Especially as the United States assumed the role of imperial power, ready to go to war on behalf of *the* national interest, odes to the power of "the State" became more than linguistic turns. Embedded in new discourses of power, the State became a "legal person; its will was the general will; being all but invisible to the eye, it could not be possessed or resisted or laid claim to even by the most wild-eyed of Populists gathered under the banner of people."[33] Talk about the State offered "a fortress against every upstart claim of rights," if the State and its needs seemed at risk.[34] Around the turn of the century, then, the language used to explain American politics and government changed in significant ways.

The power attached to legal and political discourses about the State did not go unnoticed. Lawyers sympathetic to the Populist movement argued that talk about "state powers" masked the power of large private corporations to shape public policies in their own interests.[35] Similarly, in their free speech and broader labor struggles, members of the IWW condemned state laws and officers for propping up illegitimate private hierarchies and hobbling crusades for more equitable divisions of wealth and power.[36] And in

29. Daniel Rodgers, Contested Truths: Keywords in American Politics Since Independence, 144 (1987).

30. *Id.* at 146. On the social force of state theory discourse, see Alford & Friedland, *supra* note 22, at 26-30, 388-89.

31. Rodgers, *supra* note 29, at 146.

32. *Id.*

33. *Id.* at 162 (footnote omitted).

34. *Id.* at 171-72.

35. Norman Pollack, The Just Polity: Populism, Law, and Human Welfare (1987).

36. *See, e.g.*, Elizabeth Gurley Flynn, *Free Speech in Montana*, in Fellow Workers and Friends: I.W.W. Free-Speech Fight 24 (Philip Foner ed. 1981) (story of the

an essay left unfinished at his death in 1919, Randolph Bourne, a famous critic of World War I, speculated at length about the effect on civil liberties (including free speech) that flowed from the idea of the State. For Bourne, "[c]ountry was a concept of peace, of tolerance, of living and letting live. But State [was] essentially a concept of power [that] signifie[d] a group in its aggressive aspects."[37]

Equally important was the way state-oriented discourse helped obscure "real" conflicts of "interest" within a deeply divided society. As Daniel Rodgers notes, by framing complex issues in terms of "the needs" of a united "State," dominant discourses "found a way of bringing an increasingly pluralistic, fragmenting polity back together, if not in fact, at least in the mind's eye."[38]

Recognizing the abstract, but politically powerful, quality of this discourse, insurgent members of the political science profession led their own attack upon talk about the State. To frame public issues in terms of "the State" was intellectually incoherent, an impedient to intelligent discussion (even by professionals), and a barrier against popular understanding of the need for fundamental socio-economic change. Political scientists, such as Arthur F. Bentley, argued a better public discourse could help focus popular attention upon conflicting interests within society.[39]

Lawyers associated with "legal realism" contributed a parallel critique.[40] Legal writers such as Robert Hale emphasized ways

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1909 Missoula free-speech fight); *see also*, Dave Ingler and Joe Parry, *Denver Free-Speech Fight, id.* at 152; Jack Allen, *A Review of the Facts Relating to the Free-Speech Fight at Minot, North Dakota from Aug. 1st to Aug. 17th, 1913, id.* at 158; Walker Smith, *The Voyage of the Verona, id.* at 189 (version of the famous Everett, Washington, battle of 1916).

37. *The State*, in The Radical Will: Randolph Bourne, Selected Writings, 1911-1918 at 358 (Olaf Hansen ed. 1977).

In addition, the World War I era produced an exceedingly powerful text about inequality, free expression and public policy: Susan Glaspell *A Jury of Her Peers* in Images of Women in Literature 370 (Anne Ferguson ed. 1973). For use of this story in discussions about inequality and expression, see Annette Kolodny, *A Map for Rereading: Or, Gender and the Interpretation of Literary Texts*, 11 New Literary His. 451, 460-65 (1980), Martha Minow, *When Difference Has its Home: Group Homes for the Mentally Retarded, Equal Protection, and Legal Treatment of Difference*, 22 Harv. C.R.-C.L. L. Rev. 111, 177-79 (1987). Glaspell's story offers insights into the "process" of communication that surpass anything written by justices of the Supreme Court during a comparable point in United States history.

38. Rodgers, *supra* note 29, at 171.

39. *See* Raymond Seidelman, Disenchanted Realists: Political Science and the American Crisis, 1884-1984, at 69-81 (1985) (with assistance from Edward Harpham).

40. There is, of course, a huge, ever-growing literature on "legal realism." *See generally* Laura Kalman, Legal Realism at Yale, 1927-1960 (1986); Edward Purcell, The Crisis of Value (1973); William Twining, Karl Llewellyn and the Realist Movement (1973); Robert Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in Professions and Professional Ideologies in America 70 (Gerald Gieson ed. 1983); Elizabeth Mensch, *The History of Mainstream Legal*

traditional legal descriptions of "real" world disputes inadequately represented the clash of conflicting interests, often rooted in socio-economic inequalities, that remained hidden behind judicial formalisms. Economic life, in Hale's view, was hardly a realm of liberty and free bargaining. The free-market metaphor, however, obscured the amount of coercion, sanctioned and enforced by officials of the State, that inevitably accompanied economic transactions. Talk about "freedom of contract," in the view of left-realists like Hale, was incoherent and reactionary.[41]

Similar suspicions ultimately swirled around free speech discourse. Metaphors like the free marketplace of ideas and the deliberative process—which purportedly described a communicative universe that first amendment law paternalistically protected—seemed increasingly at odds with American experience during the 1920s and 1930s. As the historian Paul Murphy has shown, constitutional battles over free speech increasingly grew out of—and were framed by—socio-economic struggles, especially ones involving portions of the American working class.[42] Instead of primarily dealing with the first amendment claims of "seditious" opponents of "State" policies, important free speech cases increasingly began to concern conflicting interests, such as labor organizers and their corporate-capitalist opponents.

Free speech discourse during the 1930s and early 1940s, then, could depart from older formulations and build upon critiques offered by political scientists and legal realists. It could highlight, for example, the clash between the marketplace metaphor of free speech and private economic power.

Thought, in The Politics of Law, *supra* note 9, at 18, 23-29; Gary Peller, *The Metaphysics of American Law*, 73 Calif. L. Rev. 1151 (1985); John Schlegal, *Book Review: The Ten Thousand Dollar Question*, 41 Stan. L. Rev. 435 (1989); Joseph Singer, *Legal Realism Now*, 76 Calif. L. Rev. 465 (1988); William Twining, *Talk about Realism*, 60 N.Y.U.L. Rev. 329 (1985).

41. *See, e.g.*, Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470. (1923). *See also* Frances Olsen, *Feminist Theory in Grand Style*, 89 Colum. L. Rev. 1147, 1162 (1989) (insisting that traditional free speech and traditional free contract arguments both contain). *But see* Winter, *supra* note 16, at 1182-93 (a spirited defense of classical free speech metaphors' expansive potential).

42. Paul Murphy, The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR (1972). *See also*, Kairys, *supra* note 9, at 153-63 (discussing impact of labor movement on free speech law); Pope, *supra* note 18, at 1982, 1089-94. And for recent views of labor struggles and the role of the state during the early 1920s, see David Montgomery, The Fall of the House of Labor: The Workplace, the State, and American Labor Activism, 1865-1925 370-410 (1987); William Forbath, *The Shaping of the American Labor Movement*, 102 Harv. L. Rev. 1109, 1201-27 (1989).

II. Anti-Classicism: Frank Capra and David Riesman

Against the backdrop of Depression era social struggles, new ways of looking at free expression emerged. The La Follette Committee of the United States Senate, for example, held extensive hearings and explored the connection between inequality and denial of civil liberties, particularly free expression, in Depression era labor disputes.[43] In the Norris-La Guardia Act of 1932 and National Labor Relations (Wagner) Act of 1935,[44] a majority in Congress responded, at least in part, to charges that capitalists were systematically violating the speech rights of labor. And after 1935, the National Labor Relations Board could protect the speech rights of union organizers, even if this meant apparent invasions of counter-speech by corporate spokespeople or by owners themselves.[45]

Toward the end of the Depression decade, the Supreme Court confronted similar issues. Initially prodded by the aging Justice Brandeis, for example, the Court considered whether or not peaceful union picketing was merely another form of "free speech" protected under familiar first amendment metaphors—as most of labor's supporters claimed—or whether even nonviolent picketing constituted a complex mixture of expression and coercive action that could be regulated as other turious activities.[46]

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43. Auerbach, *supra* note 5, at 27, 68-69, 148-49, 191-218. Auerbach credits the lengthy investigations of labor conditions by this committee (headed by Senator Robert LaFollette, Jr., of Wisconsin) with helping to win recognition of the view that "traditional definitions of liberty were inadequate in a modern industrial society." *Id.* at 210.

44. 27 U.S.C. § 104(f) (Norris-LaGuardia Act, ch. 90, sec. 4, 47 Stat. 70 (1932) (protected individual and group picketing)); 29 U.S.C. § 157 (National Labor Relations Act, ch. 372, sec. 7, 49 Stat. 452 (1935)). Roger Baldwin of the American Civil Liberties Union (ACLU) credited the National Labor Relations Act (NLRA) with establishing free speech "at points where civil liberties have been historically most flagrantly violated." Roger Baldwin, *Censorship and Freedom of Speech*, 6 Pub. Opinion Q. 295, 297 (1942).

45. *See* Lewis Van Dusen, Jr., *Freedom of Speech and the N.L.R.A.*, 35 Ill. L. Rev. 409 (1940); Charles Killingsworth, *Employer Freedom of Speech and the N.L.R.B.*, 1941 Wisc. L. Rev. 211 (1941).

46. *See, e.g.*, Irving R. Feinberg, *Picketing, Free Speech, and Labor Disputes*, 17 N.Y.U.L.Q. Rev. 385, 405 (1940). ("The sole purpose of the picket [in any labor dispute] is to acquaint the public with the facts, and picketing as an informative agent should not be discouraged. It evidences always an active interest in the problems confronting society and a confidence that the public can be persuaded of what is right."). And for a very different perspective, see, *e.g.*, Charles Gregory, *Peaceful Picketing and Freedom of Speech*, 26 A.B.A. J. 709, 714 (1941). (Even "peaceful picketing is not an argument intended to achieve an intellectual conquest. It is . . . a type of coercion."); *see also* Ludwig Teller, *Picketing and Free Speech* 56 Harv. L. Rev. 180 (1943); Dodd, *Picketing and Free Speech: A Dissent*, *id.* at 513; Ludwig Teller, *Picketing and Free Speech: A Reply*, *id.* at 532. Teller was a prominent corporate attorney and an advocate of legislative revision of the Wagner Act. *See* Christopher Tomlins, The State and the Unions 280 (1985).

But conflicts over issues such as anti-business picketing did not fit easily into the classical, state-oriented free speech metaphors of Holmes and Brandeis. Consequently, legal discourse struggled to catch up to egalitarian social movements, especially the Congress of Industrial Organization's unionizing drives and Afro-American struggles in the South.[47] People engaged in labor struggles did not need a law professor to tell them, in 1941, that courts, under the prevailing constitutional tests "do not ordinarily

47. *See, e.g.*, De Jonge v. Oregon, 299 U.S. 353 (1937) (state's criminal syndicalist law cannot reach labor rally under auspices of Communist Party); Herndon v. Lowry, 301 U.S. 242 (1937) (Afro-American organizer for Communist Party cannot be tried under anti-slave insurrection statute); Hague v. CIO 307 U.S. 496 (1939) (city ordinance forbidding all public meetings is unconstitutional).

On the issue of the first amendment and labor picketing, see, *e.g.*, Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937). According to Justice Brandeis, "[M]embers of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." *Id.* at 478. One contemporary commentator claimed that as a result of this single sentence "a new era was begun in labor law. It was virtually a revolution in the state-federal balance." William Sherwood, *The Picketing Cases and How They Grew*, 10 Geo. Wash. L. Rev. 763, 765 (1942).

Several years after Justice Brandeis' *Senn* dictum, a majority of the Court applied the clear and present danger test to labor picketing. In Thornhill v. Alabama, 310 U.S. 88, 102-03 (1940), the Court struck down a state statute that sought to ban all peaceful picketing. For a discussion of division within the Court and the central role of Justice Frank Murphy, see Sidney Fine, *Frank Murphy, The Thornhill Decision and Picketing as Free Speech*, 6 Labor Hist. 99 (1965); *see also* Joseph Tanenhaus, *Picketing as Free Speech: The Early Stages in the Growth of the New Law of Picketing*, 14 U. Pitt. L. Rev. 397 (1953).

In short order, however, the Court began to retreat from the broad implications of *Thornhill*. *See, e.g.*, Charles Gregory, Labor and the Law 289-340 (2d ed. 1958). *Thornhill* was a "somewhat astonishing" decision, and the Court finally faced "reality" in dismantling its holding, *Id.* at 296, 328-329; *see also* Joseph Tanenhaus, *Picketing—Free Speech: The Growth of the New Law of Picketing from 1940-1952*, 38 Cornell L. Rev. 1 (1952).

The first amendment implications of picketing—peaceful speech, coercion, or some of both—during the 1930s and 1940s deserve more attention than I can give the issue here. This is particularly the case in light of recent disputes over the nature of New Deal labor legislation.

Thus, one could view decisions such as *Thornhill* in light of broader theories about the radical, transforming potential of New Deal labor law. *See, e.g.*, Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 Minn. L. Rev. 265 (1978). Seen in this way, post-Thornhill decisions could fit into a general story of how the progressive implications of New Deal legislation were blinted in the courts. In both the general story and the subplot involving picketing, Felix Frankfurter appeared to play a major role. *See, e.g.*, Klare, *supra* at 329-36. On Frankfurter's important role in picketing cases, see, *e.g.*, Mozart Ratner & Norton Come, *The Norris-LaGuardia Act in the Constitution*, 11 Geo. Wash. L. Rev. 428, 451, 455. For Frankfurter's own story of *Thornhill's* fate, see International Brotherhood of Teamsters v. Vogt, Inc., 354 U.S. 284, 288-95 (1957); *see also* Pope, *supra* note 18, at 1094-96.

Another, alternative story, which might see *Thornhill* itself as part of a complex process by which labor activities become contained within a state-dominated legal discourse, could be grounded in Tomlins, *supra* note 46 and Forbath, *supra* note 42.

think of [the right of free speech] as a matter of protecting one private person from the power of another."[48] Millions of people who struggled on shop room floors and at factory gates already had reached this conclusion. In the view of labor activists, powerful concentrations of corporate and private power, supported by reactionary judges, were restricting free speech.[49] And, at the same time, images demonstrating how inequality distorted political communication reached even more people through the mass media.

The conflict between private power and the marketplace of free speech metaphor, for example, runs through the popular films of Frank Capra. Capra's audience during the 1930s and early 1940s was considerable, even if it did not match John Cassavetes' estimate that perhaps "there really wasn't an America, maybe there was only Frank Capra."[50] And even if one does read Capra's Hollywood dreams as ultimately identifying significant social change with a return to neighborliness and a simplistic faith in faith, films such as *Meet John Doe* (1941), in their stark representations of Depression era America, still shared an egalitarian critique of conventional symbols, such as the free marketplace of ideas, with more radical cultural works.[51]

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48. T. Richard Witmar, *Civil Liberties and the Trade Union*, 50 Yale L.J. 621 (1941). For views of labor people see, *e.g.*, the testimony of Charles Doyle, a labor organizer in the steel industry, before the LaFollette Committee, 76 Cong. 1 Sess., Senate Report No. 6, Part II: Violations . . . . Private Police Systems—Harlan County, Ky. Republic Steel Corporation, 187-88 (1939).

49. *See, e.g.*, Auerbach, *supra* note 5, at 192, *passim*.

50. Leonard Quart, *Frank Capra and the Popular Front*, in American Media and Mass Culture: Left Perspectives 178 (Donald Lazere, ed., 1987).

51. *Meet John Doe* (Warner Brothers Pictures, 1941). The issues of the growing threats to free expression and of the viability of traditional understandings of free speech were also prominent themes in other Capra films of the period, especially *Mr. Smith Goes to Washington* (Columbia Pictures, 1939). *See generally* Peter Roffman & Jim Purdy, The Hollywood Social Problem Film 179-89 (1981); Quart, *supra* note 50, at 178-83.

More specifically, see Raymond Carney, American Vision: The Films of Frank Capra 301-75 (1986). Carney offers readings of *Smith* and *Doe* that parallel my own in the focus upon themes of free expression and political communication. In these films, it is not the independent voices of individual people that are heard, but the "hierarchical system of relationships" that dominate communication. *Id.* at 304. Thus, individual voices are drowned in an "extended web of elaborated relationships . . . before they ever . . . speak their first line." *Id.* at 306. Carney also suggests how the visual "grammar" of *Meet John Doe* (the use of montage, for example) underscores the idea that vast, hierarchical systems of technology now dominate the so-called marketplace of ideas. *Id.* at 350.

By talking about "Capra's films," I do not mean to imply, as the so-called *Auteur* theory would have it, that *Meet John Doe* can be attributed to Capra alone. For example, the film's themes fit into the general orientation of Warner Brothers toward social problems. Warner Brothers was a studio that not only prided itself on "social problem" films but emphasized, in a variety of different film genres, the danger of fascist subversion, both from within and without. *See, e.g.*, Stephen Vaughn, *Spies, National Security, and the "Inertia Projector": The Secret Service*

In *Meet John Doe*, a typically Capraesque hero from small-town U.S.A., a sore-armed baseball pitcher named "Long John" Willoughby (Gary Cooper), becomes the victim/beneficiary of mass-mediated communication. The story begins with a disgruntled reporter (Barbara Stanwyck) writing about a fictional "John Doe," who threatens suicide as a protest against a society tilted in favor of the rich and powerful. On Christmas Eve, this John Doe will sacrifice himself on behalf of all the "little people." The media-inspired hoax fools at least some of the people and rallies them behind a non-existent prophet. Enter the one-time baseball player chosen to play the role of Doe. Covertly backed by the paper's wealthy and politically ambitious publisher, D.B. Norton (Edward Arnold), "John Doe" instantly becomes a political celebrity. The combined communicative force of press, radio, and mass rallies creates a populistic crusade behind him.

The "John Doe movement," like its leader, is phony, a media-fueled creation of the quasi-fascist Norton. Dominating the "free" marketplace of ideas, through his wealth and leverage over the means of communication, Norton plans to come to power by manipulating the political consciousness of ordinary people. In this political fable, Norton's ability to shape popular opinion seems almost limitless. The vast disparity in wealth and power between Norton and the citizenry mocks old ideals of freedom of press, liberty of speech, and freedom of association. Norton owns the marketplace; his public relations people write Doe's speeches; and his goon squads dictate what will be said and heard at "public" rallies.[52] When Willoughby/Doe tries to speak out against Norton's manipulation, he is quickly and easily silenced. Even when the dupe-turned-true-savior makes a last ditch effort to find his voice,

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Films of Ronald Reagan, 39 Am. Q. 355, 356-57, 366 (1988). For a good overview of "classic" Hollywood and ideology, see Robert Ray, A Certain Tendency in the Hollywood Cinema (1985).

Finally, my views about the relationship between film and political discourse draw upon Dana Polan, Power and Paranoia (1986); Michael Ryan & Douglas Kellner, Camera Politica: The Politics and Ideology of Contemporary Hollywood Film 12-16, 288-95 (1988); Michael Ryan, *The Politics of Film: Discourse, Psychoanalysis, Ideology*, in Marxism and the Interpretation of Culture 477 (Cary Nelson & Lawrence Grossberg, eds. 1988). And, on the way in mass cultural and elite legal images can flow in parallel channels, see Chase, *supra* note 3; Robert Gordon, *New Developments in Legal Theory*, in The Politics of Law, *supra* note 9, at 281, 287.

52. The LaFollette Committee, in its detailed investigation of labor conflict and free speech, found similar tactics being used by corporations. *See, e.g.*, 76 Cong. 1 Sess. Senate Report No. 6 Part 4: Violations of Free Speech and the Rights of Labor . . . . Labor Policies of Employers Associations I, 117 (1939); ("planned assaults" by employer associations against free speech); 76 Cong. 1 Sess., Senate Report No. 6: Violations of Free Speech and the Rights of Labor . . . . Strikebreaking Services 38-39 (use of PR firms) (1939); 76 Cong. 1 Sess. Senate Report No. 6 . . . . Violations . . . Private Police Systems 4-11 (1939) (use of private goon squads by companies).

by threatening to carry out the phony suicide threat, Norton's media monopoly keeps any mention of Doe's intended leap out of the press.

The marketplace of ideas, as if *Meet John Doe* had been produced by the Frankfurt school of critical theory,[53] seems to produce mystification rather than enlightenment. Inequalities in wealth and power, the skills of public relations people, and the impact of corporate propaganda apparently have rendered traditional metaphors about free expression obsolete. And governmental officials seem firmly on the side of the powerful rather than the Christ-like Doe, a cinematic version of the free speech stance of the Pennsylvania mayor who announced that "Jesus Christ couldn't speak in Duquesne" for the American Federation of Labor.[54]

What should happen next? *Meet John Doe* offers no clear alternative vision of non distorted communication, and Hollywood's obligatory happy ending—a small group of loyal John Doe people, who have heard of his plight by word-of-mouth, stop the suicide—merely hints that political communication remains freest in situations of rough socio-economic equality and "appropriate scale" technologies. Thus, the political messages of *Meet John Doe* seem to go off in contradictory directions. If grassroots democracy seemingly wins out, for example, the film still ends with Norton's media empire, and the problems it produces for "free" speech, completely intact.[55] Nonetheless, the film confronts the limitations of traditional notions of free speech in a society dominated by

53. Cultural critics associated with the Frankfurt Institute for Social Research, many of whom fled Nazi Germany for the United States in the 1930s, viewed industrially produced mass culture as a form of top down social control. On the ideas of the Frankfurt School, see generally Martin Jay, The Dialectical Imagination (1973); on their approach to mass culture and its impact on public communication, see Patrick Brantlinger, Bread and Circuses: Theories of Mass Culture as Social Decay 228-48 (1983).

54. Davis, *supra* note 18, at 56.

55. Other Hollywood films of the era can also be read to raise questions about traditional free speech metaphors. *See, e.g., The Philadelphia Story* (1940) ("Screwball comedy" about power of scandal magazines); *Citizen Kane* (RKO, 1941) (A film genre unto itself that raises important issues, especially about the power of press lords and the incoherence of the public/private split). *Kane*, for example, brilliantly shows how media coverage itself helps construct—and then, constantly reconstruct—the categories public and private. *See, e.g.*, Norman Rosenberg, *Re-Raising Kane* (unpublished manuscript in author's possession). *See also* Robert Carringer, The Making of *Citizen Kane* (1985); Barbara Leaming, Orson Welles; A Biography 193-212. (1985).

For attacks upon the ways in which "press lords" manipulated public communication, see, *e.g.*, Harold Ickes, America's House of Lords (1939); Freedom of the Press Today (Harold Ickes ed. 1941); Ferdinand Lundberg, Imperial Hearst, A Social Biography (1936); George Seldes, Freedom of the Press (1942).

vast, private, and hierarchical systems of technological and economic power.

Published the year after *Meet John Doe* was released, a remarkable series of law review articles by David Riesman translated much of the film's imagery into a sophisticated legal discourse.[56] In contrast to *John Doe*, these articles offered *both* fundamental critiques of older free-speech metaphors and radical proposals for solving at least some of the problems related to inequality.

Soon to be recognized as the leading sociologist of America's "other-directed" society,[57] Riesman was still engaged in legal research, albeit broadly conceived, in 1942. A graduate of Yale Law School, a clerk to Justice Brandeis, and a former law school professor, Riesman obtained a research fellowship to study civil liberties, especially freedom of expression, in light of recent social-science literature about American society.[58]

The part of this work that remains most visible focuses on defamation law and political expression. Still cited often and justly admired, Riesman's defamation law study, published as three articles in *Columbia Law Review*,[59] condemned traditional defamation-law doctrine and contemporary court practices for being out of step with "democratic" policy-making. Only thoroughgoing revisions could eliminate the comic "confusion of issues" and make defamation law an effective tool in the struggle between democracy and fascism.[60]

Riesman, for example, showed special concern for an issue Capra highlighted in *Meet John Doe*, the impact of privately-

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56. David Riesman, *Civil Liberties in a Period of Transition*, in 3 Public Policy 33 (Carol Friedrich and Edward Mason eds. 1942) [hereinafter Riesman]; David Riesman *Democracy and Defamation: Control of Group Libel*, 42 Colum. L. Rev. 727 (1942) [hereinafter *Group Libel*]; David Riesman *Democracy and Defamation: Fair Game and Fair Comment I*, 42 Colum. L. Rev. 1085 (1942), [Hereinafter Riesman, *Democracy and Defamation I & II*]; David Riesman *Democracy and Defamation: Fair Game and Fair Comment II*, 42 Colum. L. Rev. 1282 (1942) [hereinafter Riesman, *Fair Game, II*].

57. Riesman's classic work is The Lonely Crowd: A Study of the Changing American Character (rev. ed. 1969). Riesman himself links this "social-science" study of national character to his earlier "legal" research on the impact of defamation. *Id.* at xxiii.

58. For one of the few essays making the connection between Riesman's legal and sociological projects, see Lawrence Rosen, *Individualism, Community, and the Law: A Review Essay*, 55 U. Chi. L. Rev. 571, 576-77 (1988).

59. For an analysis of Riesman's place in defamation law discourse of the 1940s, see Norman Rosenberg, *Taking a Look at "The Distorted Shape of an Ugly Tree"; Efforts at Policy-Surgery on the Law of Libel During the Decade of the 1940s*, 15 N. Ky. L. Rev. 11, 30-41 (1988).

60. Riesman, *Fair Game II*, *supra* note 56, at 1300, 1314, 1316; *see also* Rosenberg, *supra* note 59, at 37-39.

produced "propaganda" upon the so-called marketplace of ideas. Here, Riesman cited not only from studies about fascist propaganda in pre-war Europe,[61] he also invoked evidence, collected by bodies such as the LaFollette Committee and by social scientists, about the ways persistent inequalities undercut formal guarantees of free speech.[62] Powerful economic and political leaders, people such as Frank Capra's D.B. Norton, were "relatively unaffected by what is said about them;" in contrast, their own defamatory statements about "groups or individuals who lack money or organizational power" could prove "altogether overwhelming."[63] Citing his own detailed examination of recent defamation cases, Riesman concluded that courts generally failed "to appreciate—or they sympathize with—the reactionary significance of the typical patterns" of defamation against labor unions and their leaders.[64]

"Civil Liberties in a Period of Transition,"[65] also published in 1942, greatly expanded this critique and tried to reframe, in significant ways, free speech discourse. To begin, Riesman insisted that defenders of free expression were entering a time of "crisis" armed with a legal discourse that "does not rise above the level of inherited slogans, which are bandied about as if they could give answers to the problems."[66] From the vantage point of public policy making, there was "little research and little intelligent debate," particularly on legal issues related to "the formulation of public opinion on which all policies in all fields ultimately turn."[67] Legalistic discussions of freedom of expression, in other words, failed to incorporate insights that could be gained from other scholarly disciplines.

When viewed in light of major intellectual changes, neither of the classic legal discourses, natural rights or instrumentalism, confronted the complexities of twentieth century life. For example, both Marxism, with its emphasis on class rationalizations, and

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61. *See, e.g.*, Karl Lowenestein, *Legislative Control of Political Extremism in European Democracies I*, 38 Colum. L. Rev. 591 (1938); Riesman, *supra* note 56, at 58-60; *see also* Reisman, *supra* note 56, at 35 nn. 2-3; 36 nn. 7-8; 77 n. 143; 82 n. 154.

On the importance of "propaganda" studies in the late 1930s and early 1940s, see Garth Jowett, *Propaganda and Communication: The Re-emergence of a Research Tradition*, 37 J. of Comm. 97, 100 (1987).

62. *See, e.g.*, Riesman, *supra* note 56, at 84 n. 156, *see also* 76th Cong., 1 Sess., Senate Report No. 6: Violations of Free Speech and Rights of Labor . . . Labor Policies of Employers' Associations, Part II, 134-41 (1939) (Use of Public Relations and Propaganda Activities Allegedly Coordinated by National Assocation of Manufacturers.)

63. Riesman, *Fair Game II*, *supra* note 56, at 1310.

64. *Id.* at 1311.

65. Riesman, *supra* note 56.

66. *Id.* at 33.

67. *Id.* at 34.

Freudianism, with its emphasis on irrationalism, apparently showed the limits of traditional legal vocabularies. And, in particular, Riesman's own brand of public policy research, rooted in functionalist social science, revealed the abstract nature of older free speech discourses.[68]

Elaborating this theme, Riesman challenged first amendment metaphors associated with Holmes and Brandeis. At best, invocation of the clear and present danger formula could only help judges "disguise" the policymaking role they played in free speech cases.[69] Alluding to the metaphor's historical context and the plain fact that the pro-war Holmes originally employed it against anti-war speakers he detested, Riesman observed that Holmes was "inclined to see harm in actual obstruction [to the military draft] that many Americans, both pacifists and nonpacifists, would not have recognized," since they considered America's involvement in World War I "unjust or ill-advised."[70]

Following the lead of earlier interest-oriented analysts, Riesman saw himself ruthlessly cutting through the abstract metaphors that emphasized the power of "the State." Clear and present danger had a pro-State tilt that ignored the ways in which specific social interests shaped policies and then attributed their handiwork to the needs of an abstraction called "the State." In this way, the old Holmes' test gave too much deference to the policy making elites who guided "our" government. Allowing courts to hide behind this formalism, while depriving critics of "the opportunity to urge an alteration of policy, simply because that policy would thereby be endangered, is to give away one's liberalism."[71]

In contrast to mainstream first amendment libertarians of the early 1940s, who placed great faith in Holmes' metaphor, Riesman dismissed clear and present danger as an essentially empty slogan. He did concede that its association with post-1919 free-speech theory might give it "a certain propagandistic value for liberals who seek to hamper restrictive action in the realm of civil liberties by officials they distrust."[72] But constant repetition of this shop-worn phrase ran the counter-risk of a court being "fooled

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68. *Id.* at 74.

69. *Id.* at 44. For Riesman's frank assertion that "all constitutional questions are 'political,' whether so labeled," see David Riesman, *The American Constitution and International Labour Legislation*, 44 Int. Labour Rev. 123 at 192 n.2; *see also id.* at 131-32, 183 n.5, 192 n.2.

70. Riesman, at 38.

71. *Id.*; (see also Riesman's subsequent critique of the clear and present danger test's tilt toward legitimating the work of dominant policymaking elites); David Riesman, *The Present State of Civil Liberty Theory*, 6 J. of Pol. 323, 325 (1944).

72. *Id.* at 44.

by its own vocabulary . . . . "[73] Even if "liberals" controlled the courts and other policymaking bodies, "a tactic of propaganda is no substitute for a public policy," Riesman concluded.[74]

Critiquing the Holmes-Brandeis classics was only part of Riesman's project. He also expanded the theme raised in his defamation studies, the failure of legal policymakers to see doctrines and judicial decision-making "as integral parts of a total social structure."[75] Although he praised Holmes and Brandeis (along with Zechariah Chafee, Jr., their Harvard Law School advocate) for "intelligence and eloquence" in redressing the threadbare body of eighteenth century ideas about free expression,[76] Riesman dismissed their public policy positions as nothing more than "an abstract, free-market liberalism" that operated only "in the realm of ideas."[77]

Drawing upon realist oriented legal scholarship of the 1920s and 1930s, Riesman emphasized the ways in which socio-economic inequalities clashed with older free speech metaphors. Here, for example, he drew upon Robert Hale's critique of the use of market imagery in economic life to bolster his attack on the free marketplace of ideas metaphor. Like contract law, first amendment law must be considered against the backdrop of hierarchical economic relationships and social conflicts they produced.[78] Thus, when libertarians extended old metaphors to areas such as labor organizing, Riesman found them inadequate representations of the complex mix of conflicting interests at stake.

Anti-employer picketing by unions and anti-union speeches by employers, for example, helped highlight the limits of older legal discourses. Neither the eighteenth century natural rights philosophy, nor "the constitutional legalism which was the heir of that philosophy," could resolve these types of disputes. Conflicts rooted in economic relationships, according to the view championed by Hale, were inherently coercive, and this recognition required legal decisionmakers to adopt new modes of discourse.[79]

How, for instance, might a court approach a conflict over free speech in one of Detroit's auto factories? The first step "is to see it not only in terms of an abstract philosophic or constitutional argu-

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73. *Id.*
74. *Id.* at 45.
75. *Id.* at 55.
76. *Id.* at 66.
77. *Id.* at 67.
78. *Id.* at 66, 86.
79. *Id.* at 79. On the coercive nature of "free" market relationships, see, *e.g.*, Robert Hale, *Our Equivocal Constitutional Guarantees*, 39 Colum. L. Rev. 563 (1939). And for a later discussion of the broader realist project in this area, see Singer, *supra* note 40, at 482-94.

ment, but also as part of a social struggle which cannot be decided without the community's making a choice of its social goals and of the methods it is prepared to use for their achievement."[80] Given his positive evaluation of labor unions, including their contributions to both the empowerment of "the worker" and wise public policy, Riesman "would have no hesitation in forbidding" anti-union speeches by management, especially "since they served to deter self-expression on the part of employees."[81]

Pressing further, Riesman called for governmental action to enlarge speech opportunities for individuals and groups encountering obstacles rooted in inequalities of private wealth and power. Pronouncing the age of rugged individualism over, he urged measures to enable organized groups to benefit from the first amendment's freedom of association guarantee.[82] As in the specific case of balancing speech by labor unions against speech by employers, legal policymakers could not avoid making difficult moral and political choices when dealing with the speech rights of organized interest groups. Since some associations might organize and speak out on behalf of "anti-democratic" goals, free speech policy "must be selective and discriminating. It must name the names of the needing groups protection, on the basis of an overall judgment of the social forces which favor democracy . . . . "[83] Courts should no longer hide behind formalistic metaphors by which groups with widely disparate power bases could be misrepresented as contributing to a mythical, truly pluralistic dialogue.

In addition, Riesman advocated that policy conscious governmental officials must not only safeguard the speech of democratic social forces, they "must go beyond protection." They "must see to it that there are facilities for the use of a right which otherwise remains in some degree theoretical."[84] Riesman suggested, for example, that progressive first amendment policies would seek to open "school houses or courthouses, or if necessary [even] private halls" as public forums for "the impoverished and unpopular groups who are the only ones" to raise free-speech problems for the lawmaking bodies.[85] Even such guarantees of access, though,

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80. Riesman, *supra* note 56, at 79-80.

81. *Id.* at 81.

82. *Id.* 86-87.

83. *Id.* at 88. Thus, legal decisionmakers could not treat "the encounter between the 'truth' of W. J. Cameron [head of Ford's extensive public relations department] and the 'truth' of one of Ford's workmen [as if it] were the 'free and open encounter' " within the marketplace of ideas. *Id.*, at 79.

84. *Id.* at 88; *see also*, David Riesman, *Education for Democracy*, 5 Pub. Opinion Q. 195, 205 (1942).

85. *Id.*

would not be enough to deal with the free-speech problems rooted in socio-economic inequality.

Thus, the promise of first amendment guarantees (and other civil liberties), Riesman argued, would never be realized until "an aggressive public policy might substitute new liberties for the vanishing liberty of atomistic individuals."[86] Although Riesman's blueprint remained hazy on some specifics, his sketch hardly lacked breadth or ambition. People who believed in the first amendment had to look everywhere. Were public school students and teachers, for instance, "free of pressures toward unthinking orthodoxy from school boards and principals, from the clergy, from patrioteers and businesspersons, from authoritarian parents and gangs of dead-end kids?"[87] Free speech policy, in short, should not rest primarily on judicial reactions to specific allegations of first amendment violations but must assume the mantle of general social activism.

In dealing with social life, first amendment policymakers should not be fooled by the old public/private distinctions. For example, when considering issues involving people like Henry Ford, who fought the National Labor Relations Board (NLRB) for abridging his speech rights, believers in free speech must look to concentrations of power, albeit supposedly private, that "can affect the day-to-day living of most of us."[88] Pressing further, Riesman suggested the need to "go into homes and ask about the actual liberties of women." Policymakers must know whether or not, "despite the legal and formal equality which they achieved in the heyday of liberalism, women are today treated as participating adults and regard themselves as such within the family circle and in their social and business lives."[89]

Finally, any "realistic" set of first amendment policies would have to rest upon an informed assault upon inequalities in wealth, power, and knowledge. "Only a frontal attack on the inequalities and insecurities of our society will create the social soil in which civil liberties, either new or old, can flourish."[90] Unless defenders of the first amendment looked toward the broader society, and not

86. *Id.* at 90. This line of argument is restated, more forcefully, in Riesman, *supra* note 71, at 330. And for a more recent statement of the same general position, updated to the politics of the 1980s, see Owen Fiss, *Why the State?* 100 Harv. L. Rev. 781 (1987).

87. *Id.* at 91; *see also*, David Riesman, Book Review, 41 Colum. L. Rev. 358 (1941).

88. *Id.* at 90. Breaking through the public/private distinction was one of the main themes in realist writings. *See e.g.*, Singer, *supra* note 40, at 477-95, 528-32.

89. *Id.* at 90-91.

90. *Id.* at 91.

primarily toward legal doctrines, they were missing the fundamental issues.

Riesman's work of the early 1940s thus synthesized a great deal of legal and social science literature and pointed toward new ways of talking about first amendment issues. First, the series of articles published in 1942 tried to break away from marketplace models, whether Justice Holmes' marketplace of ideas or Justice Brandeis' broader marketplace of political deliberation. In addition, they sought to refocus attention from "the State's" impact, primarily exerted through prosecutions for "criminal speech" toward a wide range of informal social barriers to effective communication. Finally, all of the articles looked, with considerable suspicion, at the traditional discourse used by judges to describe and adjudicate first amendment cases. Although the emergency nature of World War II raised new dangers, "Civil Liberties in Transition" insisted that the war also provided extraordinary opportunities for broadening first amendment vistas and for confronting those "social forces which have paralyzed man's potentialities."[91] In fact, however, the war helped steer free speech discourse away from any dramatic new turns.

III. The Town-Meeting Metaphor, Visions of Equality, and Theories of Free Speech in War-Time America

World War II proved a poor time for bold socio-economic initiatives intended to transform civil liberties, including first amendment freedoms, in significantly new ways. Franklin Roosevelt's "Second Bill of Rights"—his 1944 proposal for recognizing governmentally guaranteed "rights" to jobs, adequate food and clothing, housing, medical care and education—remained a noble (or, to foes of governmental "planning," an ignoble) vision.[92]

Similarly, Riesman's call for reconstructing civil liberties discourse failed to rally even libertarian forces. Initially, the American Civil Liberties Union (ACLU) accepted the challenge to discuss Riesman's ideas, even though his article offered "a theoretical attack on our underlying assumptions" about civil liberties.

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91. *Id.* at 96; *see also*, David Riesman, *The Politics of Persecution*, 6 Pub. Opinion Q. 41, 55, (1942) (must take action to get to "the roots of our social and economic difficulties").

92. Franklin D. Roosevelt, 13 The Public Papers and Addresses of Franklin D. Roosevelt 41-42 (Samuel I. Rosenman, Comp., 1950). For a superb discussion of the significance of the "Second Bill of Rights" in the context of legal-constitutional history, see Cass Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 423-25 (1987). And for an account of how FDR's and Riesman's proposals for "social rights" fit into larger frameworks, see Edwin Amenta & Theda Skocpol, *Redefining the New Deal: World War II and the Development of Social Provision in the United States*, in The Politics of Social Policy, *supra* note 21, at 95-98.

Riesman, the ACLU recognized, rejected its essentially formalistic approach by expressing "some doubt as to the achievement of civil liberties in reality while economic inequality and insecurity exist . . . . "[93] But "no other document, so far as we are aware, has stated the case for a new orientation to civil liberties in such challenging terms."[94] Copies of "Civil Liberties in a Period of Transition" were distributed by the Union's New York office, and even a special conference to debate the article was announced. Then, several months later, absent any public explanation, the meeting was cancelled.[95]

This about-face was not surprising. Ever since 1939, when the Union expelled Elizabeth Gurley Flynn because of her membership in the "totalitarian" Communist Party, the ACLU had been deeply divided over how to approach the "political" dimensions of civil liberties disputes. In addition, internal conflicts over the organization's response to wartime internment of Japanese-Americans further split the ACLU. The Union had enough problems during World War II without confronting the issues Riesman's proposals would have raised.[96]

From a number of perspectives, "Civil Liberties in a Period of Transition" was controversial. Even given a strong egalitarian interpretation, it remains, from traditional free speech viewpoints, a troubling document. It seemingly brushes aside what most libertarians consider the core value of the first amendment, the determination to deny, or at least severely limit, governmental officials' power to inquire into the "content" of expression.[97] "Civil Liberties in a Period of Transition," in contrast, suggests creation of "a

93. *See* ACLU Statement of 27 August 1942, Reel 9, ACLU Papers (Microfilm edition, 1976).

94. *Id.*

95. *See* ACLU Board Minutes, Sept. 14, 1942, Reel 9, *id.* (proposal to convene conference on Riesman's article); Board Minutes, Sept. 28, 1942; *id.* (committee established to work on conference); Board Minutes, Oct. 19, 1942, *id.* (conference cancelled).

96. *See, e.g.*, Richard Drinnon, Keeper of Concentration Camps 118-26, 132-37, 144, 146-53, 299, 305-06 (1988); Peter Irons, Justice at War 106-18, 128-38, 168-75, 186-95 (1983); The Trial of Elizabeth Gurley Flynn by the American Civil Liberties Union (Corliss Lamont ed. 1968).

97. *See, e.g.*, Kalven, *supra* note 17, at 6-19. By the late 1940s, the first amendment libertarianism closely associated with Justice Hugo Black asserted the inappropriateness of trying to measure the social value of particular examples of speech, the position that Riesman forthrightly embraced in his 1942 pieces. *See* Mark Silverstein, Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decisionmaking 192-93 (1984). *See also* Mari Matsuda, *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 Buffalo L. Rev. 337, 361-63 (1989) (reprinted remarks from the James McCormick Mitchell Lecture in which Matsuda argued that courts should look to the content of "hateful" speech).

public policy for freedom of speech" that has "as its goal the maximization of its valid uses and the minimization of its invalid uses."[98] Writing at the beginning of World War II, Riesman still saw the social power of governmental officials, "on the whole," as "weaker than the privileged groups, and particularly weaker than they in manipulating public opinion."[99] His willingness to embrace more governmental involvement than the ACLU leadership desired, of course, stemmed not only from concerns about how entrenched and anti-democratic interests distorted communication, but from considerable faith in the ability of social-science research to inform democratic public policy making. In this view, so common to reformist thought of the 1930s and 1940s, there were few fundamental conflicts between expert leadership and a grassroots, democratic revival.[100]

In a broader historical-cultural context, World War II America offered a hostile environment in which to grow new ideas about free speech and democratization. Despite the ways the war contributed to changes in America's corporate-capitalist economy, the surveillance-state capabilities of the executive branch, and the country's social structures, the larger cultural ambience emphasized racing toward the future while holding on to the familiar and the traditional.[101]

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98. Riesman, *supra* note 56, at 79 (footnote omitted).

99. *Id.* at 82 (footnote omitted). For an example of Riesman's enthusiasm for the Roosevelt administration using the power of state to encourage "democratic" speech, see Riesman, *supra* note 84, at 201-07. For a historical critique of the Roosevelt administration's efforts in one area, see Richard W. Steele, Propaganda in an Open Society: The Roosevelt Administration and the Media, 1933-1941 (1985). And for discussions of the problems of "government speech," see Mark Yudof, When Government Speaks (1983); Chevigny, *supra* note 1, at 132-48.

100. To take only a single example of the ideal of reviving "democracy" through social science expertise, there is the influential work of Harold Laswell, a prominent political scientist and leader in efforts to construct a social science base for "realistic" legal studies. *See, e.g.*, Seidleman, *supra* note 39, at 133-38 (Laswell's place in political science discourse); Kalman, *supra* note 40, at 176-89 (efforts to develop a policy science approach to legal studies); David Riesman, *Law and Social Science: A Report on Michael and Wechsler's Classbook on Criminal Law and Administration*, 50 Yale L. J. 636, 651-53 (critical of those "emancipated realists" who recognize policy implications of law but who fail to "look over departmental walls" and borrow from social sciences); *see also*, Terence Ball, *The Politics of Social Science in Postwar America*, in Recasting America: Culture and Politics in the Age of the Cold War 76 (Lary May ed. 1989).

More broadly, calls for advancing "liberty" by emphasizing government promoted "social rights" involves highly controversial judgments about whether a capitalist welfare state liberates or subtly controls its citizenry. For a brief and insightful introduction to the issues, see Ira Katznelson, *The Welfare State as a Contested Institutional Idea*, 16 Pol. & Soc. 517 (1988).

101. *See generally* John Blum, V Was for Victory (1976). On first amendment and other civil liberties issues, see Paul Murphy, The Constitution in Crisis Times, 1918-1969, at 213-47 (1972).

Nowhere was this more true than in the dominant metaphors used to represent World War II as a struggle to preserve America's basic liberties, including free speech. Thus, President Roosevelt's famous "Four Freedoms" speech of 1942[102] took visual form in the nostalgic imagery of Norman Rockwell. Unveiled in Rockwell's usual forum, the *The Saturday Evening Post*, the "Four Freedoms" soon adorned posters from the Office of War Information and bolstered the Treasury Department's "Buy War Bonds" campaigns.[103]

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102. Roosevelt's Annual Message to Congress (January 1941) The President used the "Four Freedom's" metaphor to help justify greater United States assistance to Great Britain's struggle against Nazi Germany. According to FDR, "The first 'freedom' is freedom of speech and expression—everywhere in the world." The other essential liberties were Freedom of Worship, Freedom from Want, and Freedom from Fear. Roosevelt, *supra* note 92, at IX, 672. For a brief account of how the "Four Freedoms" became incorporated into wartime discourse, see Lester Olson, *Portraits in Praise of a People: A Rhetorical Analysis of Norman Rockwell's Icons in Franklin D. Roosevelt's "Four Freedoms" Campaign*, 69 Q.J. Speech 15, 20-22 (1983).

103. Rockwell initially failed to interest anyone in Washington in his project, but his usual outlet, *The Saturday Evening Post*, expressed great enthusiasm. He then spent six months on the four paintings. Norman Rockwell, My Adventures as an Illustrator 338-43 (1960). "Freedom of Speech" appeared in The Saturday Evening Post, Feb. 20, 1943; at 12-13.

According to Rockwell's reminiscences, he attended a town meeting just before settling upon the final form of his series. Late one night, while struggling to translate Roosevelt's language into visual imagery, he suddenly "remembered how Jim Edgerton had stood up in town meeting and said something that everybody else disagreed with. But they had let him have his say. No one had shouted him down." Rockwell, *supra*, at 339.

Even so, Rockwell had great difficulty with the "Freedom of Speech" painting, trying four different versions before settling upon the one that finally appeared in the *Post*. One "almost done" version was abandoned after Rockwell determined the picture contained "too many" people. Significantly, Rockwell judged this more heterogeneous representation as "too diverse, it went every which way and didn't settle anywhere or say anything." *Id.* at 341. Finally, he settled on a tableau that made "a strong, precise statement: the central figure of the man speaking in the midst of his neighbors." *Id.* at 342.

In the midst of the enthusiasm over the symbolism of the "Four Freedoms," at least one pro-Roosevelt commentator noted the artificiality of the free speech symbol. According to Harold F. Gosnell, a prominent political scientist, the importance of the whole idea of free speech would be difficult for the "submerged and illiterate minority to understand." *Symbols of National Solidarity*, 223 Annals of Am. Academy, 157, 159 (1942).

Gosnell touched upon a theme that became increasingly prominent in academic discourse about freedom of expression; the idea of free speech was a bit too difficult for the less educated and less sophisticated to grasp. *See, e.g.*, Emerson, *supra* note 1, at 28. For an elaboration of this theme, supported with seemingly impressive social science methodology, see Herbert McCloskey and Alida Brill, Dimensions of Toleration: What Americans Believe about Civil Liberties (1983).

Here, again, there is great room for debate. For example, do the "submerged and illiterate" (to use Harold Gosnell's terms) lack respect for free speech? Or, do they simply find metaphors, such as the free marketplace of ideas and town meetings, largely removed from their communication experiences? For the view that "the submerged" have their own sophisticated views of social issues, derived from

Comfortably set in a New England town meeting, Rockwell's rendition of "Freedom of Speech" reduced a complex social process to a soothing, thoroughly traditional and simple metaphor firmly rooted in popular mythology. In contrast to the United States during the Thirties or even the wartime Forties, Rockwell's Bennington, Vermont, remains calm. There are no pickets, anti-union "bosses," or D.B. Nortons. Rockwell's Lincolnesque version of the "great communicator" holds better-dressed, cleaner scrubbed, better-credentialed citizens in awe; he can expound upon the evening's text—Bennington's annual report, carelessly stashed in his left-side pocket—without detailed references or even three-by-five notecards.

The demeanor of the audience suggests the nature of the speech. One can almost see a "consensus" over agreed-upon fundamentals—"let's keep down taxes!"—beginning to take shape. Does anyone imagine this speaker arguing that the workers of Bennington will enjoy "real" free speech only when the town's deeply-rooted socio-economic inequalities are addressed forthrightly? Rockwell's working-class hero may have the blue book in his pocket, but there is no picket sign in his hand.[104]

Similarly, Riesman's brief paragraph about the need to address first amendment problems related to inequalities grounded in gender is almost silenced in Rockwell's town meeting metaphor. The public world of free speech, except for a partial view of one young woman's face, is a male-dominated sphere. In contrast, the other three entries in Rockwell's "Four Freedoms" series place women at the center of their frames. When it comes to "Freedom from Want," cooking meals and bringing them to the tables; "Freedom of Worship," keeping the religious-moral tone finely pitched; and "Freedom from Fear," tucking the kids into bed, women's "proper" sphere comes sharply into focus.[105]

Finally, absent from Rockwell's painting is any suggestion, save the town's blue book, of the presence—let alone, the coercive power—of public officials. Political speech is not only anti-hierar-

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their own positions within an unequal, hierarchical society, see, *e.g.*, George Lipsitz, A Life in the Struggle (1988); Interview with David Montgomery, in Visions of History 169, 180 (1983); Robert Williams, *supra* note 16, at 104-13, 129-34.

104. Norman Rockwell, *Freedom of Speech*, The Saturday Evening Post, Feb. 21, 1943 (illustration).

105. For a fascinating view of how other mass cultural workers tried to contain representations of gender defined spheres within traditional frames, see Maureen Honey, Creating Rosie the Riveter: Class, Gender, and Propaganda during World War II (1984). After completing the "official" rendition of "Freedom of Speech," Rockwell finished another version for the Metropolitan Museum. Perhaps the most significant change was the clear presence of two women. It is reproduced in Thomas Buechner, Norman Rockwell, Artist and Illustrator 86 (1970).

chical but, in this vision of a town meeting, it appears self-regulating. No presiding officer is even in view.

Rockwell's soothing, nostalgic representation of "free speech" marked, then, a retreat from those offered in *Meet John Doe* and "Civil Liberties in a Period of Transition." But Rockwell's small-town nostalgia smoothly flowed into an evocative cultural discourse about free speech that was coming into prominence during the 1940s. For example, images of mass rallies, which Frank Capra had used in *Meet John Doe* would, in the director's wartime films, depict public speech in Nazi Germany rather than anything that "could happen here." When making his *Why We Fight* series for the Office of War Information, Capra consciously juxtaposed dark shots of Hitler's mass rallies with brightly lit ones of neighborhood gatherings in small town America.[106]

Similarly, Capra's first postwar film, *It's a Wonderful Life*,[107] deftly sidesteps disturbing questions about communication in a mass, urban, class-divided society. Set in the mythical New England town of Bedford Falls, *Wonderful Life's* villainous character was not a powerful politician-press baron, but merely a stingy, small-town, (even wheelchair-ridden) banker. As played by Lionel Barrymore (familiar to viewers of the Forties for his regular portrayals of Charles Dickens's Scrooge and the Fatherly Dr. Gillespie in the series of *Dr. Kildare* films), the banker lacked effective power, save for one fleeting moment, to manipulate speech or to shape popular consciousness. At the film's point of socio-economic crisis, Capra spells relief in the form of divine intervention, an angel trying to "earn his wings," and in the homogeneous people of Bedford Falls, who willingly offer their savings in order to keep George Bailey's (Jimmy Stewart's) friendly, hometown building and loan out of the clutches of Barrymore's bank. In contrast to the disturbing look at public communication in *Meet John Doe*, Bedford Fall's citizens do not receive information from powerful media lords or at mass meetings but in face-to-face exchanges that recall Rockwell's "Freedom of Speech" painting.[108]

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106. *See, e.g., A Walk Through the Twentieth Century With Bill Moyers—World War II: The Propaganda War* (PBS, 1984) (a documentary with Capra's own explanation).

107. *It's a Wonderful Life* (Liberty Films/RKO 1946).

108. *See generally* Carney, *supra* note 51, at 377-435; Ray, *supra* note 51, at 179-205.

Viewed in another way, however, *It's a Wonderful Life* suggests a wider, typically post-1945 view of free "expression," the dream of being able to express oneself through a personal style of life. Thus, George Bailey, the hero of the film, constantly feels that the slow pace of life and the cultural narrowness of Bedford Falls "cramp his style." *See* Carney, *supra* note 51, at 398-405. For historical interpretations of this postwar search for expression through selfhood, see Peter Clecak,

The metaphor of New England towns—and their free speech meetings—popped up in a number of other places during the late 1940s. As the historian Delores Hayden has noted, the postwar home-building industry mass-produced New England "Cape Cods"—which, among other things, severely limited most women's expressive capacities—for the suburban market.[109] And, in his postwar theory of free speech, philosopher-libertarian Alexander Meiklejohn invoked the same New England mystique in his central metaphor, the self-governing town meeting.

Meiklejohn, a prominent member of the ACLU, published *Free Speech and its Relation to Self-Government* in 1948.[110] Writing just as the great postwar Red Scare was gaining momentum, Meiklejohn argued that only a new understanding of the first amendment would thwart those "from the [P]resident down, [who] are seeking to thrust back Communist belief by jailing its advocates, by debarring them from office, by expelling them from the country, by hating them."[111] In such a situation, he insisted, America must remember the basic purpose of what was, by then, being called "the First Freedom."[112] According to Meiklejohn's theory of the first amendment, democratic government required that "political" speech be unrestrained by public officials, people who, afterall, were simply agents of the sovereign, self-governing

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America's Quest for the Ideal Self: Dissent and Fulfillment in the 50s and 70s, at 103-226 (1984); Christopher Lasch, The Culture of Narcissism: American Life in an Age of Diminishing Expectations 28-179 (1979). And for a legal formulation of the right to a particular, expressive lifestyle, see C. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 Cornell L. Rev. 563 (1977).

109. Delores Hayden, Redesigning the American Dream 8-14, 35-38, 41-42, 49-59 (1983). Hayden develops the argument that postwar housing developments provided "haven" for the male-let family and thereby helped isolate women from the public realm. The female inhabitant of a Cape Cod home was supposed to express herself primarily through home-oriented consumption and child rearing. More generally, see Elaine Tyler May, Homeward Bound: American Families in the Cold War Era (1988).

110. Alexander Meiklejohn, Free Speech and its Relation to Self-Government, reprinted in Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People (1960).

111. *Id.* at 43. Meiklejohn's approach remained, then, partly rooted in the kind of state-oriented, friend-enemy mode of the classical Holmes opinions. Although Meiklejohn severely criticized Holmes's "clear and present danger" test, Professor Bollinger insightfully notes the similarities between their approaches. Bollinger, *supra* note 1, at 158-64.

112. In his "Four Freedoms" speech, FDR called freedom of speech "the first freedom." Roosevelt, *supra* note 100, Vol. 9, at 672; Vol. 10, at 33-34, 65-66. Similarly, in 1946, Morris Ernst, a prominent member of the ACLU and a supporter of Roosevelt, entitled his book on freedom of speech and press, The First Freedom (1946). Ernst initially conceived of his book as part of a series devoted to popularizing Roosevelt's "Four Freedoms."

After the 1940s, the phrase increasingly became a central part of first amendment discourse. *See, e.g.*, Nat Hentoff, The First Freedom (1984).

citizenry. Put simply, citizens could not carry out their civic responsibilities without an "absolute" right of "public discussion."[113]

In anchoring this theory in something concrete, Meiklejohn looked to the New England town meeting. "The difficulties of the paradox of freedom as applied to speech may perhaps be lessened," wrote Meiklejohn, if people understood "the procedure of the traditional American town meeting. That institution is commonly, and rightly regarded as a model by which free political procedures may be measured. It is self-government in its simplest, most obvious form."[114] Thus, Meiklejohn's book—no less than Norman Rockwell's paintings, and in stark contrast to "Civil Liberties in a Period of Transition" and *Meet John Doe*—turned away from the complexities and inequalities of a corporate-capitalist, mass-mediated society and seized upon a metaphor that harkened to the past, and a largely mythical one at that.[115]

The same impulse, to devise general theories of free expression that tended to sidestep the kinds of issues Riesman raised in the 1940s, characterized other prominent postwar first amendment theories. Even Thomas Emerson, a passionate crusader for social justice, ultimately proposed a "general" first amendment theory

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113. Meiklejohn, *supra* note 110, at 9-19, 27. The attempt to ground free speech guarantees on arguments from political self-government was hardly original. *See, e.g.*, Rosenberg, *supra* note 11, at 145-49 (a discussion of the nineteenth century theories of Frederick Grimke). After 1948, however, this position, and its tendency toward theoretical as opposed to social analyses, became firmly identified with Meiklejohn. *See* Bollinger, *supra* note 1, at 259 n. 12.

Similarly, the idea of drawing a line between public and private speech also became part of the Meiklejohnian tradition. *See, e.g.*, Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 26 (1971). Such an enterprise immediately drew critical fire; *see, e.g.*, Zechariah Chafee, Book Review, 62 Harv. L. Rev. 891, 898-900 (1949); Meiklejohn later offered a broader definition of "political" speech. *See* Meiklejohn, *supra* note 1, at 255-57.

114. Meiklejohn, *supra* note 110, at 24.

115. For a critical, historical view of the hierarchical nature of even the earliest town meetings, see Kenneth Lockridge, The New England Town (1970).

There is, I would concede, a more favorable reading of town meeting imagery: that Meiklejohn, like some other postwar democrats, simply offered the town meeting as a "frankly utopian" metaphor in a larger effort to rekindle communitarian visions of face-to-face political discussion. *See* James Miller, "Democracy is in the Streets:" From Port Huron to the Siege of Chicago 94 (1988); *see also*, Meiklejohn, *supra* note 111, at 24-26; Erich Fromm, The Sane Society 341-43, 361 (1963). For the dilemmas produced by trying to operate on such a vision, see Miller, *supra* at 146-48 (overview of struggles within Students for a Democratic Society over how to create political spaces in which town meeting types of discussion could take place).

Finally, one might note the theory that Americans' attraction to the town meeting metaphor (expressed in academic life by the penchant for "rearranging the furniture" so as to turn "lecture sessions into town meetings") represents an attempt to "pretend they can be free in a completely structured situation . . . . In a way, it's an extremely aggressive practice, this declaration that one is now so free and easy." *Comment (Gavatri Spivak)*, in Marxism and the Interpretation of Culture, *supra* note 51, at 117.

that highlighted "legal" as opposed to "nonlegal" considerations. Although "the success of any society in maintaining freedom of expression hinges on many different considerations," including socioeconomic conditions, "in the United States today we have come to depend upon legal institutions and legal doctrine," wrote Emerson.[116]

Emerson, of course, wrote against the backdrop of the post-World War II Red Scare. Growth of a national surveillance state, along with "Red-hunting" at the state and private levels, put both social activists and free speech libertarians on the defensive.[117] An emphasis on the familiar rather than the novel seemed the only—if still not always a winning—free speech strategy. Certainly, a discourse linked to faith in the policymaking capacities of governmental officials and to egalitarian social changes would have raised only more problems for political movements already identified with suspicious ideas.[118]

"Civil Liberties in a Period of Transition" quickly disappeared from free speech discourse, even from the discourse of David Riesman himself. In 1953, he alluded to the piece as an example of the kind of civil liberties text that possibly did not merit

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116. Thomas Emerson, A System of Freedom of Expression 4-5 (1972). This was an expansion of Emerson's earlier "general theory." *See* Emerson, *supra* note 1, 27-35 (role of legal institutions).

117. *See, e.g.*, Michael Belknap, Cold War Political Justice (1971); Larry Ceplair & Steven Englund, The Inquisition in Hollywood (1983); Frank J. Donner, Age of Surveillance (1980); David Caute, The Great Fear (1978); Gerald Horne, Black and Red: W.E.B. DuBois and the Afro-American Response to the Cold War, 1944-1963 (1986); Stanley Kutler, American Inquisition (1982); Michael Rogin, Ronald Reagan, The Movie: And Other Episodes in Political Demonology (1987); Ellen W. Schrecker, No Ivory Tower: McCarthyism & the Universities (1986); Peter Steinberg, The Great "Red Menace": United States Prosecution of American Communists (1984); Athan Theoharis, Spying on Americans (1981); Lary May, *Movie Star Politics: The Screen Actors Guild, Cultural Conversion, and the Hollywood Red Scare*, in Recasting America, *supra* note 101, at 125.

118. For tentative views of how the rise of the postwar surveillance state helped shape free speech discourse, see Silverstein, Constitutional Faiths, *supra* note 97, at 174-205; Norman L. Rosenberg, *Gideon's Trumpet: Sounding the Retreat from Legal Realism*, in Recasting America, *supra* note 101, at 107, 117-20; Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 Stan. L. Rev. 509, 539-47 (1984).

The Progressive Citizens of American (PCA), a group that espoused a militant expansion, rather than simply a firm defense of first amendment discourse, was itself a target of Red-baiting, especially during the 1948 presidential campaign when Henry Wallace refused to disavow Communist Party support. On the PCA's attempt to broaden discussion about freedom of expression, see Progressive Citizens of America, Thought Control in the U.S.A. 87-88 (1948). On the relationship between the Communist Party and the PCA, especially on general civil liberties issues, see Joseph Starobin, American Communism in Crisis, 1943-1957, at 155-94 (1972); Paul Mishler, *Marxism and the U.S. Constitution: Changing Views of the Communist Party, U.S.A. 1926-1956*, in A Less than Perfect Union, *supra* note 6.

publication. Writing in the prestigious *American Scholar*,[119] at the height of the postwar Red Scare, he renounced his 1942 article as sophomoric; it was a "vague and horatory" example of the "crisis" discourse that "we ethnocentrically reserve for *our* problems."[120] With this apparent retraction, Riesman contended that, during a time of international and domestic tensions, overheated rhetoric about supposed dangers to free speech, in a society as open as America's, contributed little to intelligent public debate and only helped discourage believers in free expression. In this formulation, it seemed silence, rather than more speech, best contributed to an atmosphere conducive to intellectual freedom.[121]

IV. Living in the Aftermath

Many scholars, of course, see the 1940s as an important period in first amendment history. From Vincent Blasi's "pathological perspective," for example, the late Forties began one of those "abnormal periods"—inaugurated by the Red-baiting of 1947 and 1948—during which the "indeterminate strands in Supreme Court doctrine that supported strong protection for free speech had very little influence."[122] If judges could have drawn upon a "better de-

119. David Riesman, *Some Observations on Intellectual Freedom*, in Selected Essays Reprinted from Individualism Reconsidered 122 (David Riesman ed. 1955). This essay (which originally appeared in 23 American Scholar 9 (1953)) was a response to an article by Archibald MacLeish that decried the threat to civil liberties in the early 1950s. Archibald MacLeish, *Loyalty and Freedom*, 22 American Scholar 393 (1953). Riesman, as a member of the editorial board of *American Scholar*, vigorously opposed publication of this piece and then wrote his own article in reply. Thirty-some years later, Riesman remembered "Civil Liberties in a Time of Transition" a little differently, as the publication that opened the door to a career in the social sciences rather than law. Anne Lowrey Bailey, *Riesman on Riesman*, Change May/June 1985, at 51, 54.

In constrast to his early 1940s emphasis on the importance of an engaged citizenry and the social basis of civil liberties, Riesman switched his emphasis to an individualistic, largely psychological view of freedom. *Compare, e.g.*, Riesman, *supra* note 84, at 200-06 *with* Richard Pells, The Liberal Mind in a Conservative Age: American Intellectuals in the 1940s and 1950s, at 240-46 (1985) (a summary of Riesman's later work).

See also Riesman's changing views of the media and mass culture in The Lonely Crowd, *supra* note 57, at lii-lv. By 1950, theories about the immense power of "propaganda," which Riesman had relied on in the early 1940s, had fallen out of favor among mainstream media scholars. *See, e.g.*, Jowett, *supra* note 61, at 100-101. But for an influential analysis that is much closer to the Riesman of 1942 than the Riesman of 1953, see C. Wright Mills, The Power Elite (1956); *see also* Jacques Ellul, Propaganda (1965).

120. Riesman, *supra* note 119, at 122.

121. A year later, Riesman did concede that his 1953 piece likely had underestimated threats to free speech. *Id.* at 122-25. For a sobering account of the pressures on political speech in academia during the Red Scare—and the lack of resistance to such pressures—see Schrecker, *supra* note 118.

122. Vincent Blasi, *The Pathological Perspective on the First Amendment*, 85 Colum. L. Rev. 449, 475 n.74 (1985). This essay and Professor Blasi's other major

veloped" first amendment tradition, "the courts may have played a constructive role" in free-speech controversies.[123] Offering a different formulation, Robert Gordon believes these same judges actually did possess "plenty of respectable legal arguments," but lacked the "political will" to protect alleged subversives.[124]

My theory suggests another picture of the 1940s, one that includes the pre-war, wartime and postwar years. In this view, the late 1940s represent a time in which familiar first amendment arguments—whether "indeterminate" or perfectly "respectable"—too rarely protected controversial speech. But looking beyond the immediate legal disputes of the late 1940s to the broader culture of the first amendment during the entire decade, there appears to have been another significant defeat, a turning away from a free speech discourse that attempted to confront, more directly than the classical metaphors of the 1920s, issues grounded in various types of inequality.

From this perspective, the "neo-classical" free speech talk of the late 1940s, like that of Alexander Meiklejohn, assumes a complex form. True, it attempted to reframe (rather than simply to reassert) the classic metaphors of Holmes and Brandeis. Because of its profound silence about social and political issues related to inequality, though, this same discourse also retreated from the socially sensitive strain of free speech consciousness that, only a few years earlier, seemed to be emerging.[125] And even when the Red

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theoretical piece, *The Checking Value in First Amendment Theory*, Blasi, *supra* note 1, may be read as an important modification and addition to the state oriented discourse of Holmes and Brandeis. In contrast to Meiklejohn, for example, Blasi takes the absence of an engaged, concerned public, which would see critical speech as both a right and a sacred responsibility of self-government, as a given. Blasi, *supra* note 1, at 562.

123. Blasi, *supra* note 122, at 508.

124. *An Exchange on Critical Legal Studies Between Robert W. Gordon and William Nelson*, 6 L. & Hist. R. 139, 172 (1988).

125. My "theory" joins other recent projects that, rather than finding "consensus," stress the fundamental political, cultural and social conflicts (even during World War II and the cold war years) of the 1940s. *See, e.g.*, Howard Brick, Daniel Bell and the Decline of Intellectual Radicalism: Social Theory and Political Reconciliation in the 1940s (1986); George Lipsitz, Class and Culture in Cold War America: A Rainbow at Midnight (1982); Polan, *supra* note 51; Allan Wald, The New York Intellectuals, 182-343 1986); Rosenberg, *supra* note 115, at 107.

Viewing the 1940s as contested historical terrain, one would expect to find a good many contradictory performances by the Supreme Court in first amendment cases. Readers may supply their own citations.

And to return, briefly, to cultural discourses other than law, it is easy to find analogous struggles over how to represent "expression." Even a "happy" film such as *It's a Wonderful Life*, had its "dark" sides, especially in the lengthy sequence, recalling film noir, in which George Bailey imagines he never "lived" at all and that Bedford Falls had fallen prey to the evil banker, Mr. Potter (Barrymore). *See* Carney, *supra* note 51, at 9-16, 193-249. And on the conflicts over expression and freedom in the art world of the 1940s, *see* Serge Guilbaut, How New York Stole the

Scare "pathology" finally passed in the late 1950s, mainstream talk about free speech, even during the 1960s, never recaptured the breadth of vision that had been present during the late 1930s and early 1940s.[126]

Perhaps one of the most poignant obeservations on this came from the late Harry Kalven, Jr. One of the most prominent libertarians in the postwar legal academy, Kalven became a fervent advocate for the neo-classical Meiklejohnian position during the 1960s.[127] Yet, prior to his death in 1974, Kalven expressed some regret about the trajectory of this mode of discourse. However, reassuring the "philosophic map" of first amendment dialogue might have become after the postwar Red Scare, "the *Sociological* map" looked much more "disturbing:" Free speech became "skewed" because of "the sheer weight of broadcasting, the sheer weight of advertising, and the ownership of the means of communication."[128] The normal, legalistic focus upon Supreme Court discourse, Kalven noted, ran "the danger that all or almost all really important areas are left outside the Court's 1st A [sic] scrutiny."[129]

Idea of Modern Art: Abstract Expressionism, Freedom, and the Cold War (1983) and Erika Doss, *The Art of Cultural Politics: From Regionalism to Abstract Expressionism*, in Recasting America, *supra* note 101, at 195.

126. For a prominent exception to normal scholarship of this era on the First Amendment, see the work of Jerome Barron. *See, e.g.*, Jerome Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967).

127. *See, e.g.*, Harry Kalven, Jr., *Meiklejohn and the Baranblatt Opinion*, 27 U. Chi. L. Rev. 315 (1960), and *The New York Times Case: A Note on the "Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191.

128. Worthy Tradition, *supra* note 17, at xiv; *see also* Owen Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405 (1986); *see* Bollinger, *supra* note, at 74 (singling out Riesman's defamation law series of 1942 as one of the "few serious efforts to integrate into the general free speech discourse a more complex and realistic view of modern society"). And, as I have stressed, Riesman's "Civil Liberties in a Period of Transition" went much further than his libel pieces in trying to bring "realism," especially about deeply rooted inequalities, to the forefront of first amendment discourse.

There is, however, nothing inherent to a "realistic" view of law that automatically translates into particular positions on speech issues. *See, e.g.*, Edgar Jones, *Picketing and Coercion: A Jurisprudence of Epithets*, 39 Va. L. Rev. 1023 (1953); Charles Gregory, *Picketing and Coercion: A Defense*, 39 Va. L. Rev. at 1053; Jones, *Picketing and Coercion: A Reply*, 39 Va. L. Rev. at 1063; Charles Gregory, *Picketing and Coercion: A Conclusion*, 39 Va. L. Rev. at 1067 (two self-proclaimed realists engaged in a potentially endless exchange).

129. Worthy Tradition, *supra* note 17, at xv. Here, one must note Duncan Kennedy's bravura "judicial" performance in suggesting how a creative judge might turn a "labor case" into "a first amendment prior restraint (or at least a 'free speech policy' case . . . . ") Duncan Kennedy *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. Legal Educ. 518, 524 (1986). Kennedy views his exercise "as an extension of the legal realist project" associated with Felix Cohen, Karl Llewllyn, and Edward Levi, with assistance from the kind of fancy European intellectual moves so familiar to friends and foes of CLS (critical legal studies) scholarship. *Id.* at 18 n. 1. Viewed another way, Kennedy might also be picking up the fallen standard of "Civil Liberties in a Period of Transition," while

Kalven's lament, penned in the margin of the manuscript on which he was working when he died in 1974, could provide an epitaph for the discourse that, during the late 1930s and early 1940s, tried to address how the unequal distribution of wealth, power, and knowledge in the United States might affect consideration of first amendment issues.

My "theory" about the importance of the 1940s to the history of free speech discourse offers no blueprint, such as the one in "Civil Liberties in a Period of Transition," about where "we" should go next. Hopefully, though, it does speak to some important silences in classical and neo-classical first amendment texts,[130] and it may suggest the need for other, historically-situated explorations of the interrelationship between social and free speech questions. Given the powerful appeal of historical arguments in American legal culture, different stories about the relationship between free speech and social structures, along with an appreciation of the twists and turns in the history of first amendment discourse, may offer valuable resources for egalitarian movements. The past, like the future, offers a field for creative work.

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leaving behind the functionalist social science and New Deal political baggage of the early 1940s.

130. There is a growing literature, for example, that points toward what might be called the "History of Silences," rather than the "History of Free Speech," in the United States. *See, e.g.*, Susan Brownmiller, Femininity, 105-26 (1984); Ira Katznelson, City Trenches, 6-7, 71-72 (1981); Pells, *supra* note 120, at 139; Robin Lakof, Language and Woman's Place (1975); Ira Katznelson, *Rethinking the Silences of Social and Economic Policy*, 101 Pol. Sci. Q. 307 (1986); Catherine MacKinnon, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech*, in MacKinnon, *supra* note 9, at 163, 192-95; Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 Yale L. J. 1860, 1900-05 (1987); Martha Minow, *Speaking of Silence*, 43 U. Miami L. Rev. 493, 502-05 (1988).