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THE EGALITARIAN FIRST AMENDMENT: ITS HISTORY AND A CRITIQUE ON THE GROUNDS OF TEXT, RIGHTS, NEGATIVE LIBERTY, AND OUR REPUBLICAN CONSTITUTIONAL STRUCTURE

ZACHARY C. LARSEN*

This article articulates the growing tendency of constitutional theorists and U.S. Supreme Court justices to construe the First Amendment in the light of egalitarian principles and argues that to do so is inconsistent with the meaning and purpose of the First Amendment. The article criticizes the egalitarian approach as creating a positive right, contrary to the structure of the Bill of Rights as a “charter of negative liberties” and as diluting the right to speech by infusing in it a relative determination of speech values. Finally, the article concludes that the egalitarian reading should be rejected as endangering the very liberties the First Amendment creates.

I. INTRODUCTION

Were there an “Equality Clause” tacked onto the First Amendment’s Speech Clause, it would most likely read as follows: “Congress shall make no law . . . abridging the freedom of speech, or of the press, *except where doing so is necessary to preserving the greater goal of egalitarian democracy.*”¹ On the basis of such a clause, Congress could be justified in legislating that muting some voices is necessary to the creation of a forum that gives an ear proportionally to all view-

* Law Clerk to Hon. Calvin Osterhaven; J.D. *Magna Cum Laude*, Ave Maria School of Law 2008; B.A. *Magna Cum Laude*, Washington State University 2005. I am grateful to my wife Andrea, without whom this article would not have been published, for persistently speaking encouragement to me and for awakening my imagination to bigger dreams. Gratitude is also extended to my family, to the many great faculty members who served me at Ave Maria and made their mark on this article, including John Dudley, Fr. Joseph Isanga, Richard Myers, Phillip Pucillo, and Lee Strang, and to the editors of the North Carolina Central Law Review for their assistance and professionalism during our dealings. Lastly, I thank the Giver of All Good Gifts for this opportunity.

1. See STEPHEN BREYER, *ACTIVE LIBERTY* 48 (2005) (“[B]asic democratic objectives, including some of a kind that the First Amendment seeks to further, lie on both terms of the constitutional equation. Seen in terms of modern liberty, they include protection of the citizen’s speech from government interference; seen in terms of active liberty, they include promotion of a democratic conversation.”); see also CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993) [hereinafter *SUNSTEIN, PARTIAL*].

points.² As a means to such ends, the government could render compulsory the exposure of citizens to ideas they consider repugnant,³ and media owners might be compelled to succumb to government regulation of content.⁴ No such laws would violate the Speech Clause of the First Amendment as, of course, the Equality Clause would modify that provision to permit these restrictions on the reasoning that the restrictions are necessary to promote a greater goal than simply free speech—*actually* free speech.

To the chagrin of many theorists and even a number of Supreme Court Justices,⁵ the First Amendment lacks such a qualification. Instead of granting a positive liberty to share the nation's collective ear equally with every other citizen, the clause conforms to the structure and nature adopted by the rest of the Bill of Rights—granting a freedom by limiting the power of government to act.⁶ It is in this manner that the Supreme Court's First Amendment jurisprudence charges that the clause requires "commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"⁷ and admonishes to let "speech rebut speech"⁸ rather than to restrict one person's ideas for the sake of another.

Despite the absence of a textual qualification to the Speech Clause on egalitarian grounds and the inconsistency of such an approach with the Court's overall Speech Clause jurisprudence, the idea of an implicit Equality Clause is often advocated and has accumulated a stronger following over time. This reading of the First Amendment creates a positive right to speech, backed and guaranteed by the government and requires government intervention in and balancing of speech in order to ensure private citizens the enjoyment of that right. It is the intention of this paper to offer a brief explanation of the Equality Clause as it has developed in Supreme Court jurisprudence,

2. See SUNSTEIN, PARTIAL, *supra* note 1; CASS SUNSTEIN, ONE CASE AT A TIME (1999) [hereinafter SUNSTEIN, ONE CASE].

3. See CASS SUNSTEIN, REPUBLIC.COM (2001) (arguing against "the growing power of consumers to filter what they see" and stating that "a well-functioning system of free expression" requires that "people should be exposed to materials that they would not have chosen in advance.") [hereinafter SUNSTEIN, REPUBLIC].

4. CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH, 107 (1993) ("[I]nsofar as newspapers invoke the civil and criminal law to prevent people from reaching the public, they too might be subject to mild forms of regulation without abridging the freedom of speech.") [hereinafter SUNSTEIN, DEMOCRACY].

5. See BREYER, *supra* note 1.

6. *New York Times v. United States*, 403 U.S. 713, 716 (1971) (Black, J., concurring) ("[T]he new powers granted to a central government might be interpreted to permit the government to curtail [various freedoms] The amendments were offered to *curtail* and *restrict* the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution.") (emphasis in original).

7. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

8. *Dennis v. United States*, 341 U.S. 494, 503 (1951).

followed by a critique that aims at dispelling the ostensible wisdom of egalitarian approaches to the First Amendment. The grounds for critique have been partially disclosed in the foregoing introduction and rely upon the concept that our constitutional freedoms are negative liberties, the structure of our government as requiring republicanism and not egalitarian democracy, and, to a lesser extent, the nature of rights as absolutes.

The first section of this paper endeavors to adumbrate a history of the Equality Clause in the Supreme Court's jurisprudence as well as in constitutional theory. The second section addresses the normative appeal of an equality addendum. The third and final section will take issue with the Equality Clause on the separate grounds of its inconsistency with the Bill of Rights as a listing of negative liberties, its inconsistency with the republican form of government outlined by the Constitution, and its inconsistency with the theory of rights as non-derogable⁹ trumps, concluding not only that such a reading is inconsistent with the First Amendment as written and understood but also that they are inapposite to the ideal structure for protecting our liberties.

II. BIRTHING THE EQUALITY CLAUSE

The Equality Clause, or egalitarian reading, of the First Amendment has its roots both in constitutional theory and in the body of several, primarily dissenting, opinions of the Supreme Court. Because it represents an implemented approach of jurists rather than the musings of academics, the Supreme Court's jurisprudence will be discussed first. The academic discourse, however, is expressed with less of a veiling and therefore is also important to the discussion and will succeed the account of the Supreme Court's journey. Combined, the two represent a growing egalitarian approach to the First Amendment that both threatens to irreparably corrupt that fundamental freedom and skews the purpose and meaning of the constitutional text.

A. *An Egalitarian Reading by the Court*

The egalitarian reading has been invoked in diverse areas of the Supreme Court's First Amendment jurisprudence including incitement, freedom from speech compulsions, and campaign finance reform. Largely, this reading has been rejected, having been advocated only by the Court's dissenters or discussed but not adopted by the

9. The term "non-derogable" is commonly used in human rights speech to refer to rights from which no derogation may be had. See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), ¶ 21, U.N. Doc. A/6316 (Dec. 16, 1966) (specifically, Article IV stating that "no derogation" from certain rights-giving provisions may be made).

majority opinions. The following sketch does not intend to cover this area exhaustively but instead offers an outline of some of the more important decisions of the Court that implicate this ideology.

i. Holmes in *Schenck* and *Debs* Compared to *Abrams*

The injection of egalitarianism into Speech Clause jurisprudence has its roots in the opinions of Oliver Wendell Holmes, Jr. from some of the earliest and most profoundly important free speech cases, *Schenck*,¹⁰ *Debs*,¹¹ and *Abrams*.¹² The contrast of Holmes' opinions in these cases betrays the underlying philosophy that has gained prominence in contemporary constitutional interpretation and which this paper critiques. It is important to note that these cases were not "early" at all in the history of our Constitution, being handed down successively in 1919, nearly 130 years after the Constitution's framing.

In each of the cases, men espousing Socialist beliefs were criminally indicted under the Espionage Act after engaging in efforts, via print or public speech, to recruit actors to their cause. The men challenged those convictions on First Amendment grounds. The Espionage Act survived the attack in all three circumstances, the majority opinions differing primarily by their authorship. Writing for the majority in both *Schenck* and *Debs*, the revered Justice Oliver Wendell Holmes, Jr. voted to uphold the statute against the challenges based upon the "clear and present danger" presented by the speech.¹³ In *Schenck*, the Socialist party general secretary was charged under the Espionage Act for circulating pamphlets decrying the Conscription Act as unconstitutional and arguing for men to resist the draft.¹⁴ Holmes concluded that the appellee's words had been akin to "falsely shouting fire in a crowded theater and causing a panic"¹⁵ and were consequently unprotected. In *Debs*, after finding that the "natural and intended effect" of Socialist party leader Eugene Debs' speech was to "obstruct recruiting,"¹⁶ Holmes disposed of *Debs* by citing *Schenck*.¹⁷ Similarly, the majority in *Abrams*—written by Justice John Clarke—upheld the conviction of the pamphlet-distributing Socialists who had written to urge

10. *Schenck v. United States*, 249 U.S. 47 (1919).

11. *Debs v. United States*, 249 U.S. 211 (1919).

12. *Abrams v. United States*, 250 U.S. 616 (1919).

13. *Schenck*, 249 U.S. at 53; *Debs*, 249 U.S. at 217.

14. *Schenck*, 249 U.S. at 49, 50-51. *Schenck*'s document recited the Thirteenth Amendment, saying that the idea embodied was violated by conscription, that a conscript was little better than a convict, and urging men to "assert [their] rights" by resisting the draft. *Id.*

15. *Id.* at 52.

16. *Debs*, 249 U.S. at 214.

17. *Id.* at 215 ("The chief defences upon which the defendant seemed willing to rely [included] . . . that based upon the *First Amendment* . . . disposed of in *Schenck*.").

workers in factories; which produced bullets, bayonets, and other vehicles of war; to walk off the job.¹⁸

The striking difference between *Abrams* and the previous two cases was not the majority opinions but was Justice Holmes' dissenting opinion, concurred in by Justice Louis Brandeis.¹⁹ Holmes belittled the characterization of the defendants' conduct in *Abrams* as not presenting anything remotely justifying the abridgment of speech.²⁰ The central distinguishing aspect of the case appeared to be Holmes' statement that "nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger" to the government.²¹ Holmes went on to trivialize the defendants as "poor and puny anonymities,"²² in arguing for the protected nature of their speech, stating that "[t]o allow opposition by speech seems to indicate that you think the speech impotent[.]"²³ Holmes' opinion was just that—that the speech was impotent, or more precisely that the speakers were.

Whereas Holmes' two majority opinions refused to offer protection for the Socialist party presidential candidate or the party's general secretary, Holmes' dissent in *Abrams* reasoned that the two "poor and puny anonymities"²⁴ were deserving of protection, as if by virtue of the fact that their speech was unlikely to garner an audience. The impotence of the speakers was cause enough for Holmes to find that it deserved a voice. As Harry Kalven has noted, "[I]t seems that *Abrams* moved Holmes because he was so trivial a critic[;] Debs should have moved him because he was such an important one."²⁵ In that respect, Holmes' *Abrams* dissent foreshadowed the arguments of scholars and justices alike that would come later, in the principle that muffled voices deserved a megaphone and louder ones may be muffled, in a leveling of the field.

ii. Compulsory Equal Airtime and Market Regulations

The egalitarian reading next prominently reappeared in two cases involving public media outlets that followed relatively closely upon one another. In the first, *Red Lion Broadcasting Co. v. FCC*,²⁶ the

18. *Abrams*, 250 U.S. at 624.

19. *Id.* at 624-31 (Holmes, J., dissenting).

20. *Id.* at 626 ("No argument seems to me necessary to show that these pronouncements in no way attack the form of government of the United States . . .").

21. *Id.* at 628.

22. *Id.* at 629.

23. *Id.* at 630.

24. *Id.* at 629.

25. HARRY KALVEN, *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA*, 143 (1988).

26. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

Court considered whether the “fairness doctrine”—a Federal Communication Commission (FCC) regulation requiring broadcasters to permit responsive airtime to controversial issues that the stations discussed in political editorial—could withstand First Amendment scrutiny.

The appellant, Red Lion Broadcasting Company, had aired a broadcast in which a guest speaker accused the author of a political commentary of having been fired for making false accusations against public officials, working for a Communist-affiliated publication, and writing the book as a smear tactic.²⁷ The appellee, the commentary’s author, complained to the FCC that he had been attacked and requested airtime on the station to rebut these allegations.²⁸ The FCC agreed with the appellee and declared that Red Lion had failed to meet its obligation under the fairness doctrine, and needed to provide the appellee with airtime, whether he paid for it or not.²⁹ Red Lion responded by alleging that its First Amendment rights had been violated.³⁰ The Supreme Court disagreed, reasoning that the scarcity of frequencies and radio broadcasting abilities necessitated the fairness doctrine.³¹ The Court held that “the right of the viewers and listeners, not the right of the broadcasters . . . is paramount.”³² Harkening back to the marketplace analogy, Justice White stated for the majority that the purpose of the First Amendment is “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market”³³

The Court’s decision in *Red Lion* may be explained in many respects by the government’s positive involvement in the speech resulting from the nature of licensing.³⁴ Nevertheless, Justice White’s repugnance to permitting monopolies alluded to a species of enforced equality and foreshadowed the “market regulation” suggestion that has gained popularity in the time since *Red Lion*.³⁵ Shortly thereafter,

27. *Id.* at 371.

28. *Id.* at 371-72.

29. *Id.* at 372.

30. *Id.*

31. *Id.* at 387.

32. *Id.* at 390.

33. *Id.*

34. *See id.* at 388 (“Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”).

35. The fairness doctrine has been abolished by the FCC since this case. *In re Complaint of Syracuse Peace Council*, 2 F.C.C.R. 5043 (1988). Though Congress attempted to reintroduce it in 2005 as the Fairness and Accountability in Broadcasting Act, it did not succeed. H.R. 501, 109th Cong. (2005). Moreover, an opposing faction of senators has since grown and introduced their own Broadcaster Freedom Act in June 2007, which would have forbidden the FCC from ever repromulgating the fairness doctrine, if passed. H.R. 2905, 110th Cong. (2007).

Justice White changed his attitude and within four years was towing the opposite line.³⁶

In *Miami Herald Pub. Co. v. Tornillo*,³⁷ a political candidate had suffered the shortcomings of a robust press, having been the subject of numerous articles critical of his candidacy.³⁸ A Florida law permitted political candidates the “right of reply” mandating that a paper must publish the candidate’s response to attacks on the candidate’s personal character or official record, and the candidate sought to compel the Miami Herald to print his reply.³⁹ The Court majority, headed by Chief Justice Burger, acknowledged the arguments that the “‘market-place of ideas’ is today a monopoly controlled by the owners of the market” and consequently that “the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take affirmative action.”⁴⁰ The Court further considered the arguments of certain academics, one of whom urged that “a limited right of access to the press could be safely enforced.”⁴¹ Nevertheless, in holding for the Herald, the Court aptly noted that “[h]owever much validity may be found in these arguments, at each point the implementation of a remedy . . . necessarily calls for some mechanism, either governmental or consensual.”⁴² The necessity of a mechanism for implementation was the problem, Chief Justice Burger reasoned, and “governmental coercion” of the press “at once brings about a confrontation with the express provisions of the First Amendment[.]”⁴³

Justice White, concurring in a separate opinion,⁴⁴ ostensibly recanted his earlier statement.⁴⁵ White stated that “the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed . . .”⁴⁶ Justice White’s notably laissez-faire opinion and contentedness to leave speech to “market forces” was seemingly in conflict with his earlier endorsement of government’s role in breaking up the “monopoly.”⁴⁷ Further, Justice White went on to find that “any other system that would supplant private control of the press with the heavy hand of

36. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 260 (1974) (White, J. concurring).

37. *Id.* at 241 (majority opinion).

38. *Id.* at 243.

39. *Id.* at 244.

40. *Id.* at 251.

41. *Id.* at 253.

42. *Id.* at 254.

43. *Id.*

44. *Id.* at 260 (White, J., concurring).

45. *Red Lion*, 395 U.S. at 390.

46. *Tornillo*, 418 U.S. at 260 (White, J., concurring).

47. See *Red Lion*, 395 U.S. at 390; *Tornillo*, 418 U.S. at 260 (White, J., concurring).

government intrusion—would make the government the censor of what the people may read and know,”⁴⁸ rejecting on the harshest terms the government’s role as the antitrust regulator of the marketplace of ideas but introducing its symbolism into the debate on free speech.

iii. *Buckley* and the Rejection of “Relative Voices”

The Supreme Court again addressed the egalitarian reading, this time within the context of the hot-button issue of campaign finance reform, in the landmark case of *Buckley v. Valeo*.⁴⁹ The *Buckley* Court thus had to decide whether one or both of these provisions offended the First Amendment’s guarantee of freedom of speech. In its decision, the majority opinion struck down the provision restricting campaign expenditures as “necessarily reduc[ing] the quantity of expression by restricting the number of issues discussed.”⁵⁰ In contrast, the Court upheld the donation restrictions, finding that they were less a matter of speech as a donation “serves as a general expression of support . . . but does not communicate the underlying basis for support.”⁵¹

In explicating its rationale, the Court then turned to the argument that FECA’s defenders had urged upon the Court that the act was justified by three important interests, two of which implicated political equality: equalizing the relative ability of all citizens to affect the outcome of elections and opening the political system more widely to candidates without access to sources of large amounts of money.⁵² The majority considered but rejected that argument, stating that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”⁵³

Over the many years since the decision, *Buckley* has been criticized both by those who say it did not offer enough protection to speech⁵⁴ and by those who say it offered too much.⁵⁵ Proponents of campaign finance reform for egalitarian reasons, in particular, have inveighed

48. *Tornillo*, 418 U.S. at 260 (White, J., concurring).

49. *Buckley v. Valeo*, 424 U.S. 1 (1976).

50. *Id.* at 19.

51. *Id.* at 21.

52. *Id.* at 48.

53. *Id.* at 48-49.

54. See, e.g., Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 667 (1997).

55. See John C. Bonifaz, Gregory G. Luke & Brenda Wright, *Challenging Buckley v. Valeo: A Legal Strategy*, 33 AKRON L. REV. 39, 58 (1999); Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126 (1994).

against *Buckley's* "relative voice" statement, as the statement rejected precisely what they believe is necessary to achieve political equality.⁵⁶ Advocating that no tension existed between equality and First Amendment principles prior to *Buckley*, Judge Skelly Wright states that "paradoxically, by equating political spending with political speech and according both the same constitutional protection, the Court placed the First Amendment squarely in opposition to the democratic ideal of political equality."⁵⁷ By contrast, Professor Kathleen Sullivan describes the choice as inherent in the facts of *Buckley*, stating that, "*Buckley* involved nothing less than a choice between two of our most powerful traditions: equality in the realm of democratic polity, and liberty in the realm of political speech . . . the Court in effect chose a little of both."⁵⁸ Yet, while the Court may have found some shared ground between the two, it rejected the idea of compromising the integrity of the First Amendment's guarantee for equality's sake.⁵⁹ The *Buckley* Court sent a clear message that the hand of the government was not the mechanism for achieving political equality in speech. That message would continue to be challenged by both the changing composition of the Court and academics alike subsequent to *Buckley*.

iv. Subsequent Campaign Finance Reform Cases

Like *Buckley*, much of the Supreme Court's recent jurisprudence on the egalitarian reading has taken place in the context of campaign finance reform. Between *Buckley* and the later case of *McConnell*,⁶⁰ the Court often had occasion to consider whether laws aimed at making elections "more democratic" passed the scrutiny of the First Amendment.⁶¹ Not all of these cases can, nor need, be covered but a few revived with increased fervor the debate over an equality-restricted Speech Clause in the post-*Buckley* era.

56. See J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982); Bonifaz, *supra* note 55, at 58 ("[F]ew phrases in that decision have subdued subsequent prudential and legislative debate more than the Court's famous dictum [on relative voices] . . . a survey of American political philosophy and legal precedent reveal that this claim is overblown . . .").

57. Wright, *supra* note 56.

58. Sullivan, *supra* note 54, at 667.

59. *Buckley*, 424 U.S. 1.

60. *McConnell v. FEC*, 540 U.S. 93 (2003).

61. See generally *Virginia Pharmacy Bd. v. Virginia Citizen's Consumer Council, Inc.*, 425 U.S. 748 (1976); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *United States v. Grace*, 461 U.S. 171 (1983); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Clark v. Community for Creative Non-Violence*, 468 U.S. 88 (1984); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 780 (1984); *Texas v. Johnson*, 497 U.S. 397 (1984); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000).

For instance, in *Austin v. Michigan Chamber of Commerce*⁶² a non-profit corporation challenged the constitutionality of a law barring the use of corporate treasury funds for expenditures related to the endorsement of or opposition to a political candidate's campaign.⁶³ The Court upheld the law against the constitutional challenge, noting that the nature of corporations permitted the companies to "use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'"⁶⁴ In other words, regulation of the permissible uses of economic resources in direct relation to political speech, was necessary to ensure political equality.

Justice Scalia, dissenting from the majority opinion, conceded that "perhaps the Michigan law before us here has an unqualifiedly noble objective—to 'equalize' the political debate by preventing disproportionate expression."⁶⁵ Nevertheless, he remarked "the premise of our Bill of Rights, however, is that there are some things—even some seemingly *desirable* things—that government cannot be trusted to do."⁶⁶ To Scalia, the First Amendment fits squarely within this context, and he noted that "[t]he fundamental approach of the First Amendment was to assume the worst, and to rule regulation of political speech 'for fairness' sake' simply out of bounds."⁶⁷

The Court again approached the issue of equality and campaign finance in *Nixon v. Shrink Missouri Government PAC*,⁶⁸ when a political candidate and political action committee sought to enjoin the enforcement of a contribution statute that they claimed violated the First and Fourteenth Amendments.⁶⁹ While the majority flatly rejected the candidate and PAC's claims on the basis of *Buckley*,⁷⁰ Justice Breyer, in a concurring opinion, breathed life into the egalitarian reading by attempting to recategorize *Buckley*. Referencing the "relative voice" statement of the *Buckley* Court, Breyer commented that such language "cannot be taken literally."⁷¹ Breyer thus implied what has been made explicit in his subsequent scholarship—that government may permissibly serve as a referee of the relative voices of citizens.

62. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

63. *Id.* at 654-55.

64. *Id.* at 659.

65. *Id.* at 692 (Scalia, J., dissenting).

66. *Id.*

67. *Id.* at 693.

68. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000).

69. *Id.* at 383.

70. *Id.* at 397.

71. *Id.* at 402 (Breyer, J., concurring).

Additional campaign finance reform cases and laws have been decided and passed since *Nixon*.⁷² Although the cases have not squarely addressed the issue of equality, the “fairness” rationale of the legislation is manifest⁷³ and continues to be a central focus for legislators as well as those in the academy.⁷⁴ Absent any conclusive decisions by the Supreme Court, the future of campaign finance reform is therefore likely to be rife with equality arguments confronting the central First Amendment principle of political speech for decades to come. That area is not the sole source of fodder for egalitarian arguments in the free speech context, however, and in fact only serves as one of many battlegrounds in the continuing clash between the competing understandings of the Speech Clause—the one embodied by a laissez-faire governmental posture towards the marketplace of ideas and the one demanding government intervention and regulation. This larger battle rages in Supreme Court decisions in various other First Amendment areas⁷⁵ as well as in the literature of the legal academy as many professors attempt to debunk the plausibility of an unregulated marketplace.

B. *The Theoretical Underpinnings of Modern Equality Articulations*

The core theoretical underpinning of “equality” interpretations to the First Amendment concern a belief that the Constitution’s infusion with the values of “participatory self-government,”⁷⁶ “reflective and deliberative debate,”⁷⁷ or “public rights”⁷⁸ necessitates interpreting the First Amendment in the same way.⁷⁹ These theories tend to place

72. See *McConnell v. FEC*, 540 U.S. 93 (2003); *Wisconsin Right to Life v. FEC*, 127 S.Ct. 2652 (2007).

73. See, e.g., 147 CONG. REC. H373 (Feb. 13, 2002) (“[L]arge sums of money drown out the voice of the average voter.”) (remarks of Rep. Langevin) (emphasis supplied).

74. See Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599 (2008).

75. For example, in the 2008 term, the Court’s decision in *Ysursa v. Pocatello Educ. Ass’n*, embodied this continuing clash of ideologies, the majority deciding that Idaho was not compelled to subsidize the teaching union’s speech and Justice Breyer’s concurrence taking issue with the distinction between “failing to promote” an individual’s speech and “abridging” it. *Ysursa v. Pocatello Educ. Ass’n*, 129 S. Ct. 1093 (2009).

76. BREYER, *supra* note 1, at 46.

77. SUNSTEIN, ONE CASE, *supra* note 2, at 178.

78. Gregory P. Magarian, *Regulating Political Parties Under a “Public Rights” First Amendment*, 44 WM. & MARY L. REV. 1939 (2003).

79. A broader constitutional interpretive theory which, when imported into First Amendment context, has an equal effect to the approaches described in the foregoing discussion is John Hart Ely’s “representation reinforcing” democracy. JOHN HART ELY, *DEMOCRACY AND DISTRICT: A THEORY OF JUDICIAL REVIEW* 103 (1980) (arguing that government intervention in political processes is necessitated when a systematic malfunction occurs and defining a systematic malfunction as “when the *process* is undeserving of trust. . . [such as when] though no one is actually denied a voice or vote, representatives beholden to an effective majority are systematically disadvantaging some minority . . .”).

a high value on democracy as the lens through which all other Constitutional provisions are to be viewed.⁸⁰ Moreover, the democracy of which they speak is an egalitarian democracy, personified in the “one person, one vote” scheme mandated by the Supreme Court in *Reynolds v. Simms*.⁸¹ The democracy these theories allude to is assembled out of phrases lifted from such places as the Preamble of the Constitution and hypothesizes that the three words, “We the People,”⁸² are an interpretive mechanism for the balance of the document.

One incarnation of this theory is Cass Sunstein’s “deliberative democracy.”⁸³ Deliberative democracy prizes political equality and “seeks to promote, as a democratic goal, reflective and deliberative debate about the possible course of action.”⁸⁴ Sunstein contends that within the paradigm of deliberative democracy, “[g]overnment is certainly not permitted to regulate speech however it wants” but it “may try to ensure diversity of view.”⁸⁵ In summary, “a well-functioning democracy requires a degree of citizen participation, which requires a degree of information; and large disparities in [political] equality are damaging to democratic aspirations” and therefore legitimately regulated by the government.⁸⁶

What might be seen as a piggy-back on deliberative democracy is current Supreme Court Justice Stephen Breyer’s “active liberty.”⁸⁷

80. BREYER, *supra* note 1, at 7 (suggesting that the Constitution ought to be read “through a more democratic lens.”); Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, and Fiss-ian Freedoms*, 58 U. MIAMI L. REV. 265, 267 (2003) (“Treating the more recent amendments as interpretive lenses for the older parts is justified by a meta-constitutional value of democracy.”).

81. *Reynolds v. Simms*, 377 U.S. 533, 558 (1964); *see also* David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1383 (1994) (“[I]f equalization is a legitimate (in fact mandatory) reason for rearranging voting rights, it is not clear why it is an illegitimate reason for rearranging other rights to political participation.”).

82. All of the theorists discussed below refer primarily to these three words in discussing their interpretive theories. *See* SUNSTEIN, ONE CASE, *supra* note 2, at 178 (“[T]he American free speech tradition owes much of its origin and shape to a conception of democratic self government . . . symbolized by the transfer of sovereignty from the King to ‘We the People.’”); BREYER, *supra* note 1, at 10. The text is an additional source of strength for advocates such as Frances R. Hill. *See* Frances R. Hill, *Putting Voters First: An Essay on the Jurisprudence of Citizen Sovereignty in Federal Election Law*, 60 U. MIAMI L. REV. 155, 155-56 (2006). Interestingly, some opponents of an egalitarian reading also root their argument in the Preamble and popular sovereignty. *See, e.g.,* James Bopp, Jr. & Richard E. Coleson, *The First Amendment Needs No Reform: Protecting Liberty from Campaign Finance “Reformers,”* 51 CATH. U. L. REV. 785, 788 (2002) (“[T]he Constitution’s Preamble makes plain what the Court has reiterated and what certain ‘reformers’ have neglected, that ‘we the People of the United States’ established and control this government. Therefore, the people’s right to speak out about issues and [political] candidates is paramount.”) (rejecting regulation of speech).

83. *See* SUNSTEIN, ONE CASE, *supra* note 2.

84. SUNSTEIN, ONE CASE, *supra* note 2, at 178.

85. *Id.*

86. *Id.* at 178-79.

87. *See* BREYER, *supra* note 1.

Breyer's book of the same name concerns the "constitutional theme" which informs his approach to our fundamental text, labeled the "people's right to 'an active and constant participation in collective power.'"⁸⁸ With deference to this overarching theme of active liberty, Breyer casts the First Amendment as "seeking to facilitate a conversation among ordinary citizens that will encourage their informed participation on the electoral process."⁸⁹ Thus, "insofar as they achieve these objectives" laws restricting a form of speech, like campaign finance reform, would be acceptable as they, "despite the limits they impose, will help to further the kind of open public political discussion that the First Amendment seeks to sustain, both as an end and as a means of achieving a workable democracy."⁹⁰ A related but independent strain of thought, articulated by a number of scholars and most recently advanced by Professor Gregory Magarian is the public rights reading of the First Amendment, which will be referred to as "collectivism." Collectivists, like Magarian, describe the First Amendment as not solely proscriptive but also exhortative, requiring more than a *laissez-faire* policy from the government in regulating the marketplace of ideas.⁹¹ This theory suggests that the "Free Speech Clause . . . must enable a political discourse aimed at reaching collective determination of wise policy," electing that courts should have the role of "evaluat[ing] asserted threats to and protections of expressive freedom based on their actual effects on the system of free expression."⁹² The underlying value is that all viewpoints would be heard,⁹³ and the government acts as a referee in ensuring that this will be so—going so far as to make the Speech Clause a "substantive" right requiring not merely protection from "government denials [of] expressive freedom," but also government facilitation of "the public debate required for self-government."⁹⁴

To the extent that these theories vary in the labels they invoke, their foundational structure and philosophy is identical. After concluding that the Constitution is a democratic instrument, they turn this conclusion lose upon First Amendment construction. The sacrosanct value of political equality effects a transmogrification of the Speech Clause from an admonition against government interference in the exchange of ideas to a limitless license and positive obligation to regulate the

88. BREYER, *supra* note 1, at 5.

89. *Id.* at 46.

90. *Id.* at 47.

91. See, e.g., Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992).

92. Magarian, *supra* note 77, at 1980, 1985-86.

93. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 26 (1948) ("What is essential is not that everyone shall speak, but that everything worth saying shall be said.").

94. Magarian, *supra* note 77, at 1983 (emphasis supplied).

marketplace so as to ensure that all views are not merely voiced but heard.

III. THE APPEAL OF EQUALITY: ARGUMENTS ROOTED IN DEMOCRATIC GOVERNANCE

To be fair, even the most expansive readings of the First Amendment admit to limitations on the freedom of speech. Justice Brennan wisely stated in *Roth v. United States*,⁹⁵ that “[i]n light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance.”⁹⁶ The egalitarian reading thus offers one appealing reason for curtailing First Amendment freedoms—that a supposedly greater interest is served by sacrificing individual liberty in order to achieve a more perfect democracy and better political deliberation. To evaluate its consistency with the First Amendment, the basis of the egalitarian reading should then be examined. This discussion will first explore two of the best arguments for the egalitarian reading: the antitrust metaphor and the analogy to the “one person, one vote” principle of political equality.

A. *An Antitrust for the Marketplace of Ideas*

In a 1982 law review article on campaign finance and the First Amendment, Judge Skelly Wright wrote that “the truth-producing capacity of the marketplace of ideas is not enhanced if some are allowed to monopolize the marketplace . . . just as proponents of the free market system generally recognize the need for government policing . . . by enforcement of antitrust laws, proponents of freedom of expression must recognize the need for government policing[.]”⁹⁷ Although the antitrust suggestion was directly aimed at campaign finance reform,⁹⁸ the rationale can easily be extended to other areas of speech.⁹⁹

Though Judge Wright may have been first to expound upon the Court’s own imagery of monopolies by invoking the concept of antitrust, the argument has not been lost by subsequent egalitarian reading commentators on both sides. For instance, Justice Stephen Breyer picked up on the idea, noting that “just as a restraint of trade is sometimes lawful because it furthers, rather than restricts, competition, so a restriction on speech, even when political speech is at issue, will some-

95. *Roth v. United States*, 354 U.S. 476 (1957).

96. *Id.* at 483.

97. Wright, *supra* note 56, at 636.

98. *Id.*

99. Antitrust, as a metaphor, is used within the broader realm of the marketplace of ideas metaphor that permeates First Amendment jurisprudence.

times prove reasonable, hence lawful.”¹⁰⁰ Critics of the egalitarian reading are also aware of the antitrust analogy, taking issue with its zero-sum logic and stating that “it has long been a fundamental part of the ‘drowning out’ argument popular in [campaign finance] reform circles that some doors of communication must of necessity be closed in order to open others.”¹⁰¹

The repercussions of imposing the antitrust analogy on free speech issues are obvious: mandatory government intervention of so-called “market failures.” The analogy requires that a judge must define what market failures are and must correct them.¹⁰² Ultimately, this ability corresponds to the duty that advocates of equality perceive judges to have—the duty to promote deliberative democracy—and does not entirely lack support in the Supreme Court’s jurisprudence of protecting against the breakdowns of the democratic process, most candidly described in the famous *Caroline Products* case, footnote number four.¹⁰³

B. *One Person, One Vote; One Person, One Voice*

As with the antitrust analogy, Judge Skelly Wright was one of the earliest to articulate that “[f]inancial inequalities pose a pervasive and growing threat to the principle of ‘one person, one vote,’ and undermine the political proposition to which this nation is dedicated—that all men are created equal.”¹⁰⁴ The argument has been echoed by many since.¹⁰⁵ Its core is that regulation of speech for equality purposes is justified by analogy to voting, as both acts constitute an exercise of political power.

Uniquely, the position rests, as some of its proponents readily admit, upon the principle that volume control, or “reducing the speech of some to enhance the relative speech of others,” is constitutionally

100. BREYER, *supra* note 1, at 48.

101. Bradley A. Smith, *Campaign Finance Reform: The John Roberts Salvage Company: After McConnell, a New Court Looks to Repair the Constitution*, 68 OHIO ST. L.J. 891, 909 (2007).

102. Symposium, *Positive Political Theory and Public Law Part II: Strict Scrutiny and Social Choice: An Economic Inquiry Into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1788 (1992) (“Representation-reinforcing process theories urge judges to rely on democratic political processes and intervene only when political market failure silences the voices of particular interests or under-represented groups.”).

103. *United States v. Caroline Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (commenting, though not holding, that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and . . . may call for a correspondingly more searching judicial inquiry.”).

104. Wright, *supra* note 56, at 610.

105. See, e.g., David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1383 (1994).

justified.¹⁰⁶ The justification is found in the alleged constitutionality of reapportionment.¹⁰⁷ Advocates see it as a natural extension; if the government is required to give equal weight to all votes, the government may not permit unequal political power in the arena of speech.¹⁰⁸

IV. PROBLEMS WITH THE EGALITARIAN READING

The egalitarian reading should be rejected for many reasons, only a few of which will be detailed. Those which demand addressing include that free speech is a negative liberty relying upon government non-intervention, that radical equality is not mandated by our republican Constitution, and that it is inconsistent with the nature of negative rights as absolutes. However, as a predicate and correlate to each of these arguments, the foundation will be laid to show that the egalitarian reading is not supported by either the text or history of the First Amendment.

A. *Lack of Textual or Historical Justification*

The text of the Constitution is oddly often sidelined (and sometimes exiled) in much constitutional theory. Nonetheless, any defensible theory on the interpretation of a constitutional provision must have some basis in the text and history. The Constitution has legal status as it was adopted by legal processes¹⁰⁹ and purports to be law.¹¹⁰ Any interpretation must therefore begin, as with interpretation of a statute, with the text¹¹¹ and inquire into history for contextual purposes where ambiguity exists.¹¹² The argument that the egalitarian reading misconstrues the text and purpose of the First Amendment does not stand alone but is instead the basis of the subsequent arguments. Therefore, in order to give those arguments context, this proposition will be expounded first.

106. *Id.* at 1382-84.

107. *Id.* See Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1392 (1994); see also Wright, *supra* note 56, at 625-31.

108. See Sunstein, *supra* note 107.

109. H.L.A. HART, *THE CONCEPT OF LAW* 56-57, 110-16 (2d ed. 1994). Law is that which is adopted by legal processes. See *id.*

110. U.S. CONST. art. VI (declaring that the Constitution is the "supreme law of the land").

111. See generally *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990) (stating statutory interpretation begins with text of statute).

112. ROBERT BORK, *THE TEMPTATION OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 145 (1990) ("If the Constitution is law, then presumably, like all other law, *the meaning the lawmakers intended* is as binding upon judges as it is upon legislatures and executives.") (emphasis supplied).

Many egalitarian reading proponents attempt to root themselves in the text or history.¹¹³ The problem is that this takes place not in the text and history of the First Amendment, but in a broader history of the Constitution.¹¹⁴ Constitutional provisions can certainly inform each other to the extent a phrase is repeated or used elsewhere, but claiming that drafting history, federalist essays on *other* provisions and the like should specifically inform the Speech Clause is a less credible position. Additionally, ambiguity ought not to be *read into* a provision that is—at least in a few respects—unambiguous. The text of the Speech Clause is unambiguous to the extent that it binds the government's hands in making laws that abridge what can be legitimately called "speech." This leads to the first argument against the egalitarian reading: the freedom of speech as a negative liberty.

B. *Free Speech as a Negative Liberty: A Speaker-Centric First Amendment*

A fundamental flaw in the egalitarian reading is to view the Speech Clause as a positive, rather than a negative, liberty. Casting the Speech Clause as not merely proscriptive but exhortative requires the assurance of a positive right, the promise of which is inconsistent with the structure of the Bill of Rights as a list of negative liberties.¹¹⁵ A "positive right is a claim to something . . . while a negative right is a right that something is not done."¹¹⁶ Phrased differently, a negative right is one which is or can be satisfied by the absence of government action, whereas a positive right requires government action to be satisfied.¹¹⁷

The Bill of Rights, by and large, "confer[s] rights of protection *from* rather than *by* the government,"¹¹⁸ or negative rights.¹¹⁹ As the Supreme Court has remarked, "the new powers granted to a central gov-

113. See, e.g., BREYER, *supra* note 1, at 22-34.

114. *Id.*

115. The label of the Bill of Rights as a "charter of negative rather than positive liberties" was first endowed by Judge Richard Posner in *Jackson v. City of Joliet*, although this understanding is not recent and is supported by the language and history of the text. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

116. CHARLES FRIED, *RIGHT AND WRONG* 110 (1978).

117. Frank B. Cross, *The Error of Positive Rights*, 48 U.C.L.A. L. REV. 857, 866 (2001) ("[T]he negative right is not dependent upon government in the sense that the obligation would intrinsically satisfy the right.").

118. David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 866 (1986) (emphasis in original). Although Currie's phrase references the Due Process clauses, the phrasing is equally applicable to the whole text of the Bill of Rights.

119. See Susan Bandes, *The Negative Constitution*, 88 MICH. L. REV. 2271, 2273 (1990) (acknowledging that "[t]raditionally, the protections of the Constitution have been viewed largely as prohibitory constraints on the power of government, rather than affirmative duties with which government must comply" though mounting a case to challenge the correctness of this view).

ernment might be interpreted to permit the government to curtail [various freedoms]. . . . The amendments were offered to curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches of government two years before in the original constitution.”¹²⁰ The amendments are composed “not as shields around particular actions, but as shields against particular rules.”¹²¹ Thus, “while the rights recognized in the Constitution are not perfectly negative, they are overwhelmingly oriented that way.”¹²² The determination depends upon whether the language of a given clause is “phrased as a prohibition, not an affirmative command.”¹²³

The First Amendment’s Speech Clause is undoubtedly a government conferral of negative liberty to the people.¹²⁴ The language of the clause is phrased that “*Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .*”¹²⁵ A plain reading of the text connotes negative liberty—a restriction of government’s power to legislate. As one commentator suggests:

The First Amendment does not provide that Congress shall pass such laws as are necessary to promote informed debate, or assure vibrant political competition, or promote political equality. . . . Rather, it says that ‘Congress shall make no law abridging the freedom of speech’ . . . the means chosen to fulfill the values and goals behind the Constitution was to prohibit government regulation of speech.¹²⁶

Inevitably, the government cannot assure every speaker an audience.¹²⁷ The Speech Clause does not make this promise, either, but instead promises an unregulated market for good or for ill.

The proscription against government action as the foundation of free speech indicates a faith in the power of ideas to find their voices. The equal capability of men to set up shop and sell their goods and their freedom to enter the marketplace is essential, not their ability to command the attention of passers-by. The value is placed upon their merchandise and the assumption is that it will attract buyers based upon *its* value, not upon the ubiquity of advertisements directing cus-

120. *New York Times v. United States*, 403 U.S. 713, 716 (1971) (emphasis in original).

121. Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 13 (1998).

122. Cross, *supra* note 114, at 873 (noting that a positive right exists, for instance, in the Sixth Amendment right to counsel, though even the other Sixth Amendment rights are negative as they proscribe the government from trying a criminal offense without a jury or from convicting without permitting confrontation of accusers).

123. Currie, *supra* note 115, at 865.

124. See Sullivan, *supra* note 54, at 667 (“The norm in political speech is negative liberty: freedom of exchange against a backdrop of unequal distribution of resources. . . .”).

125. U.S. CONST. amend. I, § 2.

126. Smith, *supra* note 100, at 906 (2007).

127. Sullivan, *supra* note 54, at 673 (“[P]olitical speakers generally have equal rights to be free of government censorship, but not to command the attention of other listeners.”).

tomers to the shop. As the Supreme Court remarked in *Dennis v. United States*, “the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies.”¹²⁸ Faith is also placed in the rationality of audiences and particularly that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source.”¹²⁹ The American people as consumers are considered capable of “pick[ing] and choos[ing] what is valuable, and [by] their aggregate decisions driv[ing] purveyors of worthless goods (or information) out of the market.”¹³⁰

By contrast to these sacrosanct values of the Constitution, the egalitarian reading attempts to reverse the government’s duty, resulting in an obfuscating and untenable obligation. The Equality Clause prescribes that the government ought to step in where voices receive unequal airtime¹³¹ or have a marked difficulty in procuring an audience.¹³² The result is arbitrary interference and a power struggle over determining who can speak and to what degree. In a word: censorship. Politically, this leaves the incumbent governors with a definite advantage over those of differing views, permitting politicians to “use regulation to insulate the ‘ins’ from challenge by the outs.”¹³³ This is anathema to the values of the First Amendment’s Speech Clause and antagonistic to its nature as a negative right—a promise against government interference.

C. *Misconceiving the Nature of Our Republican Government*

Another blow to the proponents of an egalitarian reading of the Speech Clause is the fact that their arguments commence from a version of popular sovereignty that is rooted in direct democracy and universal suffrage, whereas nothing of the sort can be found in our Constitution as it was drafted.¹³⁴ Although egalitarian reading propo-

128. *Dennis v. United States*, 341 U.S. 494, 503 (1951).

129. *McConnell v. FEC*, 540 U.S. 93, 258 (2003) (Scalia, J., dissenting).

130. Lyriisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1582 (2007).

131. SUNSTEIN, *DEMOCRACY*, *supra* note 4.

132. SUNSTEIN, *REPUBLIC*, *supra* note 3.

133. Smith, *supra* note 100, at 906-07.

134. The Constitution as it is now structured is *more* democratic than originally designed. See, e.g., C.H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT* (1995) (particularly pointed is Hoebeke’s paraphrase of Senator Robert Owen of Oklahoma calling the amendment process the “struggle of the people ‘against delegated government.’”). Additionally, the Fifteenth, Nineteenth, and Twenty-Sixth Amendments increased popular sovereignty. Nevertheless, the government is still in nature Republican as it is still one of delegated power. Considering “which Constitution” informs a reading of the First Amendment, i.e. as drafted or as it currently reads, is an issue beyond the scope of this article.

nents “sometimes act and talk as if we had a direct democracy here in the United States,”¹³⁵ our government is republican in form. This is confirmed by numerous textual provisions, including but not limited to the Preamble, the original selection of senators from state senates, and the Guarantee Clause, whereby the federal government assured that state governments would maintain a republican form—implicitly along the lines of the federal government’s structuring of itself.¹³⁶

Because the Constitution does not mandate an egalitarian distribution of political power, the egalitarian reading theorists cannot claim that the Speech Clause should be read in light of this “theme.”¹³⁷ Doubtless the American sovereign is the people themselves.¹³⁸ Nevertheless, if radical political equality is not generally enshrined in the Constitution, the only place to root it is in the voting jurisprudence of the Supreme Court in *Reynolds v. Simms*¹³⁹ and *Bush v. Gore*.¹⁴⁰ The validity of these decisions has been called into question.¹⁴¹ Furthermore, the principle they embody is not as easily transposed to speech doctrine as supposed by some.¹⁴² First, whereas equality in voting rights may be textually gathered without reference to the Preamble’s “We the People” phrase or other grandiose visions of popular sovereignty but directly from three amendments granting all adults equal voting rights or the section of the Fourteenth Amendment which declares unequal treatment, equality in speech cannot be so easily inferred. It is one thing to say that the government may not exercise laws so as to permit inequity in voting, which is an exercise of political power with direct, certain, and meaningful consequences.¹⁴³ It is a

135. John T. Valauri, *Vladimir Putin, Campaign Finance Reform, and the Central Meaning of the First Amendment*, 35 SETON HALL L. REV. 577, 579 (2005).

136. Valauri, *supra* note 134, at 578.

137. BREYER, *supra* note 1, at 11-12.

138. LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (commenting that at the time of the founding, “[t]he United States was then the only country in the world with a government founded explicitly on the consent of its people, given in a distinct and identifiable act . . .”); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and The Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (“The central pillar of Republican Government, I claim, is popular sovereignty. In a Republican Government, the people rule.”).

139. 377 U.S. 533 (1964).

140. 531 U.S. 98 (2000).

141. BORK, *supra* note 111, at 90 (“[T]he one man, one vote doctrine was not only illegitimate constitutional law, but a political failure as well”); Michael Herz, *The Supreme Court in Real Time: Haste, Waste, and Bush v. Gore*, 35 AKRON L. REV. 185, 192 (2002) (“[R]ather than giving their considered judgment, the Justices were shooting from the hip on extremely difficult legal issues.”); Terry Smith, *Autonomy Versus Equality: Voting Rights Rediscovered*, 57 ALA. L. REV. 261, 296-297 (2005) (criticizing *Bush v. Gore* as essentially a racist decision).

142. Martin H. Redish, *Free Speech and the Flawed Postulates of Campaign Finance Reform*, 3 U. PA. J. CONST. L. 783, 809 (2001); Sullivan, *supra* note 54, at 672-73.

143. Redish, *supra* note 141, at 783, 809; Sullivan, *supra* note 54, at 672-73. (“A vote is an act with direct legal, non-expressive consequences.”).

separate proposal altogether to say that because individuals possess different resources on their own that the government may compensate for such inequality as it relates to their ability to speak, an exercise of political influence with indirect, unpredictable, and possibly less meaningful consequences.¹⁴⁴

Moreover, reflecting again the distinction between positive and negative rights, superimposing a doctrine from the Equal Protection Clause onto the Speech Clause requires at least some parallel structure, but no parallel exists. The Fourteenth Amendment, although not granting an explicit positive right, nonetheless has an enforcement clause by which Congress is encouraged to enact “appropriate legislation” to enforce its provisions and which the Supreme Court construes to grant a power to adopt the measures enforcing the amendment’s guarantees.¹⁴⁵ The First Amendment provides not for government enforcement but non-intervention. There is no parallel.

Finally, adhering to the requirement imposed by the analogy would be untenable. Although reapportionment, which attempts to effect perfect equality, is by no means an easily-manageable task; attempting to equalize speech is even more problematic. Professor Martin Redish summarizes the problems:

A logical extrapolation of the [voting] analogy would presumably require each speaker to speak for the exact same period of time, for anything more or less would of course destroy the equality that voting is constitutionally required to achieve. . . . Moreover, if one really wanted to impose a rigid, formalized equality analogous to the voting structure, presumably one couldn’t limit oneself to economic differences. Some speakers are louder or more articulate than others, and the result of allowing such disparities to continue would be that some speakers have more power and influence than others.¹⁴⁶

Absolute equality in expression requires the government to impose limitations on citizens which it is unable to accomplish, absent a program to wipe out fundamental differences in people, all too reminiscent of 20th century science-fiction movies.

D. *Derogability: Not in the Nature of Rights*

An additional problem is that the egalitarian reading causes speech rights to become derogable, no longer absolute in nature but “near

144. See, e.g., Cecil C. Kuhne, III, *The Diminishing Sphere of Political Speech: Implications of an Overbearing Election Bureaucracy*, 3 GEO. J.L. & PUB. POL’Y 189, 193 (2005) (“Each person may have only one vote, but it has never been seriously suggested that the speech of each person should be equally influential; otherwise, the views of politicians would have to be based solely on opinion polls.”).

145. U.S. CONST., Amend. XIV; *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966).

146. Redish, *supra* note 139, at 809.

absolute,” relative to any other competing values which a legal battle’s protagonist subjects it and with which the Supreme Court agrees.¹⁴⁷ Some may contest that the proposed consequence is problematic, but most assuredly it is. A right is commonly referred to in philosophical literature as a “trump.”¹⁴⁸ “Rights are, by definition, absolute, inviolable, and immune from balancing.”¹⁴⁹ They receive favored status above ordinary rules and regulations. Where derogable, therefore, a right is no right at all. The egalitarian reading is therefore anathema to the very nature of free speech as a “right” under our Constitution’s Bill of Rights.

Of course it would be difficult to argue that, to guarantee free expression, the right to speech must be absolute. The concession has already been granted that Justice Brennan was correct in wisely noting that the absolutism and inclusiveness of the Speech Clause serves to undermine any position which claims that free speech is absolute.¹⁵⁰ Nevertheless, the Speech Clause confers an absolute right, not absolute in the inclusiveness of its scope but absolute in its non-derogability, to be free from *government abridgment of speech*.

This argument does not rely upon the proposition that *speech* itself is an absolute guarantee but rather on the notion that protected areas that we can label as qualifying “speech,” worthy of receiving protection, have absolute protection from “abridgment” or censorship. Where it is alleged that the government improperly abridges speech, the government should therefore only succeed when it establishes either that they *did not abridge* the speech—for instance, where alternative avenues exist¹⁵¹ or ideas themselves are not removed¹⁵²—or that

147. See Margarian, *supra* note 77; Bonifaz, *supra* note 55, at 59 (“The First Amendment cannot protect speech rights to the exclusion of all other values.”).

148. Ronald M. Dworkin, *Rights as Trump*, in THEORIES OF RIGHTS 153, 153 (Jeremy Waldron ed., 1984) (“Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole.”).

149. Jens David Ohlin, *Applying the Death Penalty to Crimes of Genocide*, 99 AM. J. INT’L L. 747, 770 (citing Dworkin, *supra* note 147, at 166).

150. *Roth*, 354 U.S. at 483.

151. See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (“[E]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided . . . that they leave open ample alternative channels for communication of the information.”). See also *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 792 (1984); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry Education Ass’n. v. Perry Local Educators’ Ass’n.*, 460 U.S. 37, 45-46 (1983); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *United States v. Eichman*, 496 U.S. 310, 322 (1990) (Stevens, J., dissenting) (“The freedom of expression protected by the First Amendment embraces not only the freedom to communicate particular ideas, but also the right to communicate them effectively. That right, however, is not absolute - the communicative value of a well-placed bomb in the Capitol does not entitle it to the protection of the First Amendment.”).

the expression *is not speech* but is instead conduct,¹⁵³ intimately and inseparably bound up with conduct,¹⁵⁴ or intellectually non-expressive and utterly without redeeming social value.¹⁵⁵

First Amendment limitations, therefore, generally do not occur on the basis of balancing interests and finding that some greater value than speech ought to be given precedence, but rather on the basis that what looks like speech is not actually speech, is inessential to the exchange of ideas, and other similar reasoning. Obscenity, for instance, is not protected because it is considered as not in fact being speech.¹⁵⁶ The Court has said that “all ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties . . . but implicit in the history of the First Amendment is the rejection of obscenity as *utterly without redeeming social importance*.”¹⁵⁷ This has caused some to remark that “the premise is that obscenity may be regulated not because it is dangerous, but because it is worthless.”¹⁵⁸ Ideas that are worthless are rejected—they are not speech. Though it must be conceded that a few areas fall outside of such easy black and white distinctions¹⁵⁹ or have not been justified on this basis by the Court,¹⁶⁰ those areas, it could be argued, are distortions of the Speech Clause’s principle and not in accordance with the original principle of the text—but that is a different article.¹⁶¹

Within the prescribed boundaries of defining what is protected “speech,” or what is permissible infringement and not abridgement,

152. *Texas v. Johnson*, 491 U.S. 397, 432 (1989) (Rehnquist, C.J., dissenting) (“Far from being a case of ‘one picture being worth a thousand words,’ flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others.”).

153. *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”) (emphasis added).

154. Such is, for instance, the case with the doctrine of incitement. See, e.g., *Debs*, 249 U.S. 211; *Dennis*, 341 U.S. at 503; *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

155. Examples include “fighting words,” obscenity, and the like. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Roth*, 354 U.S. 476; *Miller v. California*, 413 U.S. 15 (1973).

156. *Roth*, 354 U.S. at 481.

157. *Id.* at 484 (emphasis added).

158. *KALVEN*, *supra* note 25.

159. A good example is the area of “strict scrutiny” where the court can find a compelling interest which overcomes the First Amendment “interest.” See, e.g., *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

160. For instance, in *Roth*, the Court’s reasoning on obscenity—that it was not an idea—was correct; it wasn’t speech. Unfortunately, the Court qualified its “full protection of guaranties” phrase with “unless excludable because they encroach upon the limited area of more important interests.” *Roth*, 354 U.S. at 484.

161. See generally Lee Strang, *An Originalist Theory of Precedent: Originalism, Non-Originalist Precedent, and the Common Good*, 36 N.M. L. REV. 419 (2006); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007).

all that is not carved out is absolutely protected. With the egalitarian reading, this is not so. Rather, speech that does not fall within any particular rationale for shedding constitutional protection is nonetheless taken outside of protection on the basis that it does not promote democracy as well as another course, involving some infringement of speech rights, could. The egalitarian reading's "solution" thus produces a value-laden, capricious standard that necessarily invokes a balancing of interests, with the scope of the spectrum and weight of each interest being defined by the judge. This takes speech out of the realm of "rights"—no longer guaranteed, but subject to whatever other compelling considerations five of nine jurists are moved by—and is inconsistent with the nature of our fundamental guarantees.

V. CONCLUSION

An egalitarian reading of the First Amendment, though not yet a standard interpretation, has been forcefully advanced by jurists and theorists alike, finding its way into many important areas of the Supreme Court's own jurisprudence. The egalitarian reading should be rejected as without foundation in the First Amendment's text and history. Were jurists to concede that political speech may be subordinated for the purposes of a more perfect democracy, our democracy would be destroyed as political incumbents would be invested with a powerful instrument of tyranny. Protection of "discrete and insular minorities" for the sake of all ideas being heard would marginalize many viewpoints.

The First Amendment was created to combat just such a tyranny of popular fashion. Its text rejects government intervention and places faith in the power of the unregulated market, accepting its failings over the graver consequences innate in permitting the government to referee. The interest in "robust and open debate," unregulated, should be defended. The health of our democracy relies upon it.