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H. N. Hirsch
Macalester College

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MAJORITARIAN POLITICS AND THE PUNISHMENT OF SPEECH

H.N. HIRSCH *

I. INTRODUCTION

A. Cohen v. San Bernadino Community College

Dean Cohen is a tenured professor of English at San Bernadino Valley Community College in California.¹ In 1992, a female student enrolled in Cohen's class ("Remedial English") filed a formal complaint against him. In that course, Cohen "discussed subjects such as obscenity, cannibalism, and consensual sex with children in a 'devil's advocate style.'"² It seems Cohen routinely told his students that he had written for magazines such as *Hustler*, and sometimes read from such periodicals in his classes.³ Cohen often used profanity, and his discussions of sex were, according to the student, "directed intentionally at her and other female students in a humiliating and harassing manner."⁴ When Cohen assigned his students an essay defining pornography—a routine exercise in constitutional law classes, if not in the English department—the student objected; she asked for a different assignment, but Cohen refused.⁵ The student stopped attending the class and received a failing grade.⁶

* G. Theodore Mitau Distinguished Professor of Political Science at Macalester College, and Adjunct Professor at the University of Minnesota. A.B., University of Michigan, 1974; Ph.D., Princeton University, 1978.

1. Cohen v. San Bernardino Valley College, 92 F.3d 968, 969-70 (9th Cir. 1996).

2. *Id.* at 970.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

A faculty panel, the college's president, and its governing board all found that Cohen had violated the college's new sexual harassment policy.⁷ Adopted in 1991, that policy prohibited "sexual harassment which unreasonably interfere[s] with an individual's academic performance and create[s] an intimidating, hostile, or offensive learning environment."⁸ This definition of "sexual harassment" is nearly identical to definitions of "racist speech" found in college speech codes because it repeats the formula requiring sanctions against "hostile or offensive" environments.⁹

In a unanimous decision, the Ninth Circuit Court of Appeals ruled in 1996 that the College violated Cohen's First Amendment rights.¹⁰ The decision was significant in that it was the first time a federal court addressed the issue of sexual harassment in the context of First Amendment on a college campus. The Circuit Court ruled that the college's policy was "too vague as applied to Cohen."¹¹ Cohen's speech "did not fall within the core region of sexual harassment" as defined by the College's policy.¹² "Instead, officials of the College . . . applied the Policy's nebulous outer reaches to punish teaching methods that Cohen had used for many years."¹³

B. *The New Threat to First Amendment Freedoms*

There is a disturbing trend—in courts, including the Supreme Court, but also among commentators—to sanction the punishment of thought and/or the expression of thought. We find it in many instances such as the punishment of speech that creates a hostile environment in sexual harassment cases, the desire to enhance criminal punishments in cases of racial bias and the solicitation of "non-ideological" crime. Each of these is a different way to punish unpopular ideas. Worse still, for many courts and commentators these issues appear rather easy to decide; *Harris v. Forklift Systems*¹⁴ and *Wisconsin v. Mitchell*¹⁵ are decisions by a unanimous Supreme Court, a Court whose majority is in some contexts quite zealous in its protection of First Amendment freedoms.¹⁶

7. *Id.* at 971.

8. *Id.* at 970-71.

9. See my discussion of college speech codes in H.N. Hirsch, *Second Thoughts on the First Amendment*, in *THE PRINCETON PUBLIC LAW TRADITION* (forthcoming 2001).

10. *Cohen*, 92 F.3d at 972.

11. 92 F.3d at 972.

12. *Id.*

13. *Id.*

14. 510 U.S. 17 (1993)

15. 508 U.S. 576 (1993)

16. See Burt Neuborne, *Pushing Free Speech Too Far*, N.Y. TIMES, July 15, 1996, at A13. In this op-ed column published at the conclusion of the Court's 1995-96 term, Neuborne, former director of the ACLU, said "the current Supreme Court is the fiercest defender of the First Amendment in the Court's history." Neuborne cites decisions about commercial speech, political patronage, campaign spending by political parties, and cable television. *Id.*

This article examines three areas that are outside the traditional political concerns of the First Amendment but are part of a disturbing trend toward the punishment of ideas and thoughts: sexual harassment; the solicitation and encouragement of crime; and the enhancement of punishments in race motivated crimes. This article also offers an explanation of this trend: ironically, it is caused by commentators such as Micklejohn,¹⁷ who champion the First Amendment as a shield to protect political speech and ideas. By exploring the development of libel law this article will show how the functionalist approach has over-focused the First Amendment and thus reduced its intended protection. Unless we alter our functionalist approach to the First Amendment, it may no longer function to protect our freedoms as it was intended.

II. HOW WE SANCTION THE PUNISHMENT OF THOUGHT

A. Sexual Harassment Law and the Creation of a Hostile Work Environment

1. Meritor Savings Bank v. Vinson

In 1986, in *Meritor Savings Bank v. Vinson*¹⁸ the Supreme Court began to consider seriously the issues posed by sexual harassment. There, the Court construed Title VII of the Civil Rights Act, which forbids employment discrimination on the basis of gender, to forbid “hostile environment” harassment in the workplace, and not merely discrimination in the hiring and firing of employees.¹⁹

Mechelle Vinson was hired by Sidney Taylor, a bank vice president. Vinson testified that during her probationary period at the bank, “Taylor treated her in a fatherly way and made no sexual advances.”²⁰ Soon, however, he invited her to dinner and suggested they have sexual relations.²¹ According to the Court, “at first she refused, but, out of what she described as fear of losing her job she eventually agreed.”²² She had relations with him “some 40 or 50 times.”²³ Vinson testified that Taylor “fondled her in front of other employees, followed her into the women’s rest room when she went

See *Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (commercial free speech); *Denver Telecommunications v. FCC*, 518 U.S. 727 (1996) (indecent programming on cable television); *O’Hare v. Trucking v. Northlake*, 518 U.S. 712 (1996) (right of political association); *Board of Wabaunsee v. Umbehr*, 518 U.S. 668 (1996) (retaliation for speech critical of the government); and *Colorado Republican Campaign Committee v. FEC*, 518 U.S. 604 (1996) (campaign spending limits).

17. *See, e.g.* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948)

18. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

19. *Id.* at 66.

20. *Id.* at 59.

21. *Id.* at 60

22. *Id.*

23. *Id.*

there alone, exposed himself to her, and even forcibly raped her on several occasions."²⁴ Vinson also testified "that Taylor touched and fondled other women employees of the bank."²⁵ Taylor's behavior eventually stopped after Vinson acquired a steady boyfriend.²⁶

The bank argued that in creating Title VII's prohibitions against discrimination with respect to an employee's "compensation, terms, conditions, or privileges" of employment, Congress was concerned only with "tangible loss" of "an economic character" and not the purely psychological aspects of the workplace environment.²⁷ Thus Vinson was not due damages because she had not suffered any economic loss.²⁸ Justice Rehnquist, in his opinion for a unanimous Court, relied heavily on EEOC guidelines to reject that view, and to argue that female employees had a right "to work in an environment free from discriminatory intimidation, ridicule, and insult."²⁹ Quoting a circuit court opinion dealing with discrimination against Hispanics, Rehnquist said that the Court "can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers."³⁰ A violation of Title VII can be established by "proving that discrimination based on sex has created a hostile or abusive working environment."³¹

This phrase, "hostile or abusive work environment," thus enters constitutional law as a description of the kind of environment that the Civil Rights Act prohibits; the phrase returns in a more recent consideration of sexual harassment in *Harris v. Forklift Systems* in 1993.³²

2. *Harris v. Forklift Systems*

Teresa Harris worked as a manager at Forklift Systems, Inc., an equipment rental company in Tennessee.³³ Charles Hardy, the company President, "often insulted her because of her gender and often made her the target of unwanted sexual innuendoes."³⁴ Hardy would say things like "you're a woman, what do you know," and call Harris "a dumb ass woman," often in the presence of others.³⁵ He suggested that he and Ms. Harris "go to the

24. *Id.*

25. *Id.* at 60-61.

26. *Id.* at 59-60.

27. *Id.* at 64.

28. *Id.*

29. *Id.* at 66.

30. *Id.*

31. *Id.* at 65-66.

32. 510 U.S. 17 (1993). It is worth noting that the Senate Judiciary Committee's hearings on Clarence Thomas's confirmation to the Court came between *Vinson* and *Harris*.

33. *Id.* at 19.

34. *Id.*

35. *Id.*

Holiday Inn to negotiate [a] raise.”³⁶ He would sometimes ask Harris and other women in the office to get coins from his pants pocket.³⁷ He “threw objects on the ground in front of Harris and other women, and asked them to pick the objects up.”³⁸ He would make comments about the women’s clothing.³⁹

After enduring this for two years, Harris complained to Hardy about this conduct.⁴⁰ “Hardy said he was surprised that Harris was offended, claimed he was only joking, and apologized.”⁴¹ Hardy promised he would stop, “and based on this assurance Harris stayed on the job.”⁴² Another incident soon followed: while Harris was dealing with a client, Hardy asked her, in front of other employees, “what did you do, promise the guy some [sex] Saturday night?”⁴³ Harris had had enough, quit, and sued in federal court, claiming that Hardy’s conduct “had created an abusive work environment because of her gender.”⁴⁴

The case was assigned to a United States Magistrate Judge, and the report and recommendation of the Magistrate were endorsed by the District Court.⁴⁵ Finding this to be “a close case,” the District Court held that Hardy’s conduct did *not* create an abusive environment under Title VII.⁴⁶ The court reasoned that although some of Hardy’s comments seriously offended Harris, “and would offend the reasonable woman,” they were not “so severe as to be expected to seriously affect [her] psychological well-being,” nor did they “rise to the level of interfering with [her] work performance,” nor was Harris “subjectively so offended that she suffered injury.”⁴⁷ Although Hardy was offensive, he did not “create” a “working environment so poisoned as to be intimidating or abusive” to Harris.⁴⁸ The Court of Appeals affirmed the District Court.⁴⁹

Lower federal courts had disagreed about the conduct necessary for a violation of Title VII; some courts required psychological injury or at least an effect on the employee’s work performance while other courts required less.⁵⁰ When it overturned the Court of Appeals here, the Supreme Court

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 19-20.

46. *Id.* at 20.

47. *Id.*

48. *Id.* at 19-20.

49. *Id.* at 20.

50. *Id.*

sided with courts requiring less.⁵¹ Justice O'Connor, writing for a unanimous Court, explained that "Title VII comes into play before the harassing conduct leads to a nervous breakdown."⁵² Congress intended "to strike at the entire spectrum of disparate treatment of men and women in employment," which includes "requiring people to work in a discriminatorily hostile or abusive environment."⁵³ Title VII is a "broad rule" for "workplace equality."⁵⁴ The conduct in the previous case, *Meritor Bank*, was "especially egregious," but did not "mark the boundary of what is actionable."⁵⁵ Deciding whether conduct violates Title VII cannot be done using "a mathematically precise test."⁵⁶ A decision is reached "only by looking at all the circumstances [which may include: (1) the frequency of the conduct, (2) its severity, (3)] whether it is physically threatening or humiliating, or a mere offensive utterance; and [(5)] whether it unreasonably interferes with an employee's work performance."⁵⁷

3. Analysis

a. Sexual Harassment is Defined Along a Continuum

There is no question but that Teresa Harris endured less than Mechelle Vinson. There is also no question but that the *Harris* case, and cases like it, are exercises in line drawing. We might say that the conduct we call sexual harassment stretches along a continuum that would look something like this: **Offensiveness . . . Hostility . . . Abusiveness . . . Psychological Injury**

In *Vinson* and *Harris* the Supreme Court lumps together both hostile and abusive conduct, and then draws a line between offensive conduct and the rest. Merely offensive conduct is not actionable—presumably because it is protected by the First Amendment, although the Court does not say so—but "hostile or abusive" conduct, and conduct leading to psychological injury, violates Title VII. Thus for the Supreme Court, the continuum looks like this:

NOT ACTIONABLE ACTIONABLE
Offensiveness . . . Hostility . . . Abusiveness . . . Psychological Injury

But, we must ask, does the First Amendment perhaps not create difficulties for the line the Court has drawn? Is a "hostile" environment really the same thing as an "abusive" one, as the Court assumes in *Harris*? Can the law really outlaw all forms of "disparate treatment" without treading into the ter-

51. *Id.*

52. *Id.* at 22.

53. *Id.* at 21.

54. *Id.* at 22.

55. *Id.*

56. *Id.*

57. *Id.* at 23.

ritory of personal opinion? In this light, it is perhaps instructive to compare gender and sexual orientation.

b. Hostile vs. Abusive Workplaces for Sexual Orientation; A Personal Take

As a gay man, I have endured any number of work environments and professional situations that I have considered offensive and hostile. I have listened to the usual litany of “fag” jokes from colleagues, administrators, and students. I have heard members of my professional association denounce the study of gay and lesbian political behavior as “absurd” and “a waste of time.” I have listened to colleagues tell me I would damage my career by teaching a course on gay and lesbian politics. As the Chair of the American Political Science Association’s Committee on the Status of Lesbians and Gays, I have been embroiled in a dispute with the editor of the major journal of my profession who clearly does not believe it is possible to be both openly gay or lesbian and a respected member of the profession. I have sat through a meeting of the Council of the same professional association in which no one (in a group of 25 prominent scholars) was willing to speak up to endorse a resolution in favor of a policy to protect gays and lesbians, a resolution and policy already endorsed, unanimously, by a previous Council. I have had countless conversations with colleagues in which it is clear that their only recognized social categories are “single” and “heterosexually married.”

Many of these situations have been offensive to me. In the long run, they have perhaps made it a bit more difficult to do my job. Some of these situations and incidents have risen to the level of creating a hostile environment. Princeton University in the mid-1970s, where I did my graduate work, was a hostile environment for gays and lesbians (although one in the process of becoming less so). But I would stop short of characterizing any of the professional environments in which I have found myself as abusive. I have suffered no real professional loss because of any of them nor have I suffered psychological damage. None of them has made me unhappy or fearful about going to work, although I have certainly, on occasion, been humiliated, upset, and angry.

I can easily imagine what an abusive environment would look like, and know of other gay men and lesbians who have been forced to endure one. If the Chair of my department were to repeatedly refer to me as “that faggot,” and mistreat me in various concrete ways—harder and larger courses to teach, fewer perks—the environment would be abusive. But if I knew my Chair to be homophobic and felt from him only slight social mistreatment—the dinner invitation not received, the occasional overheard casual joke—I would say that was a hostile but not an abusive situation.

Of course these are not terribly clear lines, but the point is a serious one: a hostile environment is not necessarily the same thing as an abusive one.⁵⁸ More importantly, the opinions and feelings expressed in the hostile environment are opinions and feelings my superiors or co-workers are entitled to have, and to express. I cannot say that the law should outlaw homophobia; being a homophobe is protected by the First Amendment, just as being a racist is. What should not be protected is the homophobe who forces me to endure professional loss because of his opinions, or who makes my environment so negative as to make it impossible for me to function. But hostility—because of gender, because of race, because of sexual orientation—are thoughts and feelings entitled to First Amendment protection.

c. Sexual Harassment Law Threatens the First Amendment Because it Punishes What Should be Protected Thoughts About Gender

On this basis, was the *Harris* case wrongly decided? The line between hostility and abuse may be an exceedingly narrow one; did Harris's tormentor cross it, and cross it often and consistently enough, for him to be held liable? Although, as the original Magistrate argued, the case is a close one, I would say the male superior's conduct in this case was closer to hostility than to abuse, for the following reason: when Harris called the conduct to Hardy's attention, the conduct ceased.⁵⁹ This strongly indicates a state of mind sensitive to Harris's concerns. One further "slip" produced Harris's resignation and lawsuit.⁶⁰ Might not one further complaint have ended Hardy's conduct for good? Perhaps a more cautionary approach is appropriate. This is not meant as a denial of the impact of sexual harassment. Actionable sexual harassment exists in both its quid-pro-quo form and in cases of truly abusive mistreatment. Nonetheless "hostile environment" harassment is a slippery slope that raises significant First Amendment questions.

One reason to err on the side of caution in cases such as *Harris* is a reason familiar to First Amendment analysis: the tendency of speech-curbing laws to expand. Once we enforce sanctions against speech creating a hostile work environment, it is but a small step to enforcing sanctions against a worker's personal pictures on a wall or a desk that can be construed as "a

58. See Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Countours of Title VII*, 46 U. MIAMI L. REV. 403, 417 (1991) (citing ACLU Sexual Harassment in the Workplace, Policy #316). The American Civil Liberties Union's policy statement on sexual harassment seemingly accepts a distinction between hostile and abusive situations. The statement says that the recognition of "environmental" sexual harassment should be limited to situations in which: (1) a pattern and practice of sexual conduct or expression is directed at a specific employee; and (2) has definable consequences for the individual victim that demonstrably hinders or completely prevents her or his continuing to function as an employee. *Id.* The policy does not extend to verbal harassment that has no other effect on its recipient than to create an unpleasant working environment. *Id.*

59. *Harris*, 510 U.S. at 19.

60. *Id.*

visual assault on the sensibilities of female workers.”⁶¹ Could this also include casually overheard comments, not directed at a particular individual? And if nude pictures can be sanctioned, what of partially nude photos? What of a male worker displaying a picture of his wife in a provocatively cut dress, or a picture in which he and his wife are engaged in a passionate kiss? Might not some female—or even male—workers find such pictures a “visual assault”? And if words directed at a female employee by a male supervisor or co-worker are actionable, why not prohibit sexist comments made by a male supervisor to another male and overheard by a female employee? If the goal is a workplace free of hostility, rather than the more limited goal of a workplace free of abuse, could not all expressions of sexism and all discussions of sex and gender be banned?

Some legal commentary that supports expanding the definition of sexual harassment also makes it clear that the goal of “hostile environment” harassment policy goes well beyond preventing the discriminatory treatment of women in the workplace. Even pre-*Harris* commentators felt that “attitude, language, and pictures,” rather than “touching, grabbing, and fondling,” were conditions “ripe for litigation.”⁶² Others noted that the law must “transform . . . male-centered norms.”⁶³ However, attitudes, norms, and the expression thereof is what the First Amendment exists to protect, especially if that expression is unpopular.⁶⁴

In every other area of litigation, the Supreme Court does not allow the distress of individuals who disagree with a speaker’s expression to serve as sufficient grounds for censorship.⁶⁵ Why is sexism in the workplace different? According to Catherine MacKinnon, the workplace is different because a woman at work is harassed if she “is perpetually made aware of her body and its uses in the fantasies of her coworkers or supervisors.”⁶⁶ It is also suggested that workplaces are unlike other places, that the audience subjected to

61. Horton, *supra* note 58, at 404 n.4.

62. Telephone interview with K.C. Wagner, former Program Director for Working Women’s Institute and now a consultant “on issues of women and the work environment,” *quoted in* Horton, *supra* note 58, at 414.

63. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1186 (1989), *quoted in* Horton, *supra* note 58, at 414.

64. See STEVEN SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE* 5 (1990) and Akhil Amar, *Comment, The Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 152-53 (1992).

65. See *Cohen v. California*, 403 U.S. 15 (1971) (holding that “Fuck the Draft” printed on a jacket and worn in a courthouse is protected speech); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (holding that wearing a black armband in protest to the Vietnam War to high school is protected speech); *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that setting the American flag on fire as part of a political protest is protected speech).

66. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 40 (1979), *quoted in* HERMA HILL KAY & MARTHA S. WEST, *TEXT, CASES, AND MATERIALS ON SEX-BASED DISCRIMINATION* 824 (4th ed. 1996).

annoying remarks or pictures in a workplace cannot simply walk away.⁶⁷ But even scholars who make much of this “captive audience” argument concede that “for many people, the workplace is [also] a main locus of discussion about public affairs and matters of personal significance,” and that “free speech has strong relevance for workplace communication, as it does for communication among families and friends.”⁶⁸ Thus if we say the First Amendment has no applicability in the workplace, we would be saying that it has no applicability to the only “public” space most individuals ever occupy.

III. SOLICITATION, ENCOURAGEMENT, AND THE PROTECTION OF IDEAS

Many discussions of non-ideological crime⁶⁹ have often carelessly lumped together encouragement and solicitation in much the same way that the Supreme Court’s sexual harassment jurisprudence has rather carelessly lumped together hostile environments and abusive environments, which also seems to have created similar First Amendment difficulties.⁷⁰

In one example Kent Greenawalt poses the question of whether the *Brandenburg* standard, “incitement to imminent lawlessness,” should be used to “set a general constitutional limit on punishment for urging criminal acts.”⁷¹ If the *Brandenburg* standard were adopted, only encouragement or solicitation that resulted in immediate action could be punished.⁷² Greenawalt opposes such a move, and poses this question: “If a sister writes to her brother urging that he steal money from their parents, is that protected speech. . .?”⁷³ As Greenawalt explains, “American cases have not generally assumed that such ordinary criminal solicitation presents a serious First Amendment problem,” and neither does he, “because directly urging someone else in private to commit a garden-variety crime does not significantly implicate the values of free speech.”⁷⁴

But is the issue really so simple? Take Greenawalt’s example of the brother and sister. Suppose that one or both of them had been sexually abused by one or both of their parents; would we not want the First Amendment to protect a letter from one to the other urging some kind of revenge? Or suppose that the parents in question were rich drug dealers, or pornographers; would that not change the moral calculus? Almost certainly it would. It is an enormous error to assume that speech that does not involve in some

67. See KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 86-87 (1995).

68. *Id.* at 83.

69. Crime that is not part of a discussion of political ideas.

70. For my analysis of “ideological” crime, see Hirsch *supra* note 9.

71. GREENAWALT, *supra* note 67, at 19.

72. *Id.* at 18-19.

73. *Id.* at 19.

74. *Id.*

way public affairs or politics is somehow less “worthy” speech, and yet this is an error that has governed most First Amendment analysis in the twentieth century, both on and off the Supreme Court.

Moreover, there is an important First Amendment principle involved in not allowing the state to punish the mere “encouragement” of crime—as opposed to the more direct acts of conspiracy or solicitation:⁷⁵ the fact that the autonomy of the listener must be respected. If a sister urges her brother to commit a crime, that is she tries to convince him that the commission of a certain crime would be a good thing, the brother, unless he is incapacitated in some way, has the power to refuse. For the crime actually to take place something else would have to happen beyond the sister’s mere encouragement: the brother would have to make a decision, and then carry it out (with or without his sister’s assistance). Such a decision to act would be his, and his right to make that decision is what the First Amendment is meant to protect. If the First Amendment protects autonomy, it must be understood to protect autonomy in all realms, not merely in those realms the Court considers important, such as the political arena or the realm of “personal” decisions such as abortion.⁷⁶

IV. RACIALLY MOTIVATED HATE CRIME LEGISLATION: INCREASING THE PUNISHMENT FOR YOUR THOUGHTS

When we move from the encouragement of crime to crimes actually committed, a vexing issue becomes enhanced punishment for specific motives. The Supreme Court considered this issue in *Wisconsin v. Mitchell*⁷⁷ in 1993.

The case arose out of an incident of racially-tinged assault and battery. Mitchell, an African-American, was gathered outside an apartment complex in Kenosha, Wisconsin with friends and neighbors.⁷⁸ They were discussing the then-recent film “Mississippi Burning,” and specifically a scene in which a white man beat a young black boy.⁷⁹ Mitchell asked the group, “Do you

75. Solicitation is sometimes defined as the attempt to conspire, that is, solicitation usually indicates that two individuals will agree to commit a crime together. See KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 241 (1989). See also generally *id.* at ch. 15. As Greenawalt has commented more recently, American courts have not yet given an adequate definition of solicitation. GREENAWALT, *supra* note 67, at 19. Conspiracy is typically defined as “a combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act.” BLACK’S LAW DICTIONARY 382 (4th ed. 1968).

76. Early in the twentieth century the Supreme Court began to treat family life, and decisions about family life, as fundamental rights protected by the due process clause; it eventually treated a woman’s decision to terminate her pregnancy as falling within the same sphere. See my discussion in HARRY HIRSCH, *A THEORY OF LIBERTY: THE CONSTITUTION AND MINORITIES* ch. 3 (1992).

77. 508 U.S. 476 (1993).

78. *Id.* at 479-80.

79. *Id.*

feel hyped up to move on some white people?"⁸⁰ Soon, a young white boy walked by and Mitchell said, "You all want to fuck somebody up? There goes a white boy; go get him."⁸¹ Mitchell counted to three and then pointed in the boy's direction.⁸² The group ran to the boy and beat him "severely," rendering him unconscious and putting him into a coma lasting several days.⁸³

Mitchell was found guilty of aggravated battery, an offense normally carrying a maximum sentence of two years.⁸⁴ However, the jury found that Mitchell selected his victim because of the victim's race.⁸⁵ So, under a Wisconsin law which enhanced penalties for any offense in which the defendant "intentionally selects the [victim] . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person" the maximum possible sentence was increased to seven years.⁸⁶ Mitchell was eventually sentenced to four years in prison.⁸⁷

The Wisconsin Supreme Court overturned the conviction, declaring the penalty enhancement to be equivalent to the punishment of thought, and therefore a violation of the First Amendment.⁸⁸ The state court makes a distinction between an act of discrimination and the phenomenon of bigotry:

Discrimination and bigotry are not the same thing. Under antidiscrimination statutes, it is the discriminatory act which is prohibited. Under the hate crimes statute [in this case], the "selection" which is punished is not an act, it is a mental process. In this case, the act was the battery of [the victim]; what was punished by the . . . statute was Mitchell's reason for selecting [him], his discriminatory motive.⁸⁹

The Wisconsin court contends that the law in question is aimed at prejudice, at thought: "The statute is directed solely at the subjective motivation of the actor—his or her prejudice. Punishment of one's thought, however repugnant the thought, is unconstitutional."⁹⁰

The United States Supreme Court's unanimous decision reversed the Wisconsin court.⁹¹ In his opinion Chief Justice Rehnquist claims that the Wisconsin legislature in its penalty enhancement statute is punishing not thought but conduct—that is, the intentional selection of a victim because of

80. *Id.*

81. *Id.* at 480.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 481-82.

89. *Wisconsin v. Todd Mitchell*, 485 N.W. 807, 816-17 (1992).

90. *Id.* at 814.

91. *Mitchell*, 508 U.S. at 483.

his race.⁹² Rehnquist points out that motive often comes into play in sentencing, as it does in laws enhancing penalties for murder for monetary gain.⁹³ Sounding the familiar theme of judicial deference, Rehnquist writes that “[t]he primary responsibility for fixing criminal penalties lies with the legislature,” and Wisconsin legislators have merely taken notice of the fact that bias-motivated crimes bring worse consequences than similar non bias-motivated crimes because they “are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.”⁹⁴ “The State’s desire to redress these perceived harms,” writes Rehnquist, “provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with an offender’s beliefs or biases.”⁹⁵

Is Wisconsin punishing conduct or thought? And does it make a difference from the point of view of the First Amendment? When a state punishes murder for money more harshly than murder for another motive, what sort of judgment is it making? Clearly it is a moral judgment. Is this a judgment permitted to it under the Constitution? Since there is no right to murder for any reason, or in any context, the answer would seem to be yes.

But when Wisconsin adds years to Mitchell’s sentence, what sort of judgment is it making? A moral judgment that racial bias is unacceptable. Is there a constitutional right to harbor racial animus? There is indeed, which means the two cases are not entirely similar. If he and his friends had beaten up this particular victim because he was fat, or effeminate, or well dressed, Wisconsin would not be able to enhance the penalty. Calling the selection of a victim “conduct,” as Rehnquist does, is really a semantic game; Mitchell is being punished more severely because the state does not like his ideas. Murder for money is not an “idea” in the same sense. If Mitchell was a Communist and selected his victim because he was a Republican, it is hard to imagine the Supreme Court handing down the same opinion.⁹⁶ Even Chief Justice Rehnquist, we might surmise, would take umbrage at penalty enhancement for a Communist. But because the idea being punished here is racism, the Court is willing to let the Wisconsin legislature have its way. It is seductive in the extreme to allow the Wisconsin legislature to do this as a measure of its official distaste for racism. This is a seduction the Supreme Court of the United States should resist.

92. *Id.*

93. *Id.* at 485.

94. *Id.* at 486.

95. *Id.* at 488.

96. See *Yates v. United States*, 354 U.S. 298 (1957); *Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 290 (1961).

V. THE FUNCTIONALIST THEORY OF THE FIRST AMENDMENT IS A THREAT TO FREEDOM OF THOUGHT AND EXPRESSION

A. *The Shortcomings of a Functionalist Theory of the First Amendment Can be Seen in Libel Law*

1. *The Nature and Origin of the Functionalist Approach to the First Amendment*

One factor encouraging the trend to punish thought is that a mantra of “political speech and public discourse” has been the over-arching theory governing twentieth century jurisprudence regarding free speech. The orthodox view has been that the First Amendment is designed above all to protect discussions of government and traditional politics—public debate, public discourse on topics of the day.⁹⁷ Stretching back to the opinions of Holmes and Brandeis at the beginning of the century, mainstream discussion of the First Amendment has focused on speech regarding major political topics: war and peace,⁹⁸ the draft,⁹⁹ capitalism and communism,¹⁰⁰ the attempt to organize new political parties and advocate new and unpopular political ideas.¹⁰¹ The major doctrines implementing the First Amendment, the clear and present danger test¹⁰² and the test of “incitement” to immanent lawlessness in *Brandenburg*,¹⁰³ have come in cases involving unpopular political ideas: communism,¹⁰⁴ pacifism,¹⁰⁵ socialism,¹⁰⁶ white supremacy.¹⁰⁷

An alternative justification of the First Amendment would define a free press as a necessary concomitant of free speech, and free speech as an aspect of the Constitution’s overall commitment to liberty. Indeed, there was a time in the Court’s history when such a justification for the First Amendment was

97. See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26-27 (1948) (“The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.”).

98. See *Abrams v. United States*, 250 U.S. 616 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919).

99. See *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *United States v. O’Brien*, 391 U.S. 367 (1968).

100. See *Gitlow v. New York*, 268 U.S. 652 (1925); *Dennis v. United States*, 341 U.S. 494 (1951); *Yates v. United States*, 354 U.S. 298 (1957); *Noto v. United States*, 367 U.S. 290 (1961).

101. See *Whitney v. California*, 274 U.S. 357 (1927); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Scales v. United States*, 367 U.S. 203 (1961).

102. See *Schenck*, 249 U.S. at 47.

103. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

104. See *Dennis*, 341 U.S. at 494.

105. See *Schenck*, 249 U.S. at 47.

106. See *Whitney*, 274 U.S. at 357.

107. See *Brandenburg*, 395 U.S. at 444.

common, and the abandonment of a “liberty” justification for the First Amendment during the twentieth century is an interesting story ably related by Mark Graber.¹⁰⁸

As Graber describes, during much of the nineteenth century the Supreme Court and most influential legal commentators defined both free speech and private property as equally important aspects of the Constitution’s liberty.¹⁰⁹ Scholars such as John Burgess, a political scientist, argued that the rights of both free speech and private property flowed from the general governmental obligation to carve out realms of individual autonomy—an argument based on the idea of limiting government power, and thus an argument with a straight-forward Lockean pedigree.¹¹⁰

Liberals in the Progressive era, however, horrified at the economic and human consequences of the nineteenth century’s “liberty,” began to redefine the terms of the constitutional debate; government needed to advance social interests, they argued, rather than individual rights.¹¹¹ As such, they sought to diminish the importance of a “right” to private property and, at the same time, began developing a new theory of free speech.¹¹² In this theory, free speech existed to serve the interests of listeners—an audience—rather than the rights of an individual speaker.¹¹³ The First Amendment existed to protect debate on matters of public importance, so that the “right” solution could be found to public problems: not to protect an individual who might have something he wished to say.¹¹⁴

Free speech was thus, for the Progressive era—the era of Brandeis¹¹⁵ and Holmes—about public debate, not private thoughts; the democratic process, not individual expression. From this point forward, the purpose of the First Amendment is conceptualized as functional; it existed to protect the role of open discussions on matters of public importance.¹¹⁶ Liberty is irrelevant; the concept of liberty is henceforth fatally tainted by its association with economic liberty and the human toll of early industrial capitalism.¹¹⁷

The crucial figure in this transformation, Graber finds, is Zechariah Chafee; his scholarly work in the teens and twenties is developed by the next

108. See MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* (1991).

109. *Id.* at 18-19.

110. *Id.* at 19. For a discussion of the importance of Lockean notions of limited government to the constitutional framers, see HIRSCH *supra* note 76, at 36-38.

111. *Id.* at 51.

112. *Id.* at 51, 87.

113. *Id.* at 5, 92-93.

114. *Id.* at 9, 92-93.

115. Brandeis himself argued that free speech was both a fundamental liberty and a necessity to the democratic process. See generally PHILIPP A. STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* (1984). See specifically *id.* at 314-35. I am grateful to Professor Strum for reminding me of this fact.

116. Graber, *supra* note 108, at 2.

117. See *id.* at 12.

generation of legal scholars, including, most prominently, Alexander Meiklejohn.¹¹⁸ As Graber convincingly argues, Chafee “concocted” a new theory of free speech, and deliberately distorted and ignored the long-standing relationship in constitutional theory among speech, property, and liberty, a relationship based on the fundamental idea of limiting governmental power.¹¹⁹

This abandonment of a liberty-oriented theory moves the twentieth century jurisprudence of free speech far from its constitutional roots. For the constitutional framers, liberty could not exist where governmental power could be used arbitrarily.¹²⁰ Censorship was a form of governmental arbitrariness with which they were quite familiar, and with which they became openly concerned soon after the adoption of the Constitution.¹²¹ The New Deal established the idea that government’s regulation of the economy—and thus of private property—is not arbitrary, but is instead a part of the government’s legitimate “police” and commerce powers.¹²² However, we can accept this sea-change in the idea of private property rights without, at the same time, abandoning a liberty-oriented analysis of free speech in favor of a functionalist theory.¹²³

But the new, functionalist defense of free speech, concocted by Chafee and Meiklejohn, fit perfectly the larger philosophical trends of twentieth century thought—the emphasis on relativism and the absence of absolute truth.¹²⁴ If truth is elusive or non-existent, and if answers to important public questions are always debatable, then protecting the openness of that debate on matters of public importance is paramount.

2. *The Problems of Libel Law Show the Shortcomings of the Functionalist Approach*

This way of interpreting the First Amendment reached its zenith in the Supreme Court’s landmark case of *New York Times v. Sullivan*.¹²⁵ However the Court’s ruling in *Sullivan* ran into trouble almost immediately in *Time Inc. v. Hill*.¹²⁶ That trouble illustrates some of the shortcomings of a purely political interpretation of the First Amendment—if by “politics” we continue to mean what Meiklejohn and Madison meant: the conventional politics of voting and public policy—because *Hill* raised a very different set of issues, issues hard to square with the *Sullivan* framework.

118. See *id.* at 1-15, 165, 169.

119. *Id.* at 2, 12.

120. See Hirsch *supra* note 76, at 51.

121. See *id.* at 97-100 (discussing the importance of the Alien and Sedition Acts to the First Amendment).

122. See *id.* at 87.

123. See *id.* at 97.

124. EDWARD A. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 72-73 (1973).

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

126. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

B. *New York Times v. Sullivan*

Decided in 1964, at the height of the civil rights movement, the case involved an action for libel by a city commissioner who directed the police force in Montgomery, Alabama; he sued the *Times* for an ad accusing the police of misconduct.¹²⁷ There was no question that the ad, signed by prominent figures in the civil rights movement, contained factual errors.¹²⁸ An Alabama jury awarded Sullivan \$500,000 in punitive damages, a judgment affirmed by the Alabama Supreme Court.¹²⁹

The Supreme Court reversed.¹³⁰ Justice Brennan's opinion for the Court is considered a milestone in First Amendment jurisprudence, and with good reason.¹³¹ For Brennan, the issues in the case should be considered in light of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."¹³² The case thus turns on Sullivan's status as a public official; although he may have been defamed by the false statements appearing in the ad, the Court would not allow the libel judgment against the *Times* to stand unless Sullivan could prove that the newspaper acted with "actual malice"—that is, "with knowledge that [the ad] was false or with reckless disregard of whether it was false or not."¹³³ The Court found that standard was not met and thus the libel judgment could not stand.¹³⁴

The Court in *Sullivan* thus introduces a revolutionary idea and in the process it elaborates what one commentator calls the first full statement by the Supreme Court of an American theory of free speech: the First Amendment prohibits public officials from collecting damages for libel except under the most exceptional circumstances which are unlikely ever to obtain.¹³⁵ At the heart of the Court's ruling is Brennan's notion that "the First Amendment expresses the highest public concern that people freely discuss public matters and the official conduct of public officers."¹³⁶ Explicitly invoking James Madison, Brennan relies upon the American idea of popular

127. *New York Times*, 376 U.S. at 256.

128. *Id.* at 258.

129. *Id.* at 256.

130. *Id.* at 254.

131. See Harry Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191; Melville Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

132. *New York Times*, 376 U.S. at 270.

133. *Id.* at 279-80.

134. *Id.* at 280.

135. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 153 (1991).

136. William J. Brennan, *Draft Opinion for New York Times v. Sullivan*, page 17 reprinted in LEWIS *supra* note 135, at app. 1.

sovereignty; Madison's "premise was that the Constitution created a form of government under which 'the people, not the government, possess the absolute sovereignty.'"137 This type of government "was 'altogether different' from the British form under which the Crown was sovereign and the people were subjects."138 In America, "the right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government."139

James Madison is thus Brennan's acknowledged source for his ruling in *Sullivan*; his unacknowledged source is Alexander Meiklejohn. In *Free Speech and Its Relation to Self-Government*, published in 1948, and in *Political Freedom*, published in 1960, the scholarly Meiklejohn endorsed and elaborated the political interpretation of the First Amendment.¹⁴⁰ "The primary purpose of the First Amendment," Meiklejohn wrote, "is . . . that all citizens shall, so far as possible, understand the issues which bear upon our common life."¹⁴¹ "The 'final aim' of [the] First Amendment . . . [is] 'the voting of wise decisions.'"142 Traces of Meiklejohn are everywhere in Brennan's opinion, as he himself came close to acknowledging in the annual "Meiklejohn lecture" he delivered at Brown University in 1965, the year after *Sullivan* was handed down.¹⁴³ Many scholars have noted Meiklejohn's importance to Brennan's opinion.¹⁴⁴

C. *Time, Inc. v. Hill*¹⁴⁵

The case involved the most reluctant of public figures: ordinary people who become hostages, against their will, in a sensational crime. In 1952, three escaped convicts took over a home in a suburb of Philadelphia, holding

137. *New York Times*, 376 U.S. at 274 (citing James Madison, Report in support of Virginia Resolutions of 1789, 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 569-70 (1876)).

138. *Id.*

139. *New York Times*, 376 U.S. at 275. Legal historians have characterized this "political" interpretation of the First Amendment as consistent with the intent of the framers. See, e.g., WILLIAM WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 9-10 (1988) (emphasizing the importance to the First Amendment of the idea that citizens had the right to petition government for the redress of their grievances); James Madison, *The Daily Advertiser*, 17 August 1789, in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 152 (Helen E. Veit, et. al. eds., 1991) (In the debates over the ratification of the Bill of Rights, Madison uses the phrase "the freedom of speech and petitioning," illustrating the closeness of the two ideas in his mind.).

140. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26-28, 75 (1960) [hereinafter POLITICAL FREEDOM].

141. *Id.* at 75, quoted in ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 270 (1995) [hereinafter CONSTITUTIONAL DOMAINS].

142. POLITICAL FREEDOM, *supra* note 140, at 26, quoted in CONSTITUTIONAL DOMAINS, *supra* note 141, at 270.

143. LEWIS, *supra* note 135, at 155.

144. See *id.* at 154. See also GRABER, *supra* note 108, at 168-69, 182.

145. 385 U.S. 374 (1967).

James Hill and his family hostage.¹⁴⁶ As a result of the unwanted and sensational publicity surrounding the case, the Hills moved to Connecticut.¹⁴⁷ In 1955, *Life* magazine reported, falsely, that a new play, *The Desperate Hours*, was based on the Hills' experience.¹⁴⁸ In the play, the convicts act quite brutally, beating the father and molesting a daughter; the article in *Life* made it sound—falsely—as if such things happened to the Hills.¹⁴⁹

The Hills' case was argued before the Supreme Court in 1966.¹⁵⁰ As Anthony Lewis relates, a majority of the Court initially voted to reject *Time's* First Amendment claim of immunity.¹⁵¹ However, Chief Justice Warren assigned the opinion to Justice Fortas, who wrote a strong opinion condemning the magazine's actions.¹⁵² The language in his opinion awakened Justice Black, a First Amendment absolutist, who denounced the opinion; the case was put over for reargument.¹⁵³

Eventually, in a five-to-four decision, the Court held in favor of the magazine.¹⁵⁴ Justice Brennan, now writing for the majority, analyzed the case within the framework of *Sullivan*.¹⁵⁵ The state of New York could not allow the awarding of damages for "false reports of matters of public interest" absent a showing of actual malice.¹⁵⁶

It is a long way from the public official in *Sullivan* to the "matters of public interest" in the case of the Hills. *Sullivan* had voluntarily accepted a government position; the Hills were thrust into the glare of sensational publicity against their will. If the purpose of the First Amendment is to protect and facilitate traditional political activity—such as knowledge of and discussion by citizens about government action—it is hard to understand how the same logic applies to the Hills. Justice Brennan attempts to make the connection by saying: "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of the press."¹⁵⁷ All of that is true—but it would be the basis of a very different kind of justification of First Amendment freedoms than the Madison/Meiklejohn approach embraced in *Sullivan*.

146. *Id.* at 378.

147. *Id.*

148. *Id.* at 377-79.

149. *Id.* See also Lewis, *supra* note 135, at 184.

150. *Time, Inc.*, 385 U.S. at 374.

151. Lewis, *supra* note 135, at 185.

152. *Id.*

153. *Id.*

154. *Time, Inc.*, 385 U.S. at 380.

155. See *id.* at 387-92 where Brennan, often citing *Sullivan*, sets up the framework to analyze the facts.

156. *Id.* at 387-88.

157. *Id.* at 388

Shortly after handing down its decision in *Hill*, the Court expanded the *Sullivan* ruling once again. In *Curtis v. Butts*,¹⁵⁸ a badly fractured Court ruled that the “actual malice” standard applied to public figures as well as public officials. The case involved Wally Butts, the athletic director at the University of Georgia, and an accusation that he had fixed football games.¹⁵⁹ The crucial opinion was Chief Justice Warren’s;¹⁶⁰ he explained his decision to expand the *Sullivan* framework this way:

Increasingly in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930’s and World War II there has been a rapid fusion of economic and political power, a merging of science, industry and government, and a high degree of interaction between the intellectual, governmental and business worlds. . . . In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations and associations, some only loosely connected with the Government. . . .¹⁶¹

Again—all of that may be true, and might have been relevant if the case was an action for libel by the CEO of General Motors, or a member of a government advisory board—but a football coach? What on earth does accusations of fixed football games have to do with the military-industrial complex, or “policy determinations”? Where is the connection between government and Hollywood celebrities? Carol Burnett’s drinking habits? Liz Taylor’s husbands? Tom Cruise’s sexual preferences?

D. The Functionalist Approach no Longer Functions

This functionalist theory of the First Amendment, and its major expression—the “political” understanding of speech—is what we now live with. But, as we have seen in the cases examined above, this theory has definite limitations. What about the individual speaker, whose desire to speak may not coincide with the interests, or politics, of the majority? What of her liberty? A political, functionalist defense of the First Amendment is always going to run the risk of being majoritarian—whatever the majority defines as major issues of the day, or the range of acceptable ideas, will be protected. What of minorities? Who gets to define what “politics” consist of?

Protecting the liberty of minorities has been an essential component, perhaps *the* essential component, of American constitutionalism from the beginning.¹⁶² And, as Graber describes, the close association between free speech and liberty, so clear to nineteenth century jurists and scholars, was

158. *Curtis v. Butts*, 388 U.S. 130 (1967).

159. *Id.* at 135.

160. *Lewis supra* note 135, at 190.

161. *Id.*

162. *See Hirsch, supra* note 76, at 5.

deliberately obscured by twentieth-century scholars with a specific political agenda.¹⁶³ That agenda eventually led to a “liberal” interpretation of the First Amendment, but it was liberal only in protecting unpopular political ideas—again, within a narrow, conventional understanding of politics.¹⁶⁴

But it is pornographers, sexists, and racists that need the protection of the First Amendment today, not socialists and pacifists. And, despite many attempts at doing so, neither the Supreme Court nor commentators have been able to persuasively demonstrate why (for example) racists should have fewer rights than socialists. The distinction between racists and socialists works only if one accepts a functionalist, majoritarian, “political” theory of the First Amendment—the theory of Meiklejohn, as enshrined in *New York Times v. Sullivan*.

Meiklejohn’s approach to the First Amendment no longer works. It does not work because: (1) the Supreme Court ran into almost immediate trouble applying the *Sullivan* framework to new cases; (2) many of our most important free speech cases have nothing whatever to do with traditional politics; and (3) there is a theoretical flaw in Meiklejohn’s theory.

Meiklejohn states that “what is essential is not that everyone shall speak, but that everything worth saying shall be said.”¹⁶⁵ But, as Robert Post perceptively points out, this statement requires a standard, a standard “by which the quality of the community’s thinking process can be assessed.”¹⁶⁶ Meiklejohn’s own standard was straight forward: It was based on the model of the traditional town meeting. Meiklejohn says that “the traditional American town meeting” is the appropriate First Amendment model.¹⁶⁷ “That institution,” he says, “is commonly, and rightly, regarded as a model by which free political procedures may be measured.”¹⁶⁸ Such a meeting “is not a Hyde Park”; it is not a place of “unregulated talkativeness.”¹⁶⁹ A town meeting is rather “a group of free and equal men [sic], cooperating in a common enterprise, and using for that enterprise responsible and regulated discussion.”¹⁷⁰ Their object is “to act upon matters of public interest” and thus their speech is regulated: speakers must be recognized by the chair and must confine their remarks to “the question before the house.”¹⁷¹ No one may interrupt someone

163. Graber, *supra* note 108, at 124-25.

164. *Id.* at 172.

165. POLITICAL FREEDOM, *supra* note 140, at 26, *quoted in* CONSTITUTIONAL DOMAINS, *supra* note 141, at 270.

166. CONSTITUTIONAL DOMAINS, *supra* note 141, at 270.

167. POLITICAL FREEDOM, *supra* note 140, at 24, *quoted in* CONSTITUTIONAL DOMAINS, *supra* note 141, at 270.

168. *Id.*

169. POLITICAL FREEDOM, *supra* note 140, at 25-26, *quoted in* CONSTITUTIONAL DOMAINS, *supra* note 141, at 270.

170. POLITICAL FREEDOM, *supra* note 140, at 25, *quoted in* CONSTITUTIONAL DOMAINS, *supra* note 141, at 270.

171. POLITICAL FREEDOM, *supra* note 140, at 24, *quoted in* CONSTITUTIONAL DOMAINS, *supra* note 141, at 271.

who has the floor.¹⁷² “The meeting has assembled, not primarily to talk, but primarily by means of talking to get business done.” Thus “the talking must be regulated and abridged. . . .”¹⁷³ People who break the rules may be denied the floor.¹⁷⁴

Thus, as Post says, a town meeting is an instrumental organization, designed to achieve “important and specific ends.”¹⁷⁵ Participants in a town meeting share a common enterprise.¹⁷⁶ There is, in other words, already an agreement—an *antecedent* agreement—on what needs to be accomplished in a town meeting.¹⁷⁷

This model of the town meeting, as Post rightly argues, “violates [the] necessary indeterminacy of public discourse,” and “authorizes censorship on the basis of assumptions about fairness and procedure.”¹⁷⁸ Meiklejohn’s theory is “ultimately grounded in a distinctive and controversial conception of collective identity.”¹⁷⁹ His paradigm of the town meeting specifically presupposes that the function of American democracy is to achieve an orderly, efficient, and rational dispatch of common business.¹⁸⁰ This is “an insufficiently radical” conception of “the reach of self-determination.”¹⁸¹

One does not have to be a post-modernist to recognize that the America in which we live is not a town meeting writ large, that rationality is a loaded concept and debatable ideal, that there are convulsive disagreements within our society about appropriate goals and policies, including, most prominently, debates about who gets to participate in public discussions in the first place, and on what terms. It is precisely to protect someone saying to America’s majority “you can no longer declare us out of order” that the First Amendment is most needed. A theory of free speech that depends on treating America as if it were a town meeting writ large—the theory enshrined by the modern Supreme Court—is inevitably going to lead to the censorship of individual thought, a censorship based on the notions of today’s political majority.

172. *Id.*

173. *Id.*

174. POLITICAL FREEDOM, *supra* note 140, at 25, quoted in CONSTITUTIONAL DOMAINS, *supra* note 141, at 271.

175. CONSTITUTIONAL DOMAINS, *supra* note 141, at 271.

176. POLITICAL FREEDOM, *supra* note 140, at 25, quoted in CONSTITUTIONAL DOMAINS, *supra* note 141, at 271.

177. CONSTITUTIONAL DOMAINS *supra* note 141, at 271.

178. *Id.* at 274.

179. *Id.*

180. *Id.*

181. *Id.*