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The Necessary Opportunism of the Common Law First Amendment

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ARTICLE

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ABSTRACT

The First Amendment historically has been interpreted to provide greater and greater protection to more and more forms of expression. The notion of an originalist First Amendment has never commanded a majority of the Supreme Court and is unlikely to do so. Instead the development of the First Amendment has followed a common law trajectory. As the reach of its protections expands, so to do its attractiveness for arguments that may be more accurately located elsewhere in the Constitution's text. Such opportunism is a predictable, even necessary consequence of the First Amendment's common law development, and the Supreme Court tacitly endorses such opportunism by consistently declining to issue saving constructions to laws that implicate the First Amendment. While both Justice Thomas and Justice Alito have recently offered anti-opportunism readings of the First Amendment, neither is likely to garner a majority. The common law First Amendment—and the opportunistic use of it—will continue apace.

The common law approach that focuses on the evolution of precedent over time has much to recommend as a critique of originalism and a defense of interpreting the U.S. Constitution as an evolving document.[1] This approach argues against the possibility of a completely faithful

[1] This essay draws mostly on the common law approach developed by David A. Strauss. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) [hereinafter STRAUSS, LIVING CONSTITUTION]; David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) [hereinafter Strauss, *Common Law*]; David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) [hereinafter Strauss, *Freedom of Speech*].

originalist approach.[2] This is especially true regarding the development of the Free Speech Clause of the First Amendment over time, which, this approach claims, is marked by three central principles: recognition of the core importance of the right to criticize the government, the distinction between high-value and low-value speech, and distinguishing among differing regulations on speech.[3] Indeed, many of the arguments on behalf of the common law view are formidable.

However, even if agreed upon, these principles are not self-executing in their case-specific applications. While there does exist a widely shared general narrative of the First Amendment's development, it is not the product of only one perspective.[4] Instead, it is imperative to understand the presence of two competing traditions of First Amendment interpretation: one libertarian in orientation, the other egalitarian.[5] Thus, in spite of the

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[2] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 58 (noting that "the evidence we have of the original understandings of the First Amendment does not support the idea that the framers mean to establish protections of free expression comparable to those with which we are familiar today," and mentioning the specific categories of seditious libel, blasphemy, and defamation).

[3] *Id.* at 53-55.

[4] *See, e.g.*, Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 144-46 (2010).

[5] *Id.* at 144 ("In the first [egalitarian] vision[,] . . . free speech rights serve an overarching interest in political equality. Free speech as equality embraces first an antidiscrimination principle: in upholding the speech rights of anarchists, syndicalists, communists, civil rights marchers, Maoist flag burners, and other marginal, dissident, or unorthodox speakers, the Court protects members of ideological minorities who are likely to be the target of the majority's animus or selective indiffer-ence."). *See also id.* at 145 ("The second [libertarian] vision of free speech, by contrast, sees free speech as serving the interest of political liberty. On this view[,] . . . the First Amendment is a negative check on government tyranny, and treats with skepticism all government efforts as speech suppression that might skew the private ordering of ideas. And on this view, members of the public are trusted

desirability of a single overarching narrative, the common law approach must contain enough narrative richness to credit the contributions of each tradition.

Additionally, proponents of the common law approach must pay special attention to considerations of scope. The common law approach provides a more accurate reading of the significant expansion of free speech rights in the United States over time than does any originalist or textualist account. This fact, however, also raises questions of what limits should exist on what is covered by the Free Speech clause. Both the libertarian and egalitarian traditions can provide coherent responses. However, where these traditions agree, one may still argue that free speech arguments are being used opportunistically precisely because of the high success rate of speech-protecting arguments.[6]

Part I of this essay provides a brief overview of the common law approach. This overview will outline arguments for the common law approach and note the reasons why this approach is particularly useful in examining the First Amendment. These reasons are both prudential and philosophical.

Part II examines the differences between the libertarian and egalitarian visions of the First Amendment. Of special concern are the subtle differences in how each vision would characterize the classical narrative of development from World War I era cases to the Supreme Court's decision in *Brandenburg v. Ohio.*[7] While each perspective notes the important contributions of Justice Oliver Wendell Holmes and Judge Learned Hand, the libertarian vision tends to stress Hand's influence on

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to make their own individual evaluations of speech, and government is forbidden to intervene for paternalistic or redistributive reasons.").

[6] Frederick Schauer, *First Amendment Opportunism, in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA (Lee C. Bollinger & Geoffrey R. Stone eds. 2002).

[7] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

Holmes' shift in perspective from his opinion for the Court in *Schenck v. United States*[8] to his dissent in *Abrams v. United States*[9] Further, the libertarian vision tends to focus more attention on pre-World War I "libertarian radicalism."[10] In each example, egalitarians hew more closely to Supreme Court decisions and prefer a more streamlined narrative generally.

Part III engages the notion of "First Amendment opportunism" and its compatibility with the common law approach.[11] Implicit in the opportunism argument – and explicit in other critiques – is the idea that a common law approach leads to an untethered First Amendment, one that can be utilized to bolster the prospects of positions whose more obvious defenses come from outside the parameters of the First Amendment.[12] This examination will focus on recent dissents where a majority of both the libertarian and egalitarian wings of the Court were in agreement.

Taken as a whole, the common law approach is superior practically and theoretically. The evolution of how the Supreme Court addresses free speech claims is testament to this superiority. A level of First Amendment opportunism does exist, but this need not be a problem so long as both the libertarian and egalitarian visions are given their due.

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[8] *See* Schenck v. United States, 249 U.S. 47 (1919).

[9] *See* Abrams v. United States, 250 U.S. 616 (1919).

[10] DAVID RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 15 (1997).

[11] Schauer, *supra* note 6, at 196-97 ("But if instead we see the First Amendment as intrinsically, fundamentally, or even just largely as an artifact of a constitution that is itself a common-law document, then it would be hard to make sense of the idea of the First Amendment, and arguably of the idea of free speech, apart from what the courts have made of it, and apart from the necessarily and nonproblematically opportunistic way of the common law.").

[12] *Id.* at 192 ("[T]he First Amendment appears to be, in the United States in the last thirty years, the argument of choice for those who find that their intrinsically preferred argument is unlikely to prevail.").

I. The Common Law Approach to Constitutional Interpretation

A. Practical Arguments for the Common Law Approach

One prudential argument on behalf of the common law approach is that it does a better job of explaining our actual practices than any other perspective.[13] No single judicial approach to constitutional interpretation has consistently held sway, and any accurate historical treatment must accommodate this reality. Even in a normative debate, room remains for differences of opinion within any broad interpretive approach over how to treat existing precedent.[14] The common law approach, by giving precedent its due, better explains how the Constitution is interpreted in actuality.

A related argument in favor of the common law understanding is that it is more workable in practice.[15] By emphasizing the process of interpreting and applying precedent, the common law approach stresses the skills most would expect judges to possess. This is preferable to approaches, such as originalism, that claim only to be humbly following the intentions of the framers of the text, but asks judges to perform complicated acts of historical

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[13] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 44 ("[T]he governing principles of constitutional law are the product of precedents, not of the text or the original understandings. And in actual practice of constitutional law, precedents and arguments about fairness and social policy are dominant.").

[14] This is true of originalism as well. For a recent example, see Justice Thomas's concurrence in *McDonald v. Chicago*, 130 S. Ct. 3020, 3059 (2010) (Thomas, J., concurring), where he argues that originalist incorporation of the Second Amendment should occur under the Fourteenth Amendment's Privileges and Immunities Clause, rather than under the Due Process Clause.

[15] *See* STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 43.

interpretation for which they are not suitably trained.[16] The workability of the common law approach reinforces a further argument on its behalf: The common law approach is more justifiable.[17] The common law view provides the best justification for the existing and common practice for valuing precedent so highly.

A final argument on behalf of the common law approach is that, contrary to the views of originalists, it actually does a better job of restraining judges.[18] According to the common law approach, arguments linking non-originalist approaches to judicial activism fail to note that it is judicial review that is undemocratic, not any given interpretive approach.[19] Interpreting original intent (or meaning) is no less an interpretive enterprise than interpreting precedents. In fact, the plausibility of the former typically depends on established precedent serving as a boundary marking the limits of acceptable interpretation.[20]

The arguments for common law constitutionalism are particularly relevant regarding the First Amendment. Proponents of the common law approach point to the

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[16] *Id.* at 18-21.

[17] *Id.* at 43-44.

[18] Strauss, *Common Law, supra* note 1, at 879.

[19] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 47.

[20] Strauss, *Common Law, supra* note 1, at 926-27 ("The notion that the text of the Constitution is an effective limit on judges is plausible only if one assumes a background of highly developed precedent. Within the limits set by precedent, paying more attention to text might indeed limit judges' discretion. The appeal of textualism as a limit on judges – as the argument was made, most famously for example, by Justice Black – stems entirely from the assumption that the text will be used to resolve disputes within the gaps left by precedent. If we assume that the various clauses of the Constitution are to be interpreted in something like the current fashion, then judges may indeed be more 'restrained' if they insist on some relatively explicit textual source for any constitutional right. But that is primarily a demonstration of the restraining effect of precedent, not of text; the bulk of the restraint by far is provided by precedent").

practical impossibility of following any originalist understanding of the First Amendment.[21] For example, the approach of Justice Black, the most explicitly textualist understanding of the First Amendment, never garnered majority support in any Court holding.[22] The contemporary understanding of the First Amendment, including now non-controversial applications of the First Amendment, cannot be explained in an originalist manner.

B. Conceptual Arguments on Behalf of the Common Law Approach

Aside from noting the practical reasons why an originalist understanding of the First Amendment is problematic, proponents of the common law view also allude to its philosophical grounding. This is not to say that common law constitutionalism is presented as a self-contained system. However, the common law approach possesses elements of a philosophical architecture meant to indicate its adaptability and to parallel the prudential arguments made in support of it.

For example, one defense of the common law approach against the charge of indeterminacy is to note how well its account of the development of First Amendment law tracks with John Rawls' notion of "reflective equilibrium."[23] The introduction of this concept is intended as a description of the outcome of the accretion of precedent over time insofar as it accurately characterizes

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[21] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 8-9, 29-31.

[22] *See* Griswold v. Connecticut, 381 US 479, 519 (1965) (Black, J., dissenting) (arguing for a textualist reading of the First Amendment).

[23] Strauss, *Common Law supra* note 1, at 888 ("The common law approach captures the central features of our practices as a descriptive matter. At the same time, it justifies our current practices, in reflective equilibrium, to anyone who considers our current practices to be generally acceptable – either as an original matter or because they are the best practices that can be achieved for now in our society.").

cases where different perspectives on the First Amendment are in agreement. To the extent that the evolution of precedent has guided the understanding of relevant constitutional language, then this understanding is something that is arrived at, and a condition that may be changed by a future decision, much like how Rawls characterized reflective equilibrium.[24] In this manner, reflective equilibrium is a useful concept to describe the actual practices of constitutional interpretation.

Common law constitutionalism emphasizes that the current generation should not be beholden to previous ones, including the founding generation.[25] With adherence to precedent playing the reflective role, the evolution of First Amendment standards over time is not to be feared. Indeed, it is sensible to speak of an established tradition of expanding First Amendment standards and of the common law approach as marked by "rational traditionalism."[26]

This traditionalism limits overreach by stressing "humility about the power of individual human reason."[27] By acknowledging the limitation of abstract reasoning and focusing instead on the solid grounding provided by past precedent, the common law approach is a traditionalist account. This emphasis on previously established workable interpretations is consistent with what is called "bounded

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[24] JOHN RAWLS, A THEORY OF JUSTICE 20-21 (1971) ("But this equilibrium is not necessarily stable. It is liable to be upset by further examination of the conditions which should be imposed on the contractual situation and by particular cases which may lead us to revise our judgments."). *Id.* at 48 ("As we have seen, this state is one reached after a person has weighed various proposed conceptions and he has either revised his judgments to accord with one of them or held fast to his initial convictions (and the corresponding conception).").

[25] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 18 ("Most fundamental of all, originalists have yet to come to grips with the most obvious and famous issue, one raised by Thomas Jefferson among others. The world belongs to the living, Jefferson said.").

[26] Strauss, *Common Law, supra* note 1, at 891-94.

[27] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 41.

rationality,"–recognition that reliable outcomes are best reached by treating some elements of the present controversy as already settled.[28]

Another theoretical concept is used to explain the virtue of the common law approach's conventionalism–Rawls' notion of an overlapping consensus.[29] The notion of an overlapping consensus refers to the sort of agreement over basic political principles that are possible even among individuals who have different beliefs on notions of the good, or differing comprehensive moral views.[30] The common law approach is compatible with the idea of an overlapping consensus in that both imply a core area of agreement that is possible even given substantially different interpretive perspectives. This core provides stability that is not possible through a simple agreement to respect differences.[31] While disagreements inevitably arise over how to apply a given precedent, or even over whether or not a particular precedent applies, this should not distract from the role of precedent in constitutional interpretation, an essential component to the core of the constitutional approach.

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[28] *Id.* at 894 ("In modern terms one might say that traditionalism is a recognition of bounded rationality. Humans are not perfect computing machines. People do not have the resources, intellectual and otherwise, to consider every question anew with any hope of consistently reaching the right result.") (footnote omitted).

[29] Strauss, *Common Law*, *supra* note 1, at 907 ("Conventionalism is a generalization of the notion that it is more important that some things be settled than that they be settled right. The text of the Constitution is accepted (to adapt a term used in a related way by its originator) by an 'overlapping consensus': whatever their disagreements, people can agree that the text of the Constitution is to be respected."). For Rawls's usage, *see* JOHN RAWLS, POLITICAL LIBERALISM 133-72 (1993).

[30] RAWLS, POLITICAL LIBERALISM, *supra* note 29, at 134-40.

[31] *Id.* at 148 ("The test for this is whether the consensus is stable with respect to changes in the distribution of power among views. This feature of stability highlights a basic contrast between an overlapping consensus and a modus vivendi, the stability of which does depend on happenstance and a balance of relative forces.").

Further, in arguing on behalf of his notion of an overlapping consensus, Rawls stressed the need for "reasonable pluralism."[32] Reasonable pluralism is compatible with the notion of an overlapping consensus to the extent that the substance of the overlapping consensus is a set of commitments that are common to all reasonable comprehensive doctrines. Such a perspective is useful in making sense of fundamental aspects of the evolution of First Amendment law, such as the commitment to protecting core political speech. There is a clear line connecting the reasonable baseline assertion that the First Amendment protects core political speech with the reality that the boundaries of that commitment have been marked differently at various times.

In short, the common law approach makes two important contributions. First, it provides a historically grounded way of understanding how the First Amendment has been interpreted. Second, it offers a theoretically rooted basis justifying such a precedent-heavy method of determining its meaning.

At the same time, each contribution is open to challenge. The historical development of First Amendment law may feature a settled general narrative but also possesses room for important differences in which details – as in whose contributions – are emphasized. Even the broad historical narrative will be related differently depending on whether it is related by one who sees the First Amendment through a libertarian or egalitarian lens.[33]

The theoretical argument for the common law approach draws heavily on the historical reality but also notes inherent benefits to seeing the First Amendment as properly understood as the consequences of decades of precedent. However, this view is open to the frequently made critique that this developed precedent has warped the

[32] *Id.* at xviii-xix.
[33] Sullivan, *supra* note 4, at 144-46.

actual meaning of the First Amendment. Of particular potency is the argument that the First Amendment has become a repository for arguments that are likely to fail if rooted in other parts of the Constitution that more naturally match the controversy at hand and thus, grabbing at the heightened reputation of the First Amendment, are framed as First Amendment controversies.[34] Each of these critiques will be taken up in turn.

II. Competing Narratives of the Development of the Common Law First Amendment

The common law approach rightly notes that the First Amendment, as presently understood, is exceedingly difficult, if not impossible, to reconcile with a textualist understanding of the First Amendment.[35] However, this alone does not vindicate the common law description. A careful reading of the common law approach shows that it permits differing narrative characterizations of how the First Amendment has evolved.

At one level, judgments regarding the extent to which a particular case (*Abrams*, *Masses*,[36] or *Whitney*[37]) or Justice/judge (Holmes, Hand, or Brandeis) is stressed affect how the overall narrative is constructed. Additional important questions that color and shade the emerging narrative of the evolutionary process by which the First Amendment developed exist within this framework. For example, when considering Justice Holmes' sizable role, how should the relationship of his *Schenck* opinion to his *Abrams* dissent be characterized?

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[34] Schauer, *supra* note 6, at 191 ("The arguments selected, however, are less likely under these circumstances to be selected for their intrinsic merit than for the likelihood that they will succeed.").
[35] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 8-10.
[36] *See* Masses Pub. Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 264 F. 24 (2d Cir. 1917).
[37] *See* Whitney v. California, 274 U.S. 357 (1927).

Further, should the common law narrative focus solely on Supreme Court decisions, or ought it take account of lower-court decisions such as Learned Hand's opinion in *Masses*? Emphasizing *Masses* opens the door to considering pre-WWI activity in a way that most proponents of the libertarian view find favorable. In a similar vein, should the narrative include the contributions of important legal scholars? For example, an analysis of Zechariah Chafee's influence on Justice Holmes might bolster the egalitarian argument on behalf of Holmes' contributions.

Questions such as these counsel caution in accepting a given narrative as settled; they do not prove the futility of the common law approach. In fact, a common law narrative that wrestles with such questions in good faith serves as the best reminder that the common law approach is justified roughly to the extent that it avoids the originalist assumption that a single, unimpeachable characterization exists.[38] A proper common law narrative requires a balance between putting forth a shared history that can shoulder the weight of serving as precedent and noting the joints that lead different groups (libertarians and egalitarians in this telling) to emphasize different aspects of the narrative. Several specific examples will help to make this clear.

A. The Importance of Pre-World War I Activity to the Libertarian Narrative

A typical version of the common law approach focuses on the twentieth century and almost exclusively on the Supreme Court.[39] It combines the core political speech narrative that began with *Schenck* and *Abrams* and culminated with *Brandenburg* with other key decisions

[38] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 7-31.
[39] *Id.* at 62-76.

roughly contemporary with *Brandenburg* such as *New York Times Co. v. Sullivan*[40] and *New York Times Co. v. United States*[41] that expanded the reach of the clause's protections.[42] Nothing that happened prior to World War I is examined in any detail.[43]

While the common law historical narrative can plausibly begin with the World War I era, libertarians view this narrative of the First Amendment's development as historically truncated in its failure to acknowledge other actors who sought to begin the historical narrative earlier. By limiting itself only to a few important Supreme Court cases that advanced the understanding of the First Amendment, it erroneously treats the Supreme Court as the sole source of this evolutionary process. While contemporary understandings of the First Amendment's development justifiably focus on the Supreme Court as a leading protector of free speech rights, the Court's role is the culmination of the evolutionary process that the common law approach stresses and is neither a permanent nor an exclusive feature of it. The common law narrative tends to evince little skepticism of the Supreme Court's role, even though the Court, pre-WWI, showed little interest in hearing from those who sought to expand the reach and understanding of the Free Speech Clause.[44] Thus, both on their own terms, and for the influence that they had on subsequent arguments centering around more

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[40] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[41] *See* New York Times Co. v. United States, 403 U.S. 713 (1971).

[42] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 53-56.

[43] Strauss, *Freedom of Speech*, *supra* note 1, at 44 ("The American system of freedom of expression, as we know it, did not begin to emerge as a coherent body of legal principles until well into the twentieth century – in opinions written in a series of cases decided just after World War I.").

[44] RABBAN, *supra* note 10, at 15 ("Most dramatically, no group of Americans was more hostile to free speech claims before World War I than the judiciary, and no judges were more hostile than the justices on the United States Supreme Court.").

mainstream First Amendment disputes, the contributions of so-called "libertarian radicalism" of the late-nineteenth and early-twentieth century should receive greater attention in the common law narrative.[45]

For example, while the Comstock Act finds few defenders today, at the time of its implementation, the most vociferous opposition came from libertarian radical thinkers such as Theodore Schroeder and Gilbert Roe, whose arguments were focused less on a framework of core political speech than on opposing obscenity prosecutions.[46] The libertarian radical perspective was heavily influenced by the abolitionist movement and was thus less inclined to understand the Free Speech Clause as limited by a notion of the public good.[47] In this sense, libertarian radicals treated the First Amendment "opportunistically."[48] This desire to expand the scope of the First Amendment, and the refusal to defer to any established notion of the public interest, ran counter to the Court's own preferences at the time. In short, libertarian radicals presented a vision of the value of the First Amendment different from the standard common law account of the time, yet one that ultimately came to be viewed as largely conventional.

Additionally, while Schroeder and Roe were outside the mainstream that appealed to influential Justices such as Holmes and Brandeis, the scholars who influenced these Justices were, in fact, influenced by strains of the libertarian radical perspective.[49] Furthermore, Schroeder

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[45] *Id.* at 23.

[46] *Id.* at 27-74.

[47] *Id.* at 28 ("For some social purists, including Anthony Comstock, expressions of libertarian radical views about religion and sex were examples of blasphemy and obscenity that should be suppressed in the public interest.").

[48] Schauer, *supra* note 6, at 191-93.

[49] As Rabban demonstrates, Ernst Freund called Zechariah Chafee's attention to Schroeder's work in a personal letter. *See* RABBAN, *supra* note 10, at 303 n.13.

and Roe helped advance what evolved to become a core principle of free speech that seems not to have received much attention from the common law perspective: protection for free speech as a fundamental principle and not just for specific parties, content areas, or manners of expression.[50] This commitment found fullest expression in Schroeder and Roe's work with the Free Speech League, a forerunner to, and influence on, the American Civil Liberties Union.[51] This advocacy included challenging the era's standards for criminal libel through the *Masses* case, well in advance of *Sullivan*, the case stressed by the common law approach.[52]

These early stirrings helped shape the direction of subsequent debates, both by expanding the range of pro-free speech arguments offered and by influencing the generation of scholars who most influenced Justices Holmes and Brandeis, Justices who are central to the more standard common law narrative. An accounting of the development of the First Amendment that fails to note these contributions is one that risks misconstruing the evolutionary process.

B. Holmes, Hand, and Getting to *Abrams*

Just as the common law narrative can be too limited when it excludes early work such as the contributions of libertarian radicals, it can also be too confined when

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[50] It should go without saying that the common law approach should be read to endorse this view, and the reason it goes unmentioned may well be because it is so uncontroversial at the present. However, the point remains that well before the Court came to enshrine this view, it was being advanced by these libertarian radicals and that departures from this broad principle are usually justified in egalitarian language.

[51] RABBAN, *supra* note 10, at 57-76.

[52] For a discussion on *Masses*, *see id.* at 71. For a discussion on *Sullivan*, *see* STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 53-54, 73-75.

providing a reading of its own standard narrative, which starts with *Schenck* and *Abrams* and ends with *Brandenburg* and *New York Times Co. v. United States.* Most specifically, by seeing the decisions in these latter two cases as featuring a version of the clear and present danger test, the common law perspective risks oversimplifying what happened in between the former two.[53] Even when the common law approach steps back from too clean of a narrative, such as when it acknowledges that there exists no single moment of inspiration for defining what is protected free expression, it quickly qualifies that claim by noting that this is true only because Holmes' *Abrams* opinion was in dissent.[54] However, the reality is more contingent than this. Even if Holmes had been writing for the Court, other moments, such as Brandeis' subtly different celebration of First Amendment values, might be favored from another narrative direction.[55]

Furthermore, even if one were to accede to the necessity of finding a single statement of free speech's value to anchor the narrative account, and even if one were to agree that Holmes' *Abrams* dissent is that statement, the common law approach still must confront what appears to be a significant shift in Holmes' own position, from writing

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[53] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 64 ("Holmes's opinion asserted that the clear-and-present-danger test required the government to show a high-probability risk of harm that is both immediate and serious . . . . Versions of this test appear in the Pentagon Papers case and in *Brandenburg*.").

[54] *Id.* at 64-65.

[55] Vincent Blasi, *Free Speech and Good Character*, ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA, 73 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) ("Notwithstanding the magisterial articulations of Justices Holmes, Roberts, Jackson, Black, Harlan, and Brennan among others, if there is a single passage in the United States Reports that best captures why the freedom of speech might be considered the linchpin of the American constitutional regime, it is the following paragraph from Justice Brandeis's concurring opinion in *Whitney v. California*") (footnotes omitted).

for the Court in *Schenck* to his dissent in *Abrams*.[56] In *Schenck*, Holmes was troubled enough by the anti-war, anti-conscription pamphlet that the defendants had been handing out to invoke his famous example of "falsely shouting fire in a theatre, and causing a panic . . . .";[57] whereas in *Abrams* – mere months later – Holmes was minimizing the threat posed by "the surreptitious publishing of a silly leaflet by an unknown man."[58] The common law narrative may note the incongruity between Holmes' statements, but it still tends to treat each as a step in a logical progression.[59]

This retrospective view rationalizes Holmes' statements, but it misses an opportunity to fully examine the influences that may have led him to reconsider what he wrote for the Court in *Schenck*.[60] While the common law perspective never claims that *Schenck* and *Abrams* are continuous, it minimizes the extent to which *Schenck* represents a false start.[61] It also ignores the extent to which

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[56] *See, e.g.*, GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 192-211 (2004).

[57] *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

[58] *See* Abrams v. United States, 250 U.S. 616, 628 (1919).

[59] Strauss, *Freedom of Speech*, *supra* note 1, at 49 ("But as it happens, the principle Holmes called for in the *Abrams* dissent is essentially impossible to square with *Schenck*[,]" and "[i]n retrospect, it is possible to understand what Holmes and Brandeis were doing, even though they were not explicit about it at the time, nor even, probably, fully conscious of it.").

[60] STONE, PERILOUS TIMES, *supra* note 56, at 208 (2004) ("Although the explanation for Holmes's sudden passion for the freedom of speech remains a wonderful mystery, there can be little doubt that his reading in the summer of 1919 and his discussions with [Learned] Hand, [Zechariah] Chafee, and [Harold] Laski sparked a change in his thinking.").

[61] HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 138 (1988) ("We confront therefore a benign conspiracy. With the advent of the Holmes eloquence in *Abrams*, *Schenck* is infused with new vitality and *Debs* is conveniently forgotten. The

Holmes' views announced in *Schenck* were consistent with what Holmes had previously written, especially his opinion in *Patterson v. Colorado.*[62] *Patterson* is notable for how narrowly it read the First Amendment, closely adhering to Blackstone's view that the only significant restriction on the government was a prohibition on prior restraints.[63]

Thus, a less constrained narrative reveals that Holmes, while still a major figure in the evolution of our understanding of the First Amendment, was viewed as advocating a cramped understanding of the First Amendment by libertarian radical activists, numerous scholars influenced by these activists, lower court judges such as Learned Hand, and fellow members of the Supreme Court, such as Justice Harlan in *Patterson.*[64] Hand's opinion in *Masses* is of particular relevance, both because it offers a well-developed alternative to Holmes' viewpoint, and, insofar as contemporary free speech standards are viewed, as somewhat of a Holmes-Hand hybrid.

Just as Holmes would two years later in *Schenck*, Hand was dealing with a prosecution under the Espionage Act of 1917. However, Hand chose to focus more directly and explicitly on what the illustrations and language in question stated and not on any bad tendency that could be imputed to the challenged expression. Hand combined this emphasis on actual assertion – rather than estimating consequences – with a careful construction of the statutory language and reached an "extraordinarily speech-

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tradition is read as though the *Abrams* dissent had in fact been the opinion for the unanimous Court in *Schenck.*").

[62] *See* Patterson v. Colorado, 205 U.S. 454 (1907).

[63] RABBAN, *supra* note 10, at 130-34.

[64] *Id.* at 134 ("Justice Harlan's dissent in *Patterson* contained a vigorous, if undeveloped, defense of free speech under the First Amendment. Harlan explicitly opposed Holmes's conclusion that the First Amendment prevents only prior restraints."). *See Patterson* , 205 U.S. at 465.

protective" interpretation of the 1917 law.[65] Hand's decision distinguished between speech that could be viewed as disloyal or unpatriotic but nonetheless constitutional, and speech that expressly advocated illegal activity which was not:

> Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists. If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation.[66]

Hand chose such a speech-protective approach at great potential risk to his own career.[67] Unlike Holmes, who was firmly ensconced on the highest court in the land, Hand was hoping for a promotion to the court of appeals but was passed over shortly after his *Masses* opinion was reversed by the Second Circuit.[68] It is easy to conclude that the

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[65] GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 128 (1994) [hereinafter GUNTHER , LEARNED HAND: THE MAN].

[66] *See* Masses Pub. Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917), *rev'd*, 264 F. 24 (2d Cir. 1917).

[67] STONE, PERILOUS TIMES, *supra* note 56, at 165-66.

[68] GUNTHER, LEARNED HAND: THE MAN, *supra* note 65, at 161; STONE, PERILOUS TIMES, *supra* note 56, at 169. *See* Masses Pub. Co. v. Patten, 246 F. 24 (2d Cir. 1917).

progress of free speech was slowed both by the reversal of *Masses* and by Hand's being passed over.[69]

Also worth noting is that this emphasis on Hand's *Masses* decision is not a recent phenomenon. Hand's importance, and the distinctiveness of his approach compared to that of Holmes, has been noted for some time.[70] Indeed, in correspondence with and about Holmes, Hand himself sought to articulate the specific differences he saw between his and Holmes' approaches.[71]

Hand feared that more context-dependent tests would lead to an interpretive morass born of the challenge of offering precise boundaries to terms such as bad tendency or clear and present danger. From this perspective, the debate over whether Holmes announced a new, stricter reading of clear and present danger in *Abrams*, or whether the context of the fact pattern in *Abrams* explain Holmes' decision to switch and vote to strike down a conviction, is beside the point.[72] What mattered to Hand was that reliance on such standards permitted such confusion. Instead, in his *Masses* opinion, Hand offered up a clearer and more strongly speech-protective standard, one

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[69] The open judgeship went instead to Martin T. Manton, who viewed *Ulysses* as obscene and was ultimately convicted of accepting bribes. *See* GUNTHER, LEARNED HAND: THE MAN, *supra* note 65, at 335-43, 503-13.

[70] *See, e.g.*, Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975) [hereinafter Gunther, *Learned Hand and the Origins*].

[71] *See* RABBAN, *supra* note 10, at 293-97; STONE, PERILOUS TIMES, *supra* note 56, at 198-203; Gunther, *Learned Hand and the Origins, supra* note 70, at 732-50.

[72] *See* STONE, PERILOUS TIMES, *supra* note 56, at 192-95; GUNTHER, *supra* note 65, at 140-41. As noted, such an argument also meshes well with the similarities between Holmes' opinions in *Schenck* and *Patterson*.

that has been widely hailed, even if it is muted in standard common law accounts.[73]

C. The Common Law First Amendment is Both Egalitarian and Libertarian

The current First Amendment standard – *Brandenburg's* requirement of both the intent and likelihood of producing "imminent lawless action" – combines elements of both Hand and Holmes in a way that is more speech-protective than the standards announced by either individually. In this way, the culmination of the common law evolution of the First Amendment contains both egalitarian and libertarian components.

Even taken on its own, Holmes' perspective combines egalitarian and libertarian elements. Insofar as his *Abrams* dissent was consistent with the view of First Amendment as "a negative check on government tyranny,"[74] it sought libertarian consequences. Thus, viewed retrospectively, it is narrowly accurate to see in Holmes a commitment to the libertarian vision.

However, Holmes' emphasis on the "competition of the market" as the "best test of truth" is paired with his understanding of the Constitution as "an experiment."[75] This view, consistent with the pragmatic strain of progressive thought, treats free speech as crucial insofar as a fair competition is crucial to societal advancement, and not as a fundamental liberty possessed by individuals.

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[73] For accounts that acknowledge the importance of *Masses*, *see* GUNTHER, LEARNED HAND: THE MAN, *supra* note 65, at 151-163; KALVEN, *supra* note 61, at 126-30; RABBAN, *supra* note 10, at 261-66;WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 175-178 (1998); STONE, PERILOUS TIMES, *supra* note 56, at 165-70.

[74] Sullivan, *supra* note 4, at 145.

[75] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Compared to the libertarian radicals of the time, or even to Hand's more absolute First Amendment standard, it is hard to view Holmes' position as libertarian in any broader sense of the term.[76] Holmes' focus on the societal over the individual is consistent with the general deference to legislative enactments that marked his jurisprudence.[77] When combined with the contingencies implicit in his more contextual clear and present danger standard, it is clear that in a broader historical context, Holmes' approach was more egalitarian than available alternatives.

Thus, while *Brandenburg* is among the most absolute, speech-protective, libertarian statements of the purpose of the First Amendment, it can still be placed in notably different contexts depending on how its place in the overall narrative is presented. Consider two different statements of *Brandenburg's* importance. The first implies that Hand's *Masses* opinion is an equal partner to Holmes' clear and present danger standard and proclaims *Brandenburg* to be:

> [The] clearest and most protective standard under the [F]irst [A]mendment . . . . In one sense, *Brandenburg* combines the most protective ingredients of the *Masses* incitement emphasis with the most useful elements of the clear and present danger

[76] LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 65 (2001) ("The key to Holmes's civil liberties opinions is the key to all his jurisprudence: it is that he thought only in terms of aggregate social forces; he had no concern for the individual.").

[77] *Id.* ("It is easy to see Holmes's concern for allowing democracy to work its way, without peremptory restriction by courts, in his opinions in cases involving economic issues....But that concern is also at the bottom of his opinions in the civil liberties cases . . . . Those were ostensibly First Amendment disputes; but their real grounds were economic. For in every case, the defendant was some kind of socialist.").

> heritage . . . . *Brandenburg* is the most speech-protective standard yet evolved by the Supreme Court.[78]

The second opts not to mention Hand or *Masses* by name and paints a picture of the core of clear and present danger remaining, but being augmented by later decisions with the following result:

> *Brandenburg* was the product of two strands of well-developed twentieth-century legal evolution . . . . In *Brandenburg*, the Court concluded that, although the Holmes-Brandeis test captured something important about the First Amendment, that test was not sufficient by itself . . . . So in *Brandenburg*, the Court combined the Holmes-Brandeis line of precedents with *Chaplinsky* and *Yates*–cases that emphasized the distinction between high- and low-value speech.[79]

There is a broad commonality in these accounts, but also significant differences. While the former attributes the incitement element in *Brandenburg* to Hand's *Masses* opinion, the latter derives it from later Supreme Court cases and characterizes it as a distinction regarding the inherent value of the speech. Thus, the first statement portrays *Brandenburg* as a robust, maximally speech-protective standard, whereas the latter presents *Brandenburg* as substituting a better context-based consideration – high- versus low-value speech – for Holmes' somewhat outdated version.[80] For a number of reasons – the relative dormancy

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[78] Gunther, *Learned Hand and the Origins, supra* note 70, at 754-55.
[79] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 72-73.
[80] *Id.* at 73 ("The evidence for that conclusion [that clear and present danger was insufficient] was the product of trial and error: specifically,

of *Chaplinsky's* "fighting words" standard,[81] the expansion of libel protections beyond *Sullivan* (another case stressed by the common law approach[82]), and the historical importance of Hand's contributions[83]--there is, at least, a compelling case to be made that the first account does a better job of communicating the range covered by the evolution of First Amendment doctrine in all of its fits and starts.[84]

Thus, while there is a shared core to varying accounts of the First Amendment's common law development, it can be presented with significant degrees of libertarian—or egalitarian—directed emphasis. This is also true with respect to free speech controversies outside the range of core political speech. In their advocacy against the Comstock Act, libertarian radicals invoked the First Amendment in appealing obscenity convictions.[85] However, from a more egalitarian direction, obscenity is low-value speech.[86] Of course, what was held to be obscene under the Comstock Act is a far cry from the Warren Court's line of obscenity cases. The common law account needs to be augmented with a consideration of the necessary opportunism of the First Amendment.

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the use to which the test had been put in *Dennis*. In the crucible of common law testing, clear and present danger collapsed too easily into simple balancing of costs and benefits.").

[81] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[82] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 53-54, 73-75.

[83] *See* Gunther, *Learned Hand and the Origins, supra* note 70; Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335 (2003). *See also* KALVEN, *supra* note 61, at 125-30.

[84] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 53 ("The story of the emergence of the American constitutional law of free speech is a story of evolution and precedent, trial and error—a demonstration of how the living Constitution works.").

[85] RABBAN, *supra* note 10, at 28-44.

[86] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 54, 69.

III. The Necessary Opportunism of the Common Law First Amendment

An oft-made criticism of the common law approach is that it can wind up, by intended outcome or as the consequence of rigid adherence to precedent, justifying outcomes that never were intended by the original drafters of the relevant text. While this taps into a much larger, well-worn debate over constitutional interpretation, there is a specific critique that is of particular relevance here. The charge of First Amendment opportunism consists in the claim that, likely owing to the reverence with which it is held and its high likelihood of success, the First Amendment has come to serve as a convenient lifeline for arguments that may be more accurately anchored in other legal theories, though likely with a lowered chance of victory.[87]

This charge is made with some ambivalence.[88] On the one hand, opportunistic use of the First Amendment raises several concerns, notably: potential negative repercussions for the First Amendment as present,[89] misunderstandings of the First Amendment's intended

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[87] Schauer, *supra* note 6, at 175 ("In many respects, the culture of First Amendment discourse and argument, both in the courtroom and in the larger culture, exhibits many of the same features as being faced with driving a nail with a pipe wrench. With surprising frequency, people and organizations with a wide array of political goals find that society has not given them the doctrinally or rhetorically effective argumentative tools they need to advance their goals . . . . And in looking for these imperfect but usable tools, they often find that the leading candidate is the First Amendment. Like the pipe wrench, the First Amendment is frequently called on to do a job for which it is poorly designed.").

[88] *Id.* at 176 ("When people make do with whatever happens to be available to them we call them 'opportunistic,' a word that hovers precariously between the pejorative and the complimentary.").

[89] *Id.* at 175 ([Under such opportunistic usage,] "the job gets done poorly and the tool is damaged in the process.").

purpose,[90] and weaknesses with the common law approach.[91] On the other hand, such concerns would prove ill-founded if no agreed upon understanding of the First Amendment's intended purpose exists[92] and, thus, the common law approach offers an accurate description.[93]

When specific examples of First Amendment opportunism are offered, the potential ambiguity is only compounded. For instance, the example of campaign finance reform may be opportunistic,[94] but it may also be a logical implication of the libertarian vision of the First Amendment.[95] Or, more likely, it may be both.

As a strictly logical matter, one might temporarily concede that there is an intended purpose of the First Amendment. At the very least, this means that either the libertarian or the egalitarian vision of the First Amendment is opportunistic in a damaging way. In fact, such a concession would likely imply that both visions are

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[90] *Id.* at 195 ("If First Amendment opportunism is as widespread as I suspect, and as some of the documentation here may suggest, then the First Amendment, precisely because of its cultural salience and consequent empirical persuasiveness, may be especially vulnerable to the kind of misuse and consequent distortion that I am suggesting . . . . [It] may over time lose its ability to perform the function for which it was originally designed.").

[91] *Id.* at 192 ("All of this is of course the armchair sociology of doctrinal evolution.").

[92] *Id.* at 195 ("It may turn out that in the final analysis none of the justifications for a distinct free-speech principle is sound, and the that the First Amendment is revealed to be merely the raw material of opportunism and nothing else.") (footnote omitted).

[93] *Id.* at 196-97 ("[I]f instead we see the First Amendment as intrinsically, fundamentally, or even just largely as an artifact of a constitution that is itself a common-law document, then it would be hard to make sense of the idea of the First Amendment, and arguably of the idea of free speech, apart from what the courts have made of it, and apart from the necessarily and nonproblematically opportunistic way of common law.").

[94] *Id.* at 188-90.

[95] *See* Sullivan, *supra* note 4, at 157-58, 161-63, 167-77.

negatively opportunistic. For example, one who believes the First Amendment has an intended purpose is likely to be suspicious of attempts to expand it to the realm of sexual expression, whether it be in the service of libertarian arguments on behalf of nude dancing,[96] or egalitarian arguments against First Amendment protection of exploitive, objectifying pornography.

A narrower evaluation of opportunism in its negative connotation should steer clear of controversies that can better be described divided along libertarian versus egalitarian lines. Such disputes are often framed by both sides as arguments over which vision is truer to the intended purpose of the First Amendment. To declare a pox on both houses in such situations is to declare the necessity of First Amendment opportunism on the cheap. There are more sustained arguments against First Amendment opportunism that must be addressed on a deeper level, ones that are made against both visions of the First Amendment and expressly in situations where those visions appear to converge.[97]

In recent years, two different anti-opportunism arguments have been put forth by members of the Supreme Court. One, Justice Thomas' concurrence in *Morse v. Frederick*,[98] fits comfortably within the view that opportunism leads to the First Amendment being extended beyond its intended purpose. The other, Justice Alito's dissent in *United States v. Stevens*,[99] is less direct in citing an original intended purpose of the First Amendment. However, he still provides a considered argument against

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[96] *Id.* at 180-83, 191.

[97] *See id.* at 163-67 (providing examples of points of convergence between the libertarian and egalitarian visions).

[98] *See* Morse v. Frederick, 551 U.S. 393, 410-22 (2007) (Thomas, J., concurring).

[99] *See* United States v. Stevens, 130 S. Ct. 1577, 1592-1602 (2010) (Alito, J., dissenting).

the opportunism, or, frankly, the meta-opportunism he sees in the Court's usage of the overbreadth doctrine.

While Alito's *Stevens* dissent is not the first instance of such an argument, it merits specific attention for two different reasons. First, Alito's critique of a too lenient application of the overbreadth doctrine is a part of his general uneasiness over what he sees as the ever-expanding scope of the First Amendment. In this way, his more recent dissent in *Snyder v. Phelps*[100] further announces a developing anti-opportunism distinct from either the libertarian or egalitarian vision. Second, the logic of Alito's *Stevens* dissent played a conspicuous role in Justice Breyer's dissent in *Brown v. Entertainment Merchants Association*,[101] suggesting that there exists an anti-opportunism argument that could potentially appeal to justices otherwise associated with competing First Amendment visions. Each anti-opportunism argument will be examined in turn.

A. Justice Thomas' anti-opportunism

Justice Thomas' anti-opportunistic view of the First Amendment develops out of his interpretive methodology, which stresses the original public understanding of a document.[102] This view is consistent with his overall

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[100] *See* Snyder v. Phelps, 131 S. Ct. 1207, 1222-29 (2011) (Alito, J., dissenting).

[101] *See* Brown v. Entm't Merch. Assn., 131 S. Ct. 2729, 2761-71 (2011) (Breyer, J., dissenting).

[102] *See Morse,* 551 U.S. at 410-11, 418-19 (Thomas, J., concurring) ("In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools . . . . In my view, petitioners could prevail for a much simpler reason: As originally understood, the Constitution does not afford students a right to free speech in public schools."). *See also Brown*, 131 S. Ct. at 2751, 2759 (Thomas, J., dissenting) ("The Court's decision today does not comport with the original public understanding of the First Amendment . . . . Admittedly, the original public

constitutional jurisprudence and not limited to First Amendment considerations.[103] Thomas' approach leads him to view appeals to *stare decisis* with considerable skepticism and to express a readiness to overturn even long-standing precedent if he believes it to be poorly grounded.[104]

Such was the case in *Morse v. Frederick*, where Thomas, in concurrence, announced his view that he would go further than the Court's opinion and vote to overturn the precedent set in *Tinker v. Des Moines Independent Community School District.*[105] To Thomas, *Tinker* conflicted with the original understanding of the First Amendment, which simply could not have been conceived to protect free speech rights in a public education setting given what the historical record reveals.[106] Thomas' opinion applies the common law doctrine of *in loco parentis,* concluding that free speech rights in a public school setting are virtually nonexistent.[107]

Though rather brief by contemporary standards, Thomas' opinion has far-reaching implications. The fact that respondent Frederick was not a minor at the time of the controversy was "inconsequential" to Thomas because

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understanding of a constitutional provision does not always comport with modern sensibilities.").

[103] *See* McDonald v. Chicago, 130 S. Ct. 3020, 3072 (2010) (Thomas, J., concurring in part and in the judgment) ("When interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted.").

[104] *Id.* at 3062-63 ("I acknowledge the volume of precedents that have been built upon the substantive due process framework, and I further acknowledge the importance of *stare decisis* to the stability of the Nation's legal system. But *stare decisis* is only an 'adjunct' of our duty as judges to decide by our best lights what the Constitution means.") (citation omitted).

[105] *Morse*, 551 U.S. at 417-19 (Thomas, J., dissenting) (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

[106] *Id.* at 416-19.

[107] *Id.* at 413-19.

"courts have applied the doctrine of *in loco parentis* regardless of the student's age."[108] Further, though not directly implicated by the case at hand, Thomas' interpretation would potentially uphold denial of free speech rights at the college level,[109] imposition of corporal punishment in public school settings,[110] and compelled speech in public school settings.[111] Because of the absence of constitutional protection for such speech, courts would have less of a basis to scrutinize the rationale behind any actions taken against students, and school administrators would be free to punish students based on their readings on the intent behind the speech.[112]

Concurrent with the specific elaboration of Thomas' *in loco parentis*-based understanding, of the original public understanding of the First Amendment in a public education setting, is his view of the proper avenue for relief should one find his opinion overly restrictive of free speech rights in such a setting. In announcing that overly-restrictive rules "can be challenged by parents in the political process," Thomas is drawing a contrast with the common law approach evidenced in *Tinker*, which "substituted judicial oversight of the day-to-day affairs of public schools."[113] Clearly, regardless of how described, whether as opportunism or adherence to common law development, Justice Thomas forcefully opposes such an approach. He believes the First Amendment has a "function

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[108] *See id,* at 413 n.3.
[109] *Id.* at 412 n.2.
[110] *Id.* at 414 n.4.
[111] *Id.* at 415 n.5.
[112] *Id.* at 415, 419. (discussing *Wooster v. Sunderland*, 27 Cal. App. 51 (Cal. Dist. Ct. App. 1915)).
[113] *Id.* at 420. *See also id.* at 421 ("Historically, courts reasoned that only local school districts were entitled to make those calls. The *Tinker* Court usurped that traditional authority for the judiciary.").

for which it was originally designed"[114] and he is prepared to limit its application accordingly.

Indeed, Thomas continues to apply his in *loco parentis*-based reading outside of a public education setting. In *Brown v. Entertainment Merchants Association*, Thomas declares that the First Amendment does not include "a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians."[115] Going into more detail than he does in *Morse*, Thomas lays out a detailed analysis of the historical evidence regarding "the founding generation's views on children and the parent-child relationship."[116] This survey leads Thomas to reiterate the conclusion he reached in *Morse*, namely that "the Framers could not possibly have understood 'the freedom of speech' to include an unqualified right to speak to minors."[117]

Consequently, as applied to the California ban on video games sales to minors, Thomas would uphold the law as exactly the type of action through the political process that he believes to be the appropriate way of navigating the contours of *in loco parentis*. The ban in question did not seek to completely prohibit minor possession of violent video games. Instead, it sought only to make sure that such possession occurred only if a parent or guardian purchased the game on the minor's behalf. Such a law, to Thomas, is consistent with *in loco parentis*, and therefore, cannot be a violation of the First Amendment.

Viewed together, one can see in Justice Thomas' *Morse* and *Brown* opinions a clearly drawn understanding of the original public understanding of the First Amendment. This understanding would significantly limit

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[114] Schauer, *supra* note 6, at 195.
[115] *See* Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2751(2011) (Thomas, J., dissenting).
[116] *Id.* at 2752.
[117] *Id.* at 2759.

the current reach of the First Amendment in cases involving minors owing to the doctrine *in loco parentis*. However, in cases not involving minors, Justice Thomas can still support an expansive understanding of the First Amendment's scope, one that can accurately be referred to as libertarian when discussing *Citizens United*, for example. The point is not that Thomas favors a broader or narrower reading of the First Amendment, but rather that he has announced a specific principle that can be characterized as anti-opportunistic. His is not the only such principle, however; and if *Brown* is any guide, it may well be Justice Alito's approach that would have the best chance of mustering a majority that counters the more typical common law view.

B. Justice Alito's Anti-opportunism

Justice Alito's approach is less rooted in the original public understanding of the Framers.[118] Rather, Alito's view, though anti-opportunistic in application, proceeds from a distinction critical to the common law approach, the distinction between high- and low-value speech.[119] While not a tacit endorsement of an egalitarian approach, Alito's dissents in *United States v. Stevens* and *Snyder v. Phelps* are strong critiques of a libertarian vision that would almost

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[118] Indeed, Alito's concurrence in *Morse v. Frederick* endorsed the value of *Tinker* as precedent and drew a clear contrast with Thomas' concurrence. *See* Morse v. Frederick, 551 U.S. 393, 424 (2007) (Alito, J., concurring) ("When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents. It is a dangerous fiction to pretend that parents simply delegate their authority – including their authority to determine what their children may say and hear – to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State.").

[119] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 54.

reflexively strike down any enactment on First Amendment grounds.

In *Stevens*, Alito notes that the specific intent of the law in question was to prohibit "a form of depraved entertainment that has no social value."[120] He is particularly critical of the majority's use of the overbreadth doctrine in striking down a federal statute that prohibited the production, sale, or possession of depictions of animal cruelty. In his dissent, Alito makes a sustained criticism of using overbreadth to strike down laws that he believes would be upheld under an as-applied standard. In making this criticism, Alito relates an excerpt from *Board of Trustees of State Univ. of N.Y. v. Fox* that serves as a useful one-sentence distillation of the anti-opportunism viewpoint: "Ordinarily, the principal advantage of the overbreadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application *to someone else*."[121] Overbreadth has its applicability; it ought to be used as a last resort, only in cases of "substantial" overbreadth evidenced from "actual facts" showing a "realistic danger" of the First Amendment being compromised.[122]

To heighten his low-value argument, Alito draws most heavily on *New York v. Ferber*, the 1983 case in which the Court held that child pornography, regardless of whether the material is actually obscene, was of "exceedingly modest, if not *de minimis*" value and not entitled to any First Amendment protection.[123] Alito provides several arguments as to the low value of the depictions targeted by the statute and concludes that the logic of *Ferber* should extend to the case in question.

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[120] *See* United States v. Stevens, 130 S. Ct. 1577, 1592 (2010) (Alito, J., dissenting).
[121] *Id.* at 1593 (citing Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 483 (1989)).
[122] *Id.* at 1594.
[123] *Id.* at 1599 (citing New York v. Ferber, 458 U.S. 747, 762-63 (1982)).

Alito extends this argument in *Snyder v. Phelps*. Alone among the Justices, Alito believes the intentional infliction of emotional distress (IIED) tort in question does not run afoul of the First Amendment. Alito again emphasizes the distinction between high- and low-value speech, seeing no constitutional basis to protect speech that "intentionally inflict[s] severe emotional injury on a private person at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate."[124]

Of particular note is Alito's contention that the majority picks and chooses which expressions of the Westboro Baptist Church to consider. He is chagrined that the majority declined to consider an online account of the church's picketing of Matthew Snyder's funeral.[125] While the Court claimed that is was a separate event from the picketing itself and, therefore, not part of the IIED tort, Alito countered by noting that the Court had considered previous protests by the church to further the majority's view that the church's activities merited First Amendment protection. Given that the online account "addressed the Snyder family directly,"[126] Alito notes that consideration of it significantly strengthens that argument that a claim of IIED is justifiable. Implicit in Alito's dissent is the assertion that the majority is being opportunistic in how it determines which statements to consider and that their opportunism is in service of extending First Amendment protection beyond its proper scope. In contrast, Alito states that he "fail[s] to see why actionable speech should be immunized simply because it is interspersed with speech that is protected."[127]

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[124] *See* Snyder v. Phelps, 131 S. Ct. 1207, 1222 (2011) (Breyer, J., concurring).
[125] *Id.* at 1225-26 n.15.
[126] *Id.* at 1226.
[127] *Id.* at 1227.

Contrary to Thomas' anti-opportunism, Alito does not attempt in either of his solitary dissents to announce just what the original expectation of the First Amendment was with respect to the particular controversy under consideration. However, each dissent makes clear his displeasure with the majority for inappropriately stretching the First Amdendment–whether through application of the overbreadth doctrine or through selective consideration of statements–beyond its logically necessary range of application. Perhaps because his criticism is not tethered to an exact reading of the First Amendment's original function, it has been subsequently adopted by another justice in a way that Thomas' has not.

In his dissent in *Brown v. Entertainment Merchants Association.* Justice Breyer favorably cites Alito's *Stevens* dissent when arguing that the Court has over-expansively applied the First Amendment in striking down a California prohibition on the sale of violent video games to minors.[128] As noted previously, Justice Thomas also filed a dissenting opinion in this case; one rooted in his *in loco parentis* view of the original understanding of the First Amendment's application with respect to minors. When Justice Breyer announces that "the special First Amendment category I find relevant is not (as the Court claims) the category of 'depictions of violence,' but rather the category of 'protection of children'"[129] he appears to concur with Thomas' understanding of the specific issue. However, by citing Alito's *Stevens* dissent, he is declining to endorse the specific logic of Thomas' approach.

Also noteworthy about Breyer's dissent, however, is that it directly responds to Justice Alito's concurrence.

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[128] Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2762 (Breyer, J., dissenting) ("A facial challenge to this statute based on the First Amendment can succeed only if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'") (citing *Stevens*, 130 S. Ct. at 1587)).

[129] *Id.* (citations omitted).

Thus, we are faced a situation where Breyer is tacitly arguing that Justice Alito is not being faithful to his own views. Certainly, this could be attributed to gamesmanship on Breyer's part. However, Alito's concurrence also indicates discomfort with the more expansive approach taken by the Justice Scalia's opinion for the Court and is at pains to stress that "[a]lthough the California statute is well intentioned, its terms are not framed with the precision that the Constitution demands, and I therefore agree with the Court that this particular law cannot be sustained."[130] Alito shares Breyer's view that the majority is too quick to rely on an expansive application of the First Amendment. Rather than the "broad ground adopted by the Court," Justice Alito relies on the "narrower ground that the law's definition of 'violent video game' is impermissibly vague."[131]

Nonetheless, the fact remains that Alito felt required to concur, albeit on narrower grounds. While Breyer argued that the California legislature acted appropriately in using the *Miller v. California*[132] obscenity test as a guide in crafting its law, Alito disagreed. The California law is a regulation of "expression related to violence," a type of prohibition with no long-standing history behind it. On the other hand, Alito argues that "obscenity had long been prohibited" by the time the Court turned its attention to it in the 1960's.[133] In other words, Alito's distinction is predicated on there existing a *common law understanding* of obscenity being outside the scope of First Amendment protection in a way that violent expression is not.

Alito may introduce an anti-opportunism argument in *Stevens*, but he does not believe it can override a settled

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[130] *Id.* at 2742.
[131] *Id.* (citations omitted).
[132] *See generally* Miller v. California, 413 U.S. 15 (1973).
[133] *Brown*, 131 S. Ct. at 2746 (citing Roth v. United States, 354 U.S. at 484-85).

common law understanding in the present case. Breyer declined to join Alito's dissent in *Stevens*, joining instead the majority's application of the overbreadth doctrine. Thus, while barely a year old, Alito's anti-opportunism argument in Stevens is already susceptible to the claim that it is open to being used opportunistically. The problem of First Amendment opportunism may be compared to using a pipe wrench to drive a nail, but in reality it is not so simple to identify.[134] Less a matter of using the wrong tool because it is the only tool present, the various criticisms of the Court's approach in *Morse*, *Stevens*, *Snyder*, *Phelps*, and *Brown* is more akin to the claim that the Court used a paring knife when it had a scalpel at its disposal. The consequence is less that the First Amendment is misshapen than that its boundaries are imprecise. However, under a common law understanding, this is necessarily so, and not a significant cause for despair.

Conclusion

The common law understanding of the First Amendment is firmly entrenched. *Brandenburg* casts a tall shadow and virtually any remotely controversial free speech case turns on whether the contact is or is not located within a proscribed category of speech and therefore regulable. In other words, there exists a well-accepted framework for talking about what free speech is. This is appropriate.

Within this agreed upon framework, however, more than one compelling narrative can operate. Egalitarian and libertarian accounts will reach different conclusions about when a category threshold has been breached. *Citizens United v. Federal Election Commission*,[135] *Christian Legal*

[134] Schauer. *supra* note 6.
[135] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

Society v. Martinez,[136] *United States v. Williams*,[137] and *United States v. Alvarez*[138] are recent examples where these accounts have led to a closely and strongly divided Court. It is entirely likely that the common law First Amendment will continue to evolve. However, there is little reason to expect that evolution to alter the fundamental post-*Brandenburg* understanding of the Free Speech Clause.

This is true in large part because the most contemporary understandings of the First Amendment are welcoming of opportunistic arguments that seek to add to the range of communication and conduct that fit within its protection. Where a case does not cut along explicit libertarian/egalitarian lines, the Court has shown a clear tendency to find in favor of the speaker. Put differently, questions of whether the First Amendment has become too opportunistic are judge-refereed and there is scant evidence of a critical mass existing that would call into question the present consensus as announced in cases such as *Stevens*, *Snyder*, and *Brown*.

[136] *See* Hastings Christian Fellowship v. Martinez, 130 S. Ct. 2971 (2010).
[137] *See* United States v. Williams, 553 U.S. 285 (2008).
[138] *See* United States v. Alvarez, 132 S. Ct. 2537 (2012).