

## THE POLITICS OF THE FIRST AMENDMENT

STEVE BACHMANN\*

### I. INTRODUCTION

Interpretations of the first amendment have changed over time<sup>1</sup> and it seems certain that they will continue to do so. However, the factors that underlie these changes remain questionable. An examination of the changes that the first amendment has undergone in the past<sup>2</sup> will elucidate the forms that the first amendment is likely to assume in the future. Scholarly historians and practicing attorneys frequently confront these questions. In this Article, the author will assume the role of both historian and attorney to develop a sense of how and why legal change occurs within the realm of the first amendment.<sup>3</sup>

Since law follows politics, developments in first amendment law follow developments in politics.<sup>4</sup> First amendment issues are quintessentially socio-political issues. Freedom of thought, speech, and association provide the impetus for organization and mobilization—the keys to political power.<sup>5</sup> Thus, first amendment affairs prove even more politically charged than most other legal affairs.

Controlling political groups<sup>6</sup> realize that an expansion of first amendment freedoms to those not in control undermines their power. Since groups in power seek to retain such power, they will attempt to monopolize first amendment freedoms. Fail-

\* B.A., Harvard College, 1972; J.D., Harvard Law School, 1976; M.F.A., University of New Orleans, 1984. Member of the Bars of Arkansas, Indiana, Louisiana, New York, Washington D.C., and Colorado.

<sup>1</sup> See, e.g., *Hudgens v. NLRB*, 424 U.S. 507 (1976) (prohibiting employees from picketing employer's leased store in a shopping center owned by a third party not unconstitutional); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (absent other factors, peaceful picketing on private property generally open to the public protected by the first amendment); *Hague v. CIO*, 307 U.S. 496 (1939) (plurality opinion) (municipal ordinance forbidding the distribution of printed matter and the holding of public meetings in the streets, without a permit, held unconstitutional); *Davis v. Massachusetts*, 167 U.S. 43 (1897) (upholding city ordinance restricting freedom of speech upon any public ground as within the city's police power).

<sup>2</sup> See *infra* notes 52-209 and accompanying text.

<sup>3</sup> For a discussion of changes in the law in general, see Bachmann, *Lawyers, Law, and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1 (1984-85).

<sup>4</sup> *Id.* at 17, 20-21, 44-47.

<sup>5</sup> Political development is a function of which social group proves more effective at intra-group organization and mobilization as compared to other groups. See *id.*

<sup>6</sup> In this Article, "controlling political groups" will refer to both established elites that enjoy a predominance of political power as well as social and economic power.



ing that, they will strive to restrict these freedoms to a limited scope.<sup>7</sup>

Disenfranchised groups may only succeed in expanding first amendment freedoms if they organize to pressure the established powers. This is best achieved when the established powers are disorganized,<sup>8</sup> rendering them susceptible to such pressure. Therefore, the development of first amendment rights, or the lack of them, will depend upon which groups prove to be more effectively organized.

## II. THEORY

The first amendment seldom provides the focus for philosophical writings. If nothing else, its relative youth insures that it will not be an obvious topic for the consideration of traditional philosophers.<sup>9</sup> However, with certain theoretical writings, an author's opinion concerning issues of freedom of speech, thought, and assembly can be extrapolated. This observation holds true for works of the past fifteen to twenty years on both sides of the political spectrum.<sup>10</sup> The seminal writings of John Milton<sup>11</sup> are informative of the presuppositions underlying both sides.

<sup>7</sup> See K. MARX & F. ENGELS, BASIC WRITINGS ON POLITICS AND PHILOSOPHY 16, 338-39 (L. Feuer ed. 1959). Marx noted that various modes of associating, such as organizations and political parties enhance the power of disenfranchised groups. To be more precise, Marx expressed this concept in terms of class transformation: the class which has most transformed itself from a "class-in-itself" into a "class-for-itself" will enjoy the most power. Marx' point about classes in particular can be applied to groups in general; see also *id.* at 9-10.

<sup>8</sup> Such disorganization usually derives from two sources: internal division or external coercion (e.g., war). A classic instance of the former involves differences between the northern and southern branches of the American power elite during the black civil rights movement. *Id.* at 19-21. Another example is provided by the successes of the American labor movement in the 1930's when certain leaders of industry looked to unionization as a means of stabilizing the workplace. *Id.* at 17 n.68. Instances of war's contribution to revolution, such as the Paris Commune and the Russian Revolution, are well documented.

<sup>9</sup> The first amendment reached its 200th birthday in 1987. However, its philosophy is at least 2500 years old assuming it marks its birth with the pre-Socratic Greeks. P. GAY & R. WEBB, MODERN EUROPE TO 1815, at 6-8 (1973).

<sup>10</sup> The events of 1968 have brought into focus a number of issues which intellectuals both on the left and right have had to confront: the decline of American international power; the bankruptcy of the Soviet model in Czechoslovakia; the potential for post-industrial revolution suggested by the May Days in France, etc. The full impact of 1968 has yet to be evaluated, but for a discussion of some of these issues, see M. POSTER, FOUCAULT, MARXISM & HISTORY 7-40 (1984).

<sup>11</sup> John Milton, 1608-1674, ended a grand tour of the continent in 1639 in order to participate in the English Revolution. He served in the revolutionary government from the execution of the King in 1649 until the restoration in 1660. Arrested but released due to his blindness, Milton concentrated on poetry until his death. J. MILTON, *Paradise Lost, Paradise Regained, and Samson Agonistes*, in M. DAY, HISTORY OF ENGLISH LITERATURE TO 1660, at 414-17 (1963).

### A. John Milton

In *Areopagitica*,<sup>12</sup> Milton expressed notions which have become fundamental postulates in the western political tradition:

Truth is compared in Scripture to a streaming fountain; if her waters flow not in perpetual a progression, they sicken into a muddy pool of conformity and tradition. . . .

. . . Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties. . . .

. . . And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter? . . . For who knows not that Truth is strong, next to the Almighty? . . .

. . . Yet it is not impossible that she [Truth] may have more shapes than one. . . .

. . . Neither is God appointed and confined, where and out of what place these his chosen shall be first heard to speak. . . .<sup>13</sup>

According to this perspective, truth is an imperfect but evolving entity, developing through the contentions and discussions pursued by many parties. From this position, the liberal tenets of Anglo-American thought follow. Pluralism is necessary so that the best from each imperfect voice may be gleaned. Censorship must give way to tolerance, so that the state of pluralism may be maintained, and truth cultivated.<sup>14</sup>

### B. The Right

Milton's position differed markedly from the presuppositions held by the Right<sup>15</sup> during his lifetime. Milton's society

<sup>12</sup> Milton, *Areopagitica*, in THE PORTABLE MILTON 151-205 (D. Bush ed. 1967). Published in 1644, Milton wrote *Areopagitica* in response to a sermon calling for censorship of his controversial views on divorce. C. HILL, MILTON AND THE ENGLISH REVOLUTION 130-31, 149-51 (1977).

<sup>13</sup> Milton, *supra* note 12, at 186, 198, 199, 200, 202.

<sup>14</sup> Milton was not an absolute pluralist. He served as a censor in the Cromwellian revolutionary government. L. LEVY, CONSTITUTIONAL OPINIONS 9 (1986). However, expressions like those cited did establish a breach with prior assumptions and they ultimately provided the rationale for future and further liberalizations of his position. See *supra* note 12 and accompanying text. Thus, to identify this pluralist position with one of its first and most forceful expositors is not inappropriate. For subsequent developments of the Miltonic arguments, see Locke, *A Letter Concerning Toleration* in GREAT BOOKS OF THE WESTERN WORLD 35 (Hutchins ed. 1952); JEFFERSON, THE PORTABLE THOMAS JEFFERSON 253 (Peterson ed. 1975).

<sup>15</sup> In this Article, the terms, "Left" and "Right" will indicate the following: The Right tends to support and intensify unequal concentrations of power between human beings. The Left tends to support and accelerate trends towards more equal



held the aristocratic assumptions that nature selected the "best" by birth and that the "best" ruled.<sup>16</sup> Not surprisingly, the "best" promulgated the ideology that nature was hierarchically organized.<sup>17</sup>

In this context, Milton's assertions prove to be radical. An aristocratic conception of truth suggests that truth is to be cultivated and elucidated by the best. The role of those in such an order, who do not qualify as the best, is to be edified. They are not to corrupt an already existing and perfect truth with their vulgar and deficient musings. A licensing system<sup>18</sup> administered by the best is accordingly necessary and sensible.

However, as his remarks indicate, Milton asserted that truth might "have more shapes than one"<sup>19</sup> and might issue from any number of sources. If no one knows "where and out of what

distributions of power between human beings. This means of identification is more productive than ideological buzzwords such as "state," "property," and "individualism" which both sides will use. For example, both Right and Left will cite "property rights" to justify protection of certain interests. Yet, the Right will address interests relating to the exclusivity of property rights, while the Left will tend to talk about interests relating to distribution of social benefits. See generally Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Reich, *The New Property*, 73 YALE L.J. 733 (1964). The Right will happily enhance the power of the State for the principle of law and order. The Left will claim that its conceptions of property and use of the state will increase individual freedom and happiness.

<sup>16</sup> "Aristocrat" derives from the Greek words, "aristos" and "kratos," which mean "the best" and "power" respectively. H. LIDDELL & R. SCOTT, GREEK-ENGLISH LEXICON 102, 392 (1968).

<sup>17</sup> Perhaps the most eloquent expression of this position is found in Shakespeare's *The History of Troilus and Cressida* I, iii:

The heavens themselves, the planets, and this centre  
Observe degree, priority, and place,  
Insisture, course, proportion, season, form,  
Office, and custom, in all line of order.  
And therefore is the glorious planet Sol  
In noble eminence enthroned and sphered  
Amidst the other; whose med'cinable eye  
Corrects the influence of evil planets,  
And posts, like the commandment of a king,  
Sans check to good and bad. . . .  
[W]hen degree is shaken,  
Which is the ladder of all high designs,  
The enterprise is sick. How could communities,  
Degrees in schools, and brotherhoods in cities,  
Peaceful commerce from dividable shores,  
The primogenity and due of birth,  
Prerogative of age, crowns, sceptres, laurels,  
But by degree, stand in authentic place?

W. SHAKESPEARE, WILLIAM SHAKESPEARE: THE COMPLETE WORKS 985-86 (A. Harbage ed. 1984). Of course this speech fails to acknowledge the extent to which this "natural" order was based on violence and coercion. See C. HILL, THE CENTURY OF REVOLUTION 27-28 (1961).

<sup>18</sup> A licensing system was a system whereby an intellectual product would have to secure a license from the government before it could be published.

<sup>19</sup> See Milton, *supra* note 12, at 200.

place"<sup>20</sup> truthful utterances might occur, the best could claim no legitimate right to monopolize and regulate the cultivation of truth.

Although Milton's thoughts might have initially appeared radical, they nevertheless promulgated the wave of future Rightist thinking.<sup>21</sup> The aristocratic order was eventually replaced by a bourgeois order<sup>22</sup> which distributed power and wealth according to success achieved through the marketplace, and not through lineage. Milton's vision of the development of truth is consistent with a vision of the universe that sees the market as central, if not essential, to the order of things. Better ideas, like better products, win out in competition.<sup>23</sup>

It is questionable to what extent Milton's perspective on truth has been appropriated by bourgeois thinkers for ideological purpose. At least three arguments can be made suggesting that the bourgeois embrace of Miltonic thought is insincere. First, the bourgeoisie will crush freedom of speech wherever it is necessary and wherever it is possible.<sup>24</sup> Second, it is politically advantageous for the bourgeoisie to correlate Milton's idea market<sup>25</sup> to the economic market. The rationale behind the correlation is that truth can be seen to derive from market orders, and then market orders will appear to be morally laudable and worthy of support. Additionally, they will appear to be grounded in the natural order of things, and thus futile to oppose. Third, the identification of a Miltonic market with capitalistic markets is insincere obfuscation. The Miltonic market postulates "free and open"<sup>26</sup> encounters, which suggests general equality on the part of the participants, whereas, the essence of the capitalistic market

<sup>20</sup> *Id.* at 202.

<sup>21</sup> See *infra* note 28 and accompanying text.

<sup>22</sup> As the work of Christopher Hill establishes, the initial intimation of bourgeois ascendancy occurred during England's century of revolution. See generally C. HILL, *supra* note 17. A century later, in the 1700's, the process appeared in more thorough and dramatic visages in the American Revolution and in the French Revolution which eventually extended over the continent of Europe. See C. MORAZE, THE TRIUMPH OF THE MIDDLE CLASSES 77-159 (1966).

<sup>23</sup> C. HILL, *supra* note 12, at 263; see also C. HILL, THE EXPERIENCE OF DEFEAT 183 (1985).

<sup>24</sup> See, e.g., *Debs v. United States*, 249 U.S. 211 (1919) (Socialist Eugene V. Debs indicted for speaking in opposition to World War I); *Frohwerk v. United States*, 249 U.S. 204 (1919) (publisher of newspaper indicted for printing articles against the draft during World War I).

<sup>25</sup> Milton's notions concerning truth development suggest an analogy to the economic market, where, "ideas" constitute the products which compete for predominance. See *supra* note 23 and accompanying text.

<sup>26</sup> MILTON, *supra* note 12, at 199.



is inequality of bargaining power.<sup>27</sup> The more a market is viewed as fair, the fewer critics there will be to raise objections to this system. Yet, whatever the motivation behind the bourgeois embrace of Miltonic thought, ideologically, the two appear to share similar approaches.

Thus, while contemporary neoconservative apostles trumpet the virtues of the market,<sup>28</sup> they will continue to accord Milton's view some credibility. Less philosophically consistent Rightists will advocate certain forms of censorship.<sup>29</sup> However, even these Rightists can place their approaches within a framework which embraces market analogies.<sup>30</sup> The extent to which these censors or any other Rightist truly believes in the free market of ideas is open to debate. Yet, they will advocate a market economy because the market is the source of their power.<sup>31</sup> The Miltonic vision of free speech, if nothing else, helps to legitimate the market order. For this reason alone, we can expect the Right to continue to cite Milton as it attempts to perpetrate its vision of truth and morality.

<sup>27</sup> The famous French historian Fernand Braudel has contrasted the relations inhering in the market of the small village to the larger markets pursued by more classical capitalists. He finds the essence of the latter to involve domination and inequality of bargaining power. F. BRAUDEL, *AFTERTHOUGHTS ON MATERIAL CIVILIZATION AND CAPITALISM* 57-63 (1977).

<sup>28</sup> See, e.g., M. NOVACK, *THE SPIRIT OF DEMOCRATIC CAPITALISM* 104-12 (1982) (market's key role in sustaining freedom and prosperity); G. GILDER, *WEALTH AND POVERTY* 28-46 (1981) (beneficial effects of governmental withdrawal from marketplace); R. NOZICK, *ANARCHY, STATE & UTOPIA* (1974) (dangers of governmental interference in voluntary human relationships).

<sup>29</sup> These Rightists advocate the censorship of pornography. See *Miller v. California*, 413 U.S. 15 (1973) (obscene material held not to be protected by the first amendment); N.Y. Times, July 13, 1986, at A4, col. 1 (report of Meese Commission). They also advocate the censorship of "subversive" ideas and risque high school speeches. See *Gilbert v. Minnesota*, 254 U.S. 325 (1920) (law punishing speech aimed at discouraging enlistment in the armed forces upheld); Nat'l. L.J., Feb. 11, 1985, at 28, col. 1 (Dean of Duke Law School suggested that members of the Critical Legal Studies movement leave law school faculties); *Bethel School Dist. No. 403 v. Fraser*, 487 U.S. 675 (1986) (school officials allowed to censor student speech considered to be obscene).

<sup>30</sup> Insistence upon the maintenance of some minimal standards in the marketplace so that it cannot be inundated with unfair tactics, tainted goods, etc. is one such example.

<sup>31</sup> According to Braudel, the capitalist market is a function of power relations. BRAUDEL, *supra* note 27. Those with power in that marketplace will not want their power circumscribed. They will plead for a "free market." Weaker parties in the market will plead other ideologies as their objectives. This is why American industry, when in its infancy, consistently demanded tariffs for the sake of protecting nascent manufacturing. See G. TINDALL, *AMERICA*, at 290-91, 847-48 (1984). Now that their enterprises have grown to world scale, American industries' hirelings demand "free trade," i.e., the ability to employ their market puissance uninhibited. When and if foreign competition begins to overwhelm its products, it is certain that American industry will again begin to request limits on "free trade." See T. Edsall, *Beyond the Political Impasse*, N.Y. Rev. of Books, Mar. 26, 1987, at 8, 14.

### C. The Left

Ironically, Milton stood on the left of the political spectrum.<sup>32</sup> While Milton's vision shared certain affinities with a market order, it also shared affinities with a democratic order. To suggest that truth can appear in many guises from many quarters implies that everyone has the potential to contribute,<sup>33</sup> and therefore, should have the opportunity and capacity to do so.<sup>34</sup> This is clearly a democratic proposition, and thus Milton also supports a Leftist vision.<sup>35</sup>

Some twentieth century Leftist thinkers have questioned the validity of the Miltonic vision.<sup>36</sup> This may be the result of several factors including: (1) a hostile reaction to the appropriation of the Miltonic vision by the hypocritical Right; (2) a tactical reaction to exigencies inhering in revolutionary situations;<sup>37</sup> or (3) a despairing reaction to the apparently overwhelming triumph of bourgeois materialist culture. Whatever the reasons, Leftist thinkers from Lenin to Marcuse<sup>38</sup> have occasionally questioned the worth of the Miltonic vision.<sup>39</sup>

More recently, though, several Leftist thinkers have revitalized the Miltonic vision. From the Christian Left, Roberto Unger has argued for a society of perpetual implementation of innovative visions.<sup>40</sup> In one sense, Unger views the Miltonic state of

<sup>32</sup> Milton initially established his international reputation as a propagandist for the revolutionary regicides. See C. HILL, *supra* note 12, at 182-89.

<sup>33</sup> MILTON, *supra* note 12, at 200-02.

<sup>34</sup> Milton himself did not argue that *everyone* should be allowed to contribute to the truth cultivation process. However, the positions espoused by Milton and those on his side of the debate did represent a liberalization of notions regarding the development of truth. See *supra* note 14 and accompanying text.

<sup>35</sup> For a discussion of ways of expanding capacity to communicate effectively in contemporary society see H. ENZENSBERGER, *The Industrialization of the Mind* in *CRITICAL ESSAYS* 46-76 (1982); R. GRAFF, *COMMUNICATIONS AND NATIONAL DEVELOPMENT* (1983); see also Bachmann, *The Irrelevant First Amendment*, 7 *COMMUNICATIONS AND THE LAW* 3 (Aug. 1985).

<sup>36</sup> See *infra* note 39 and accompanying text.

<sup>37</sup> Revolutionaries frequently justify suppression of alternative viewpoints in extreme situations. During the American Revolution, for example, Loyalists were imprisoned, looted, tortured, and their presses were suppressed. W. BROWN, *THE GOOD AMERICANS* 65, 91, 123, 131 (1969).

<sup>38</sup> Herbert Marcuse was born in Berlin and contributed to the thought of the Frankfurt School in both Germany and the United States. See, e.g., H. MARCUSE, *REASON AND REVOLUTION* (1941); H. MARCUSE, *ONE DIMENSIONAL MAN* (1963); H. MARCUSE, *EROS AND CIVILIZATION* (1974); see also *THE ESSENTIAL FRANKFURT READER* 3, 11 (A. Arato & E. Gebhardt eds. 1982).

<sup>39</sup> See, e.g., V. LENIN, *SELECTED WORKS, ONE VOLUME READER* 418-19 (Int'l Publishers ed. 1971); R. WOLFF, B. MOORE & H. MARCUSE, *A CRITIQUE OF PURE TOLERANCE* (1969).

<sup>40</sup> Unger, a professor of law at Harvard, is one of the leading theoreticians of the Critical Legal Studies movement and a target of the New McCarthyism. See *supra* note 29 and accompanying text. For a good introduction to Unger's thoughts, see Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 561 (1983). For an evaluation of Unger,



contention not only as an end in itself, but also the means towards an end.<sup>41</sup>

From the traditions of Marcuse's Frankfurt School,<sup>42</sup> Jurgen Habermas<sup>43</sup> has argued that the heart of human enterprise consists of two comparably situated human beings engaging in discourse attempting to ascertain truth in a mutual project.<sup>44</sup> This resembles the Miltonic market although it emphasizes a more cooperative, less contentious, mode of gleaning perfection from imperfect views.

Finally, the post-structuralism<sup>45</sup> of French thinkers like Derrida and Foucault<sup>46</sup> tends to support the Leftist revitalization of the Miltonic perspective. While deconstruction may challenge the notion that truth is ascertainable, it nevertheless implies that pluralism is necessary, in that many imperfect truths might lead to some approximation of truth.<sup>47</sup> Although the Leftist and Rightist means to ascertaining the truth or an approximation thereof differ, philosophies on both sides of the spectrum agree that truth is a pluralist enterprise.

#### D. *The Controversy*

If the common ground of pluralism as the path to ultimate

see Hutchinson & Monahan, *The "Rights" Stuff: Roberto Unger and Beyond*, 62 TEX. L. REV. 1477 (1984).

<sup>41</sup> Of course, both Milton and Unger might suggest that their means *are* their ends.  
<sup>42</sup> "Frankfurt School" refers to a group of German intellectuals and their progeny who were associated with the privately-funded Frankfurt Institute for Social Research in the 1920's. They include figures like Theodor Adorno, Max Horkheimer, Walter Benjamin, and Erich Fromm. See Z. TAR, *THE FRANKFURT SCHOOL* (1985); *THE ESSENTIAL FRANKFURT READER* (A. Arato & E. Gebhardt eds. 1982).

<sup>43</sup> Born in 1929, Jurgen Habermas began his career as a journalist, became a secretary to Adorno in the 1950's and is currently a professor at Goethe University in Frankfurt. HABERMAS (P. Dews ed. 1986).

<sup>44</sup> See J. HABERMAS, *REASON AND THE RATIONALIZATION OF SOCIETY* (McCarthy trans. 1984). Compare O. Negt and A. Kluge, who, as Jochen Schulte-Sasse points out, "argue that *only* experience confirmed and corroborated through discussion and coped with as *collective* experience can be said to be truly experienced." P. BUEGER, *THEORY OF THE AVANT GARDE* xxviii (1984).

<sup>45</sup> Structuralism refers to a method of thought which focuses on systems and structures, and the ways in which they constitute human subjects. Ferdinand de Saussure and Claude Levi-Strauss might be viewed as classical expositors of this approach. Louis Althusser provides a more recent and radical variant. Post-structuralists like Jacques Derrida and Michael Foucault reacted to structuralism's postulation of systems with extreme scepticism, preferring instead to trace its informing assumptions to their roots and exposing the arbitrary and frequently political axioms underlying them. Hence, the term "deconstruction." See *infra* note 46; see also T. EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 91-150 (1983); T. EAGLETON, *AGAINST THE GRAIN* 89-98 (1986).

<sup>46</sup> For sample texts and discussions, see J. DERRIDA, *OF GRAMMATOLOGY* (Spivak trans. 1976); M. FOUCAULT, *POWER/KNOWLEDGE* (Gordon ed. 1980); POSTER, *supra* note 10.

<sup>47</sup> For an explication of this particular interpretation of the political implications of Derrida's deconstruction, see M. RYAN, *MARXISM AND DECONSTRUCTION* 192-221 (1984).

truth constituted the premier feature of the Leftist and Rightist visions, the end of political acrimony could be attributed to John Milton. However, the Rightist and Leftist visions of freedom of speech disagree in the same manner that they disagree over other issues. The Left maintains its concerns over egalitarian distribution of power, and accordingly, pushes for an expansion of the capacity to speak effectively.<sup>48</sup> Thus, the Left judges "the market" according to the extent to which it promotes an actual, concrete pluralism which then develops truth.<sup>49</sup> The Right, however, maintains its interest in promulgating unequal concentrations of power.<sup>50</sup> Accordingly, it employs pluralism as an ideology, citing an imaginary market of equals to disguise and justify the fact that the market is in actuality dominated by a powerful few.<sup>51</sup>

The Left and Right disagree over the extent to which the truth-developing pluralist enterprise is actually practiced. The Left subordinates the market to the actualities of practiced power, while the Right subordinates these actualities to the notions of an ideal market. The Left restructures the market for the sake of equality, while the Right tolerates inequality for the sake of the market in order to sustain the inequality it prefers. Considerations of power are at stake. Not suprisingly, power (i.e., politics) determines which approach ultimately wins a particular historical confrontation.

#### III. HISTORY

History provides some sense of the future,<sup>52</sup> indicating that free speech broadens when political forces allow it to. Those who want free speech must push for it. Those pushed must be unusually susceptible to being pushed before they will yield. Three periods during which free speech experienced marked shifts in Anglo-American experience illustrate this point: the English revolutionary period (1640-1690); the American revolutionary period (1776-1800); and the judicial revolution of 1937.<sup>53</sup>

<sup>48</sup> See *supra* note 15 and accompanying text.

<sup>49</sup> For a condemnation of the present state of media oligopoly in the West (and monopoly in the East), see H. ENZENSBERGER, *supra* note 35.

<sup>50</sup> See *supra* note 15 and accompanying text.

<sup>51</sup> See generally G. SHAPIRO, P. KURLAND & J. MERCURIO, *CABLESPEECH* (1984).

<sup>52</sup> One reason for studying history is the affirmation of certain values. See, e.g., E.P. THOMPSON, *THE POVERTY OF THEORY* 42 (1978); W. BENJAMIN, *ILLUMINATIONS* 254 (1969). For a discussion of ascertaining valid value, see *supra* note 44 and accompanying text.

<sup>53</sup> It is not entirely coincidental that each period has been labelled with the term "revolution."



A. *English Revolution*

The first amendment<sup>54</sup> was born in what has come to be known as England's "century of revolution."<sup>55</sup> Milton's seminal writings on free speech were composed during this period. More importantly, it was during this period that Milton's contemporaries made it possible for him to articulate such thoughts.<sup>56</sup> While Milton was inventing first amendment doctrine, his contemporaries were inventing first amendment practices in the streets.<sup>57</sup>

Milton and the revolutionaries who inspired him rebelled against the strictures of early modern English society which, from a twentieth century perspective, evidenced totalitarian features.<sup>58</sup> Cultural productions were monitored and censored.<sup>59</sup> Rights of political activity were contained within a small elite.<sup>60</sup> The principle source of mass media, the church, worked together with the state to keep the population in a state of subjection.<sup>61</sup> Due to the overwhelming significance of religion during this period, most political speech issues were expressed in religious terms.<sup>62</sup>

The monarchy regularly used the church to disseminate messages of political importance.<sup>63</sup> When King Charles I attempted to consolidate his rule over England during the crisis of 1640,<sup>64</sup> he ordered warnings to be issued from every pulpit in the kingdom. "For subjects to bear arms against their kings, offensive or defensive, upon any pretence whatsoever, is at least to resist the powers which are ordained of God; and though they do not invade but only resist, St. Paul tells them plainly they shall receive to themselves damnation."<sup>65</sup>

Control over English churches was thus essential for control

<sup>54</sup> Obviously, to apply the term "first amendment" to seventeenth century phenomena is anachronistic because there was no first amendment until the close of the eighteenth century. However, this Article will use the term in a generic sense. It should be understood to mean various modes and concepts relating to communication and mobilization. These modes and concepts determined what eventually became the first amendment. Such modes and concepts still form a valid sense of the first amendment today.

<sup>55</sup> See C. HILL, *supra* note 17, at 1-5; see also *infra* text accompanying notes 60-95.

<sup>56</sup> See *infra* text accompanying note 80.

<sup>57</sup> See *infra* note 80.

<sup>58</sup> See C. HILL, *supra* note 17, at 27-28, 75-80.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 43-46.

<sup>61</sup> *Id.* at 75-80.

<sup>62</sup> For example, the Root and Branch Petition concerned itself with the dissemination of godly books and the freedom of ministers to preach. The truth over which Milton sweated was God's which he frequently tied into Scripture. The Levellers spoke in terms of freedom to speak and published opinions "in Religion." See *supra* note 13; see also *infra* notes 73, 82.

<sup>63</sup> See C. HILL, *supra* note 17, at 76-77.

<sup>64</sup> See *infra* text accompanying notes 70-75.

<sup>65</sup> THE STUART CONSTITUTION, at 151, 168 (Kenyon ed. 1966).

over English society.<sup>66</sup> The monarchy, in control of the Anglican Church since King Henry VIII, controlled rights of speech, press and assembly.<sup>67</sup> However, the Reformation<sup>68</sup> with its message that every person should be his<sup>69</sup> own priest, and should come to terms with the word of God on an individual basis, complicated the monarchy's control over the church.

Concern over "first amendment" issues, *inter alia*, culminated in the English Civil War. The war began in Scotland where King Charles I was unable to force the Scots to adopt a version of the Book of Common Prayer.<sup>70</sup> Beaten by the Scottish army and forced to pay 850 pounds per day until a peace settlement was reached, Charles I called Parliament into session to request the money.<sup>71</sup> However, the Parliamentarians were more interested in pursuing their own grievances than in the King's request. Though Parliament represented England's propertied class, Charles I had ignored them for eleven years by refusing to call Parliament into session.<sup>72</sup> In December 1640, the Parliamentarians presented their grievances protesting "the faint heartedness of ministers to preach the Truth of God lest they should displease the prelates, . . . the restraint of many godly and able men from the ministry, [and the] "hindering of godly books to be printed."<sup>73</sup>

Since Charles I and Parliament resisted each other, they resorted to military force.<sup>74</sup> The struggle developed into violence because the Parliamentary leaders resorted to the disenfranchised in order to pressure the King.<sup>75</sup> Any type of appeal to the people was rare, making Parliament's tactics unusual.<sup>76</sup> The actions of the radical Parliamentarians were dangerous because

<sup>66</sup> See *supra* note 61.

<sup>67</sup> P. GAY & R. WEBB, *supra* note 9, at 153-58.

<sup>68</sup> The Reformation began with Luther's nailing of his 95 Theses to the church door in Wittenburg in 1517. The Reformation reached England in 1529 with the Reformation Parliament which, in defiance of the Pope, gave Henry VIII the divorce he wanted. *Id.* at 134, 155.

<sup>69</sup> Since seventeenth century society was overwhelmingly patriarchal, it is appropriate to use the masculine gender here. However, it should be noted that during the revolutionary period, a number of leftist protestant sects took the opportunity to accord almost unprecedented rights to women. See C. HILL, *THE WORLD TURNED UPSIDE DOWN* (1972).

<sup>70</sup> See C. HILL, *supra* note 17, at 13.

<sup>71</sup> *Id.* at 13-14.

<sup>72</sup> *Id.* at 11, 42-43.

<sup>73</sup> These grievances were listed in the Root and Branch Petition. See THE STUART CONSTITUTION, *supra* note 65, at 172-75.

<sup>74</sup> See C. HILL, *supra* note 17, at 111-12.

<sup>75</sup> *Id.* at 121, 125-26.

<sup>76</sup> "The problem of early seventeenth century politics was to decide where the King's rights and privileges ended and those of his free subjects began. . . ." *Id.* at 45.



an appeal to the disenfranchised enabled them to realize their potential power. Nowhere was this more apparent than in the Parliamentarian's New Model Army which was populated by lower class "roundheads"<sup>77</sup> and led by Oliver Cromwell.<sup>78</sup> The more victories the New Model Army won, the more it realized where real power and legitimate authority lay. During this period, many political thinkers concluded that England's ultimate authority resided in its people.<sup>79</sup> Moreover, various people began publishing newspapers, pamphleteering, forming networks, and petitioning Parliament.<sup>80</sup> These activities later became conceptualized under the first amendment.

Milton's *Areopagitica*<sup>81</sup> was written against this backdrop. Other first amendment theory was also reflected in certain demands promoted by radical leaders:

[T]hat no man for preaching or publishing his opinion in Religion, in a peaceable way, may be punished or persecuted as hereticall [sic]. . . . That strong provision be made that neither the Parliament, nor any inferior Court, Officer, or Minister of the Law whatsoever, may in any wise let, disturb, or molest any person or persons, from contriving, promoting or presenting any Petition or Petitions concerning their grievances, liberties, to the High Court of Parliament.<sup>82</sup>

However, the Parliamentarian forces that sowed the wind of popular power did not desire to reap its whirlwind. Cromwell crushed the military forces of the Left at Burford in 1649.<sup>83</sup> He subjected a number of Leftist leaders to prolonged legal harassment.<sup>84</sup> Without a mass base, the progressive forces of the revolution were doomed to eventual failure. In 1660, after Cromwell's death, discontented members of England's ruling class (including disaffected

<sup>77</sup> "Roundhead" was a social sneer, contrasting the long hair of upper class gentlemen to the cropped hair worn by the men of the lower classes. *Id.* at 123.

<sup>78</sup> *Id.* at 112-15.

<sup>79</sup> THE LEVELLERS IN THE ENGLISH REVOLUTION 68-69, 89-90, 100 (G. Aylmer ed. 1975) [hereinafter THE LEVELLERS] (remarks of Overton, Rainsborough, and other Leveller leaders in the First Agreement of the People). Indeed, a number of radicals in the army viewed the army as the nation's most representative agent and therefore most fit for instituting national transformation. THE STUART CONSTITUTION, *supra* note 65, at 288-92.

<sup>80</sup> See C. HILL, *supra* note 17, at 174, plate 14; C. HILL, *supra* note 69, at 18-19; THE LEVELLERS, *supra* note 79, at 37; C. HILL, THE EXPERIENCE OF DEFEAT 132 (1984); L. LEVY, *supra* note 14, at 22.

<sup>81</sup> See *supra* note 12.

<sup>82</sup> See THE LEVELLERS, *supra* note 79, at 79, 87; see also L. LEVY, *supra* note 14, at 7.

<sup>83</sup> C. HILL, *supra* note 17, at 114.

<sup>84</sup> For example, there were dawn arrests, trials, etc. See THE LEVELLERS, *supra* note 79, at 43.

Parliamentarians) were prepared to accept the return of Charles I's son and his ascension to the throne.<sup>85</sup>

Some aspects of the revolutionary order were maintained; the most significant changes involved land transfers.<sup>86</sup> Additionally, an act of idemnity was passed to afford amnesty to most Civil War participants.<sup>87</sup> Although some religious toleration became acceptable, the Conventicle Act "forbade meetings held under color or pretence of any exercise of religion of five or more persons who were not members of the same household."<sup>88</sup> Thousands of dissenting preachers were jailed.<sup>89</sup> It became illegal to collect more than twenty signatures for any petition concerning church or state unless it was approved by a group of local gentry.<sup>90</sup> Censorship was enforced. For example, in 1683, Oxford University sponsored the burning of books of "radical" writers such as Milton, Hobbes and Harrington.<sup>91</sup>

Toward the close of the seventeenth century, the excesses of reaction abated. Parliamentarians deposed James II in response to his extension of religious tolerance to Catholics.<sup>92</sup> Nevertheless, the Parliamentarians permitted the censorship laws to lapse.<sup>93</sup> After the Glorious Revolution of 1688,<sup>94</sup> a Bill of Rights was issued in which some "first amendment" rights were partially restored:

5. That it is the Right of Subjects to petition the King, and all Commitments and Prosecutions for such petitioning are illegal.

9. That the Freedom of Speech, and Debates on proceedings in Parliament, ought to be impeached or questioned

<sup>85</sup> Charles II spent most of the revolutionary period in exile. The English ruling class found him the lesser of two evils when compared to the reign of "the fanatics, the republicans, [and] the many-headed monster [i.e., the people]." C. HILL, *supra* note 17, at 144.

<sup>86</sup> Land held from the King by feudal tenure was now converted into freehold. *Id.* at 148. Most land transfers that occurred during the Civil War were ratified. THE STUART CONSTITUTION, *supra* note 65, at 361-62.

<sup>87</sup> *Id.* at 362.

<sup>88</sup> *Id.* at 364.

<sup>89</sup> L. LEVY, *supra* note 14, at 125.

<sup>90</sup> C. HILL, *supra* note 69, at 281.

<sup>91</sup> C. HILL, *supra* note 17, at 66, 205.

<sup>92</sup> James II's decision involved more than issues of religious freedom in that the Parliamentarians could reasonably view it as a threat to the hegemony and privileges which they had gained as a result of the Restoration settlement. C. HILL, *supra* note 17, at 198-99, 239-41.

<sup>93</sup> This decision seems to have evolved more from a desire to aid the English book trade than from a liberal commitment to freedom of speech. L. LEVY, *supra* note 14, at 12. Again, political economy and political ideals are hard to untangle.

<sup>94</sup> The Glorious Revolution is how James II's deposition came to be called.



in any Court or Place outside of Parliament.<sup>95</sup>

Consequently, during England's century of revolution, first amendment rights expanded and contracted according to which political forces had been most effectively mobilized. Popular energies were released in the revolutionary chaos and crystallized in the form of the New Model Army. The English masses enjoyed unprecedented first amendment freedoms. When the radical elements of the revolutionary army were crushed, first amendment freedoms were accordingly constricted. These constrictions continued until Parliamentarians realized that power should not be concentrated in the King, but rather should be disseminated amongst themselves.

### B. *The American Revolution*

During the American Revolution, concerns of first amendment issues culminated in a general articulation of these rights. The revolutionary generation felt a need to establish these rights in law and set them out as barriers through which government should not break. After the Declaration of Independence, each state in effect became a sovereign nation. Almost every new nation-state included some type of first amendment provision in its initial constitution.<sup>96</sup>

Given their experience with the British, it is not surprising that the new states were so concerned in listing such "bills of rights." The "British Constitution" was an ambiguous agglomerate of tradition and precedent.<sup>97</sup> The Americans believed that the British had used these ambiguities to promote "tyranny."<sup>98</sup> Thus, Americans were concerned with demarcating the line between legitimate authority and arbitrary power.

<sup>95</sup> STATUTES AT LARGE I Will. and Mary, sess. 2, c. 2, (Pickering ed. 1726-1807).

<sup>96</sup> See, e.g., DEL. CONST. of 1776 art. I, §§ 9, 23 (right to petition, freedom of press); MD. CONST. of 1776 art. I, §§ 11, 38 (amended 1981 as §§ 13, 40) (right to petition, freedom of press); MASS. CONST. of 1780 §§ 16, 19 (amended 1983 as §§ 4, 15) (liberty of press, right of assembly); N.C. CONST. of 1776 art. I, §§ 15, 18 (amended 1984 as §§ 12, 14) (right of assembly and petition, freedom of speech and press); PA. CONST. of 1776 art. I, §§ 12, 16 (amended 1968 as §§ 7, 20) (freedom of press and speech, libels, right to petition); VA. CONST. of 1776, art. I, § 12 (freedom of press, speech).

<sup>97</sup> This could include statutes, traditional practice, documents such as the Magna Carta, etc. See, e.g., THE STUART CONSTITUTION, *supra* note 65, at 7-10; G. TINDALL, *supra* note 31, at 175-76.

<sup>98</sup> Some of the tyrannies perpetrated by the British included taxation without representation, elimination of trial by jury, and burden of proof placed on defendants in admiralty courts. G. TINDALL, *supra* note 31, at 176-77. It should be acknowledged that it is possible that some people might have worried about "tyrannies" exercised by "the people." During the revolutionary period, Loyalists found their first amendment and other rights suppressed in a number of situations. See *supra* note 37 and accompanying text.

First amendment rights would naturally be included in the states' listings. Even the conservative Alexander Hamilton argued that freedom of the press must be maintained, due to its capacity to "shame [or] intimidate . . . oppressive officers into more honorable and just modes of conducted affairs."<sup>99</sup> Hamilton also viewed first amendment freedoms from a broader political perspective. He noted that freedom of the press promoted dissemination of culture, and contributed to political stability by diffusing "liberal sentiments on the administration of government" and promoting national unity.<sup>100</sup> From a more leftist perspective, Thomas Jefferson noted that first amendment freedoms promoted peaceful reform.<sup>101</sup> Other commentators noted that there could be no liberty without the encouragement of "reason and knowledge."<sup>102</sup>

The American revolutionaries hoped to establish a more perfect political order. Their experience with the British, convinced them that the establishment and explication of first amendment freedoms constituted an essential part of that new order. The United States Constitution ("Constitution") was drafted to establish a revised political order. When the Constitution was initially framed, it did not secure first amendment freedoms as did state constitutions. The motives underlying this omission are questionable, but the Constitutional debates evidence a sense that a bill of rights was not needed because most power already resided in the states.<sup>103</sup> A more dour view suggests that the Constitution's framers hoped to centralize power for the sake of a wealthy and powerful few. Their objective was to surround themselves with as few trammels as was politically feasible.<sup>104</sup>

Nevertheless, the lack of a Bill of Rights generated contro-

<sup>99</sup> L. LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 397 (1966).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 376.

<sup>102</sup> THE ANTI-FEDERALIST 21 (Kenyon ed. 1966).

<sup>103</sup> P. SMITH, THE SHAPING OF AMERICA 91 (1980).

<sup>104</sup> That the more dour view of the motives of the Constitution's proponents is not totally inaccurate is suggested by the following observations from Louis-Guillaume Otto, French charge d'affaires in New York, a relatively neutral, though aristocratic, observer:

The necessity has now been felt for a long time, My Lord, to give the Federal Government more energy and vigor, but one can feel as well that the excessive independence granted to the citizens vis a vis the states, and to the States vis a vis Congress, is much too dear to the individuals to be taken away from them without great precautions. The people do not ignore that the natural consequences of a greater power granted to Congress would be a regular collection of taxes, a severe administering of justice, extraordinary



versy, especially among the opponents of the Constitution.<sup>105</sup> Many states which ratified the Constitution qualified that ratification by stating that a bill of rights was necessary.<sup>106</sup> When James Madison won his seat in the new House of Representatives, he quickly went to work to satisfy the demands of his constituents<sup>107</sup> and many other Americans.<sup>108</sup> His efforts culminated in the passage of the Bill of Rights. The first amendment states that:

rights on imports, rigorous actions against debtors, and lastly a marked preponderance of rich men and property owners. . . .

Even though there are no patricians in America, there can be found certain men known under the label "gentlemen" who, by their riches, by their talents, by their education, by their families or by their positions, aspire to a pre-eminence that the people refuse to let them have. And although several of these men have betrayed the interest of their kind to acquire popularity, there exists among them a rapport made stronger by the fact that they all fear the people's efforts to deprive them of their riches, and also by the fact that they are creditors who have thus an interest in making the government stronger and in overseeing the administering of the laws. These men ordinarily pay the highest taxes, whereas poorer owners escape the vigilance of the collectors. Most of them being merchants, it is important for them that the United States establish a good credit history with Europe by paying its debts in full, and that they give Congress enough powers to force the people to contribute.

It has been tried to no effect, my Lord, to spread notions of justice and equity by pamphlets and other publications, and to deprive the people of a liberty they use to such wrong ends. By proposing a new organization of the Federal Government, one would have shocked the spirits. Ruinous circumstances for the maserican trade have luckily happened that provide reformists with a pretext to introduce a few innovations.

S. MORRISON, *THE AMERICAN REVOLUTION 1764-1788* 223-24 (1923) (from a report to the King dated October 10, 1786).

<sup>105</sup> See P. SMITH, *supra* note 103, at 96-97.

<sup>106</sup> These qualifications impressed the Federalist John Marshall to the extent that he recalled them over 30 years later:

But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states.

*Barron v. Baltimore*, 32 U.S. 243, 250 (1833).

<sup>107</sup> The issue was felt so intensely in James Madison's district that it almost defeated him in his attempt to secure a seat in the new House of Representatives. See P. SMITH, *supra* note 103, at 166.

<sup>108</sup> In its early days, the legitimacy of the new constitution was suspect. "As historian J. T. Main has shown, a shift of twenty-four delegate votes would have meant defeat in eight states rather than victory in eleven." H. WASSERMAN, *AMERICA BORN AND REBORN* 54 (1983).

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.<sup>109</sup>

This first amendment largely resulted from a fear of centralized power. The people of the new nation were determined to insure that the new national government would not be used as "gilded chains [by] masqued aristocracy."<sup>110</sup>

The fears of skeptical Americans were not without grounds. Towards the end of the Adams administration, the Federalist Party became deeply concerned that it would lose power in the next presidential election.<sup>111</sup> To help maintain control of the government, the Federalist Party succeeded in passing the Alien and Sedition Acts.<sup>112</sup> The Acts, among other things, made it illegal for any person to write, print, or publish:

any false, scandalous and malicious writing . . . against the government of the United States, or either house of the Congress, . . . or the President, . . . with intent to defame, . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States. . . .<sup>113</sup>

Jefferson's anti-Federalist Republicans<sup>114</sup> did not appeal to the courts to secure their first amendment rights.<sup>115</sup> Instead, they launched a political counter-offensive which included protests by the states of Virginia and Kentucky, claiming that Federalists' ac-

<sup>109</sup> This Article concerns itself with the first amendment's relationship with political mobilization. Therefore, the amendment's religion clause is not focused upon. However, given our observations concerning the role of religion as a tool of thought control, the extent to which the religion clause ties into the more explicitly political aspects of the first amendment should be appreciated. The class control aspect of religion continued into colonial America and played a major role during the Great Awakening which immediately preceded the outbreak of the American Revolution. See HOFSTADTER, *AMERICA AT 1750*, 204-05, 291-92 (1971). Thus, it is not difficult to read the first amendment's religion clause as a political liberation clause, instituting a freedom from state-sponsored religion which has a deleterious effect on free political activity.

<sup>110</sup> The rhetoric is from anti-Federalist pamphlets issued during the ratification campaign. See *THE ANTI-FEDERALIST*, *supra* note 102, at 17, 31.

<sup>111</sup> The next president was due to be inaugurated on March 3, 1801, the expiration date of the Alien and Sedition Acts. 1 Stat. 596 (July 14, 1798).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Jefferson's followers ultimately formed the Democratic Party of today. They originally used the name "Republican" to suggest that their Federalist opponents were closet monarchy men. G. TINDALL, *supra* note 31, at 293-96.

<sup>115</sup> This was due in part to the fact that the courts were crammed with Federalist politicians. Indeed, Federalist judges refused to allow defendants to challenge the Acts' constitutionality. A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION* 136 (1983).



tions were unconstitutional.<sup>116</sup> Notwithstanding the passage of the Alien and Sedition Acts, the Republicans won the 1800 elections. Jefferson repudiated the Federalists' abandonment of first amendment principles by pardoning those who had been convicted under the Acts and refunding their fines.<sup>117</sup> Jefferson's partisans in Congress launched a purge designed to intimidate the Federalist federal judiciary which ultimately removed one district court judge and nearly impeached a Supreme Court Justice.<sup>118</sup>

### C. The Judicial Revolution of 1937

The "Judicial Revolution of 1937"<sup>119</sup> signalled a new receptiveness on the Court's part relating to New Deal legislation.<sup>120</sup> It represented the Court's increased willingness to permit government regulation of economic relationships which previously had been characterized as "private" and beyond the purview of

<sup>116</sup> G. TINDALL, *supra* note 31, at 313-14. In response to potential Federalist arguments that the Acts were quite within the traditions of the common law, the Republicans developed breakthroughs in first amendment theory which intimated current libertarian thought. For example, even though everyone agreed that there could be no prior restraint upon the press, the conservative position still maintained that a publisher could be prosecuted for publishing false information concerning the government after publication. The Republicans argued that, in an aroused political environment, truth and falsehood frequently became a function of subjective opinion and thus only injurious conduct should be subject to prosecution. L. LEVY, *supra* note 14, at 162-70.

<sup>117</sup> L. LEVY, *supra* note 14, at 162-70. Some of those convicted under the Act included one person who was heard to state that he wished the wad of a salute cannon would hit John Adams in his rear. Matthew Lyon, a Congressman from Vermont, was also convicted. G. TINDALL, *supra* note 31, at 313.

<sup>118</sup> John Pickering, more guilty of drunkenness than "high crimes and misdemeanors" was the first victim of the Republican campaign. The case against Supreme Court Justice Samuel Chase was more dubious and weighty. His "crimes" consisted of purging Democrats from juries and expounding his political prejudices from the bench. Efforts to remove him from the Court failed, undercutting the momentum of the Republican offensive. See G. TINDALL, *supra* note 31, at 326; see also R. ELLIS, *THE JEFFERSONIAN CRISIS* (1971). The next time that Congress would pass anything resembling these Acts would be in the hysteria encouraged by Wilson during World War I. Wilson encouraged smears against opponents of his foreign policy. This attitude culminated in the Espionage Acts of 1917 under which "it became a felony punishable by twenty years imprisonment to say anything that might 'postpone for a single moment,' as one federal judge put it, 'an American victory in the struggle for democracy.'" W. KARP, *THE POLITICS OF WAR* 228-35, 326-31 (1979). For examples of backsliding on the part of Jefferson himself, see L. LEVY, *supra* note 14, at 171-92. Apparently, paranoia that the revolution of one's youth is being betrayed, is not restricted to leaders like Castro and Mao.

<sup>119</sup> This term refers to the famous turnabout exercised by the United States Supreme Court during 1937. The initial shift occurred when the Court decided *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). This case overruled *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), which had disallowed state establishment of minimum wage laws. Yet, only the year before, the Court invalidated another minimum wage enactment in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (*Morehead* was overruled by *Olsen v. Nebraska* 313 U.S. 36 (1947)).

<sup>120</sup> See, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

government regulation.<sup>121</sup>

Equally important as the Court's shift in these areas were the modifications that the Court instituted in first amendment law. The first few years of the revolution all but transformed first amendment jurisprudence. Before the revolution, the Court accorded the government broad discretion in restricting first amendment activity. For example, in *Davis v. Massachusetts*,<sup>122</sup> the Court sustained the conviction of a reverend who had the temerity to preach on the Boston Commons without a permit from the government.<sup>123</sup> The Reverend argued that the Commons belonged to the people and that the permit system granted government officials the power to censor at their discretion.<sup>124</sup> However, the 1897 Court preferred the reasoning of Oliver Wendell Holmes, who had sustained Davis' conviction while sitting at the head of the Massachusetts Supreme Judicial Court:

For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.<sup>125</sup>

Beginning in 1937, *Davis* and its progeny were overruled. Within a few years, the Court radically redefined the areas in which potential first amendment actors might engage in expressive and associative activity. For example, union picketing was held to be protected speech under the first amendment, and therefore, could not be prohibited by the states.<sup>126</sup> In addition, the excesses of anti-communist legislation were brought under some control when the Court refused to sustain convictions for merely attending a political meet-

<sup>121</sup> See *supra* note 119.

<sup>122</sup> 167 U.S. 43 (1897). Perhaps it is no coincidence that during this period, the Court also rendered some infamous decisions. See e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896), (*Plessy* was overruled in *Brown v. Board of Education*, 347 U.S. 483 (1954) (state-sponsored segregation sanctioned)); *Pollock v. Farmers' Loan and Trust Co.*, 158 U.S. 601 (1895) (income tax invalidated despite precedent to the contrary); *In re Debs*, 158 U.S. 564 (1895) (commerce clause used to justify imprisonment of strike leader); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (Court did not find any antitrust violation). *Davis* serves as an example of a Rightist judicial offensive, which aligned the sanction of law behind large agglomerations of corporate power.

<sup>123</sup> *Davis*, 167 U.S. at 48.

<sup>124</sup> *Id.* at 46, 48. See *infra* text accompanying notes 129-32. These arguments would be commonplace after the 1937 revolution.

<sup>125</sup> *Davis*, 167 U.S. at 47. *Davis*' holding is consistent with most cases decided after it and before the 1937 revolution. The Court's decision accorded great deference to governmental efforts to stifle freedom of expression. See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925); *Gilbert v. Minnesota*, 254 U.S. 325 (1920).

<sup>126</sup> *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Senn v. Tile Layers Protective Union*, 301 U.S. 468 (1937).



ing<sup>127</sup> or engaging in organizing without inciting violence.<sup>128</sup>

The system of censorship through the use of discretionary permits upheld in *Davis* was abrogated in a number of areas after 1937. In 1938, the right to distribute pamphlets and literature was vindicated<sup>129</sup> and, in 1939, the Court prevented a township from disguising its censorship attempts through an anti-litter provision.<sup>130</sup> That same year, in *Hague v. CIO*,<sup>131</sup> the Court upheld the right to meet in public parks. In addition to all but overruling *Davis*,<sup>132</sup> the Court noted that public fora like parks, sidewalks and streets, enjoyed a sacrosanct status.

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.<sup>133</sup>

Rights of free speech and association were extended further when the Court abrogated obstructive permit requirements for the solicitation of funds by religious groups and charities.<sup>134</sup> While the Court upheld the right of a jurisdiction to require a license for the sale of books,<sup>135</sup> it invalidated similar requirements in the case of religious tracts.<sup>136</sup> In 1943, Justice Black explained the politics behind the Court's extension of first amendment status to doorknocking:

<sup>127</sup> *DeJonge v. Oregon*, 299 U.S. 353 (1937).

<sup>128</sup> *Herdon v. Lowry*, 301 U.S. 242 (1937).

<sup>129</sup> *Lovell v. Griffin*, 303 U.S. 444 (1938).

<sup>130</sup> *Schneider v. Irvington*, 308 U.S. 147 (1939).

<sup>131</sup> 307 U.S. 496 (1939).

<sup>132</sup> In contrast to the *Hague* ordinance which deals only with "the exercise of the right of speech and assembly," *id.* at 515, the *Davis* ordinance could be read to prohibit some activities "not in the nature of civil rights." The *Hague* majority thus avoided flat repudiation of *Davis*, although one dissenting opinion argued that in principle, both ordinances were the same. *Id.* at 533 (Butter, J., dissenting).

<sup>133</sup> *Id.* at 515-16.

<sup>134</sup> *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>135</sup> *Jones v. Opelika*, 316 U.S. 584 (1942).

<sup>136</sup> *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support. . . . Door to door distribution of circulars is essential to the poorly financed causes of little people.<sup>137</sup>

Thus, the Court granted protection to a prime means of lower class mobilization.

In 1945, the Court reaffirmed the right to meet in public without a permit.<sup>138</sup> In 1946, the Court rejected private property arguments used to block the distribution of religious literature.<sup>139</sup> Without these obstructions, the ability of the lower class to meet, organize, and mobilize were again enhanced.

On a broader basis, the course of these later decisions has been set out in *Palko v. Connecticut*<sup>140</sup> and *United States v. Carolene Prods.*<sup>141</sup> *Palko* has been credited with instituting the "nationalization" of the Bill of Rights.<sup>142</sup> *Carolene Prods.* signalled a new sensitivity to the maintenance of democratic rights:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth . . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national . . . or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.<sup>143</sup>

<sup>137</sup> *Martin v. Struthers*, 319 U.S. 141, 146 (1943) (emphasis added).

<sup>138</sup> *Thomas v. Collins*, 323 U.S. 516 (1945).

<sup>139</sup> *Marsh v. Alabama*, 326 U.S. 501 (1946).

<sup>140</sup> 302 U.S. 319 (1937) (*Palko* was overruled in *Duncan v. Louisiana*, 391 U.S. 145 (1968)).

<sup>141</sup> 304 U.S. 144 (1938).

<sup>142</sup> See THE AMERICAN CONSTITUTION, *supra* note 115, at 536.

<sup>143</sup> 304 U.S. at 152-53 n.4 (citations omitted). It should be noted that Jefferson and Madison, the premier advocates of the Bill of Rights, would have approved of footnote four. They felt that the main point of the Bill of Rights would be to hand the judiciary with a "legal check" on legislative excesses. See L. LEVY, *supra* note 14, at 118.



Thus, the Court suggested that those laws which constricted the political rights of the disenfranchised would be subject to strict scrutiny.

After 1937, the direction of first amendment jurisprudence was redefined. The first amendment decisions of the otherwise innovative Warren Court seem relatively tame in comparison.<sup>144</sup> This is partly because two previously conservative justices, Justices Roberts and Hughes, changed their votes. Moreover, other conservative justices (Butler, McReynolds, Van Devanter, and Sutherland) were replaced by Franklin D. Roosevelt appointments.<sup>145</sup> This particular explanation reflects a broader historical situation and it is consistent with the theory that when political situations change, changes in the law follow. Indeed, this was conceded by Justice Owen Roberts who explained his critical and pivotal 1937 shift:

Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy . . . . An insistence by the Court on holding federal power to what seemed its appropriate orbit when the constitution was adopted might have resulted in even more radical changes in our dual structure than those which have been gradually accomplished through the extension of the limited jurisdiction conferred on the federal government.<sup>146</sup>

Justice Roberts recognized that if the Court did not concede to the people's demands, the people would satisfy their demands themselves. This was clear not only because the people were voting for Roosevelt and his supporters in Congress, but also because the people were taking over cities,<sup>147</sup> sitting in factories,<sup>148</sup> marching on state capitols,<sup>149</sup> killing lawyers,<sup>150</sup> flogging judges,<sup>151</sup> and rallying

<sup>144</sup> See *Dennis v. United States*, 341 U.S. 494 (1951) (convictions of Communist party members upheld even though they were not charged with overt acts designed to overthrow the government). In other cases, the first amendment decisions merely pursued principles established shortly after the 1937 revolution. See *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969). Perhaps the Warren Court's most striking innovations occurred in *NAACP v. Alabama*, 357 U.S. 449 (1958) (right to associate) and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (protection of the press). In one sense, these cases might be viewed as additional extensions of the principles announced in the *Carolene Prods.* footnote. See *supra* note 143.

<sup>145</sup> See A. MASON, *THE SUPREME COURT, FROM TAFT TO WARREN* 74-128 (1968).

<sup>146</sup> O. ROBERTS, *THE COURT AND THE CONSTITUTION* 61-62 (1951).

<sup>147</sup> These included general strikes in Minneapolis, San Francisco and Toledo. L. BERNSTEIN, *THE TURBULENT YEARS* 217-317 (1970); F. PIVEN & R. CLOWARD, *POOR PEOPLE'S MOVEMENTS* 41-180 (1979).

<sup>148</sup> The most famous of these sit-ins occurred at Ford Motor Company. See *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

<sup>149</sup> R. CARO, *LYNDON JOHNSON: THE PATH TO POWER* 248-49 (1982).

<sup>150</sup> *Id.*

around "radical" figures such as Huey Long and Father Coughlin.<sup>152</sup> The people's new aggressiveness was precipitated and encouraged by the Depression.<sup>153</sup> The disenfranchised, made desperate by the economic devastation of the Depression, organized themselves into mobs, unions, movements, and parties.<sup>154</sup> Those who had ruled America for more than a generation witnessed the disintegration of the traditional socio-economic order and suffered an unprecedented crisis of confidence.<sup>155</sup>

The justices that Roosevelt appointed represented the new political realities in their affirmative attempts to respect, acknowledge, channel, and contain the new forces.<sup>156</sup> They insured that first amendment rights would be construed to encourage the New Deal constituency to organize and mobilize within "legitimate" means.<sup>157</sup> Yet, the justices also countered the more forceful expressions of popular political power.<sup>158</sup> As appointees of Roosevelt, the "New Deal" justices were presumably interested in securing the long term success of New Deal measures.<sup>159</sup> One way to have ac-

<sup>151</sup> *Id.*

<sup>152</sup> Huey Long was Governor and then Senator of Louisiana until his assassination in 1935. That year, the Democratic National Committee commissioned a secret poll which suggested that Long might garner six million votes in the 1936 presidential election. Father Coughlin was a Catholic priest who gained a national following through radio broadcasts. Both Long and Coughlin made issues of the unequal distribution of wealth during the Depression. Roosevelt's turn to the left in his Second New Deal measures of 1935 can easily be viewed as attempts to regain the support that Coughlin and Long were attracting. See generally A. BRINKLEY, *VOICES OF PROTEST* (1982).

<sup>153</sup> See *supra* notes 147-52.

<sup>154</sup> Deprivation is a key factor in mobilizing people. T. GURR, *WHY MEN REBEL* (1970).

<sup>155</sup> This manifested itself in a number of ways such as Justice Roberts' reluctant swing vote and President Roosevelt's reluctant support of Social Security in the face of Long's "Share Our Wealth" proposals. See *supra* notes 146, 152.

<sup>156</sup> See *supra* notes 147-55 and accompanying text.

<sup>157</sup> See *supra* notes 126-42 and accompanying text.

<sup>158</sup> *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252 (1939) (labor's highly effective "sit-down" tactic, a forcible seizure of an employer's factory by employees, declared illegal). For some of the political implications of this decision, see Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 322-25 (1977).

<sup>159</sup> Of the nine men President Roosevelt appointed to the Court, all but two had been New Deal supporters. Justice Black had backed President Roosevelt's court packing plans in the Senate. Justice Reed, as Solicitor General, had argued New Deal legislation before the "old" Court. Justice Frankfurter was a White House adviser. Justice Douglas served as head of President Roosevelt's Securities and Exchange Commission and wrote some of his speeches. Justice Murphy had worked for President Roosevelt in 1932 and 1936 and had supported him when he, Murphy, was Mayor of Detroit and Governor of Michigan. Justice Byrnes was a "political and personal ally" of President Roosevelt. Justice Jackson had supported President Roosevelt from his political base in upstate New York in 1932. As for the other two, Justice Stone was promoted to the Chief Justice post from an Associate Justice's chair, having been initially appointed by Coolidge. Justice Rutledge spent most of his career teaching law, or serving as a judge. H. ABRAHAM, *JUSTICES AND PRESIDENTS* 200, 204, 206, 210, 212, 214, 218, 221-22, 225 (1985); B.



complished this would have been to secure popular support for the New Deal by insuring that those "naturally" inclined to support the New Deal would not be discouraged from doing so.<sup>160</sup> Ultimately, the first amendment innovations of the New Deal Court might be explained as ways of bolstering the New Deal constituency. While the decisions of the New Deal Court maintained order, they also protected the political activities of the groups which constituted the New Deal's electoral strength.<sup>161</sup>

Whether the justices' reasoning was so explicit and calculating is questionable. While most of them were well versed in politics,<sup>162</sup> their sense of constitutional propriety probably influenced their decisions to a certain extent.<sup>163</sup> Although a rational argument could have been made for sustaining the status quo as represented by *Davis*,<sup>164</sup> equally rational arguments could have been made to support the new order promulgated by cases such as *Hague*.<sup>165</sup> The New Deal justices seemingly decided that the rationality of *Hague* and its progeny was more compelling than *Davis* and its progeny.<sup>166</sup> Unsurprisingly, they expressed their choices in the rhetoric of constitutional idealism rather than the language of partisan politics. Those choices make sense when we acknowledge the cold political implications underlying those decisions. *Davis* gave way to *Hague* because

MURPHY, BRANDEIS FRANKFURTER CONNECTION 99-102, 189-90, 204-205, 261, 303, 320 (1982).

<sup>160</sup> That is, the unions in particular and the "little people" in general. It is this constituency of the "little people" that the New Deal Court had to encourage and protect if the new order of the New Deal was to be secured.

<sup>161</sup> A more Marxist way of describing this phenomenon is to note that the New Deal Court encouraged the transformation of the working class-in-itself into a working class-for-itself. Again, Marx' point is that political power goes to groups that enjoy the capacities of self-organization. See *supra* note 7. With the various decisions it rendered during the few years following 1937, the New Deal Court insured that the "little people" would enjoy an unprecedented array of options to promote such self-organization. See *supra* notes 119-43 and accompanying text. With such new options available to them, the lower classes in American society were able to develop some political power to counter the organizing power already enjoyed by the American ruling class, who owned most of the government and the media.

<sup>162</sup> Of FDR's appointments, only three had ever served as judges (Black, Murphy and Rutledge). Black and Byrnes had served as senators and Murphy had been governor of Michigan. Jackson had been active in politics in upstate New York and had been an early FDR ally. Douglas and Frankfurter were confidants to varying degrees and Douglas' name was raised as a potential vice presidential candidate in 1944 and a potential presidential candidate in 1948. Only three of FDR's appointments could be viewed as being politically inexperienced or politically untrustworthy from FDR's perspective. Reed was a governmental lawyer but argued New Deal cases as Solicitor General. Stone was a Republican corporate lawyer. Rutledge was a law professor. See *supra* note 159.

<sup>163</sup> See generally A. MASON, *supra* note 145, at 74-128.

<sup>164</sup> 167 U.S. 43 (1897).

<sup>165</sup> 307 U.S. 496 (1939).

<sup>166</sup> See *supra* notes 133, 137, 143.

of politics, whether those politics were ideally or cynically conceptualized.

#### IV. DIAGNOSIS AND PROGNOSIS

Since politics is the key to understanding past developments in first amendment law, it may help explain present and future developments in first amendment law. Recent changes in the nation's political configurations may help explain this paradigm. The extent to which both the Left and Right have been organizing and mobilizing themselves is essential to understanding first amendment law.

##### A. The Politics

While the Right has been assiduously consolidating its position, the Left has been dropping opportunities with great profligacy. One commentator<sup>167</sup> has noted that, in the early 1970's, Watergate, Vietnam, and the revelation of corporate corruption at home<sup>168</sup> and abroad,<sup>169</sup> provided the Left with strong opportunities for self-consolidation and mobilization. The Democratic Party found itself with majorities in Congress that approached the clear majorities enjoyed by the Left during the glory days of the New Deal and the Great Society.<sup>170</sup> However, the new and temporary Democratic majorities did little to take advantage of this opportunity. In part, this was because the Democratic Party's constituency was from both the middle and lower classes which frequently meant that the aspirations of the latter would be sacrificed to those of the former.<sup>171</sup> Whatever the political bases of the Democratic Party were, it did nothing significant to help its lower class constituents.<sup>172</sup> In the face of growing corporate dis-

<sup>167</sup> T. Edsall, a Capitol Hill reporter since the 1970's, first began focusing on these processes when he noticed the beginnings of a shift from liberal Great Society programs to more conservative Reaganesque approaches in 1978—two years before the Reagan election. See T. EDSALL, *THE NEW POLITICS OF INEQUALITY* 16-17 (1984).

<sup>168</sup> During the 1972 presidential campaign, corporations like Gulf, ITT, and American Airlines gave millions of dollars in illegal contributions to the Nixon campaign. H. ZINN, *THE TWENTIETH CENTURY: A PEOPLE'S HISTORY* 242 (1984).

<sup>169</sup> A number of multinational corporations based in the United States were involved in the bribing of foreign officials and ITT was involved in the overthrow of the democratically-elected Allende regime in Chile. T. EDSALL, *supra* note 167, at 64.

<sup>170</sup> In 1936, the Democratic majorities in the House and Senate were 328-107 and 77-19 respectively. In 1964, the Democratic majorities were 295-140 and 68-32. In 1974, the Democratic majorities in the House and Senate were 291-144 and 62-38. G. TINDALL, *supra* note 31, at 1085, 1280; T. EDSALL, *supra* note 167, at 36.

<sup>171</sup> See T. EDSALL, *supra* note 167, at 25-32.

<sup>172</sup> See *id.* at 65-66.



regard of the National Labor Relations Act,<sup>173</sup> the Democrats failed to pass new legislation to help unions organize and expand the Democratic base.

Despite the ostensible self-interest in franchise expansion, the Democratic Party also failed to enact electoral reforms that could have encouraged a greater number of lower class citizens to vote.<sup>174</sup> Instead, both within and without the Party, the Democrats instituted "reforms" that encouraged states to adopt the primary as the premier means for sending delegates to national presidential conventions.<sup>175</sup> Since the affluent tend to vote more in primaries than the less affluent, the primary system tends to generate Democratic candidates who will *not* appeal to a lower class constituency.<sup>176</sup>

Since the 1970's, any successful primary campaign has come to depend heavily on television. Given its costs, television helps candidates with money to become even more powerful in the primary process.<sup>177</sup> Additionally, television further undercuts the ability of the Democrats to cultivate a lower class base because it curtails the ability of candidates to tailor their messages to the heterogeneous groups that make up the lower class constituency.<sup>178</sup>

<sup>173</sup> Presumably, the purpose of the NLRA is to implement the "declared policy of the United States" and encourage collective bargaining between workers and management. 29 U.S.C. § 151 (1935). Yet between 1970 and 1980, union representation elections in the United States increased by only 5.4%. By contrast, corporate illegalities (as measured by NLRB remedial actions) grew according to the following percentages: workers reinstated, 216%; back pay awards, 128%; amount of money awarded in back pay awards, 1052%; filings of unfair labor practices, 130%. See T. EDSALL, *supra* note 167, at 151-52.

<sup>174</sup> T. EDSALL, *supra* note 167, at 32-38. By contrast, some ten years earlier, President John Kennedy had the sense to make voter registration a major component of his civil rights strategy. Federal and private funds were used to encourage blacks to register to vote, thereby benefitting blacks and presumably, the Democratic Party. J. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* 121-22 (1978); A. LEWIS, *PORTRAIT OF A DECADE* 126 (1964); H. RAINES, *MY SOUL IS RESTED* 227 (1983).

<sup>175</sup> T. EDSALL, *supra* note 167, at 52.

<sup>176</sup> *Id.* at 52-54.

<sup>177</sup> *Id.* at 96.

<sup>178</sup> One of the greatest advantages to the Republican coalition has been the way in which television undermines the traditional political strategy of the Democratic party, a strategy of central importance to the Democrats since the formation of the New Deal coalition: the forging of a collection of minorities into an election-day majority. This kind of political strategy requires a candidate to direct campaign activities toward very different, and often conflicting groups: blacks, conservative white southerners, environmentalists, Jews, the elderly, working women, the poor, courthouse politicians, . . . blue-collar homeowners seeking to control crime, and civil libertarians. Television campaigning directed specifically to any of these groups is difficult, since what is directed toward one group may be seen by all . . . This universality of access to what have been traditionally sheltered if "hidden" communications makes every political message a poten-

Outside the party, the Democrats have further severed their ties to the lower classes with the reputation of patronage. Patronage, of course, insures the existence of electoral workers who will bring out the votes of those who might not otherwise participate in elections. By abandoning patronage, the Democrats have repudiated their "party glue" along with "increased working-class voter participation in elections."<sup>179</sup>

The most apparent reform instituted by the Democrats during the 1970's was the Federal Election Campaign Act of 1974.<sup>180</sup> The Political Action Committees (PACs)<sup>181</sup> spawned by this law and its interpretation have all but formalized the de facto power of money in American elections given the extent to which they encourage and legitimate the inflow of special interest money.<sup>182</sup>

While these various "reforms" have undercut the capacities of a lower class constituency to organize and mobilize, they have also abetted the national elite in its attempt to recover from the debacles it experienced during the early 1970's.<sup>183</sup> The Republican Party "has become increasingly representative of the well-to-do"<sup>184</sup> and thus has established a marked fund-raising advantage over the Democrats.<sup>185</sup> The overwhelming role of money in the high technology politics of the 1980's cannot be overstated:

[T]he political process, as far as the parties are concerned, is dominated by television and technology, which in turn means that the process is dominated by money. Money buys not only television and radio time but polls, newspaper clipping services, consultants, campaign managers, computers, computer

tial political liability. Unlike pre-television campaigning, when a politician could move from union hall to black church to nursing home to City Hall and adjust the content of his remarks to the group of the moment, television permits no such campaign targeting. For example, an attempt to appeal specifically to union members is likely to alienate as many votes among small-business owners and consumers worried about the wage-price spiral as it gains among card-carrying steel and auto workers. Television precludes the kind of campaign that emerges out of a collection of appeals to the various elements of the Democratic constituency, forcing, instead, a style of presentation appealing to an undifferentiated viewing audience.

*Id.* at 94-95.

<sup>179</sup> *Id.* at 196-98.

<sup>180</sup> 2 U.S.C. §§ 431-55 (1974).

<sup>181</sup> The PAC has become the legal conduit for campaign contributions under the Act. 2 U.S.C. § 421(c)(4).

<sup>182</sup> T. EDSALL, *supra* note 167, at 130-38.

<sup>183</sup> See *supra* notes 168-69.

<sup>184</sup> T. EDSALL, *supra* note 167, at 72.

<sup>185</sup> Tolchin, *Record Spending in Congressional Campaign Had Mixed Results At Polls*, N.Y. Times, Nov. 7, 1986, at A18, col. 1. The GOP has a 5 to 1 fund-raising advantage over the Democrats. *Id.*



lists, computerized mailings, the production of radio and television commercials, and the services of fundraisers to get more money.<sup>186</sup>

Generally, business has not solely relied upon the Republicans to advance its interests. "During the 1970s, business refined its ability to act as a class, submerging competitive instincts in favor of joint, co-operative action in the legislative arena."<sup>187</sup> In part, this action by business involved the conscientious revival of the United States Chamber of Commerce under the leadership of Lewis Powell and Bryce Harlow.<sup>188</sup> It also involved a major investment in advertising which was designed to influence people as "citizens" rather than as consumers.<sup>189</sup> Additionally, business' actions involved the establishment of a broad array of business PACs whose "pattern of contributions function[ed] to maintain working relations with incumbent members of both parties, while, in competitive election contests, financing the more conservative of the two parties, the GOP."<sup>190</sup>

The successes enjoyed by the Republican Party are not only a function of the Democrats' inability or unwillingness to implement a consistent class-based perspective. The Republican party benefits from an attempt by the nation's elite to consolidate its power at the expense of the less affluent. Such is not only suggested by the actions of Lewis Powell, corporate advertisers, and business PACs, but is also indicated by comments made in a series of management conferences held during the mid-1970s.<sup>191</sup> For example, "[a] representative democracy has never worked in the history of the world and we are seeing that here."<sup>192</sup> "We are in serious trouble. We need

<sup>186</sup> T. EDSALL, *supra* note 167, at 92-93. Although the 1986 elections did show some victories for outspoken Democrats, the impact of money was generally acknowledged. Senator George J. Mitchell, Chairman of the Democratic Senatorial Campaign Committee, observed that, "[m]oney is not the only factor in American politics, but it's a very important factor." Fred Wertheimer, President of Common Cause, noted that, "[m]oney never guarantees winning, but having money makes a big difference." Additionally, Kirk O'Donnell, president of the Center for National Policy, a political research institute and a Democratic strategist contended, "that the Republicans' money advantage discouraged a number of potentially strong Democratic candidates from running for Senate in New York, Oregon, Kansas, and Indiana." Tolchin, *supra* note 185.

<sup>187</sup> T. EDSALL, *supra* note 167, at 128.

<sup>188</sup> Lewis Powell was subsequently appointed to the United States Supreme Court. *Id.* at 123.

<sup>189</sup> Such expenditures are now approximately one-third of their tax-deductible corporate advertising dollars. F. PIVEN & R. CLOWARD, *THE NEW CLASS WAR* 9 (1982).

<sup>190</sup> T. EDSALL, *supra* note 167, at 134.

<sup>191</sup> These involved meetings of the Conference Board, a major corporate forum. See L. SILK & D. VOGEL, *ETHICS AND PROFITS: THE CRISIS OF CONFIDENCE IN AMERICAN BUSINESS* (1976); S. BOWLES, D. GORDON & T. WEISSKOPF, *BEYOND THE WASTE LAND* 256 (1983); F. PIVEN & R. CLOWARD, *supra* note 189, at 122-23.

<sup>192</sup> L. SILK & D. VOGEL, *supra* note 191, at 189.

to question the system itself: one man, one vote."<sup>193</sup> Thus, since 1970, while the Right has been recovering, consolidating and enhancing its power through self-organization and mobilization, the Left has undercut its power.

### B. *The Law*

The political developments of the past fifteen years manifested themselves in the pronouncements of the Burger Court. That Court rendered decisions which assisted the Right in consolidating and enhancing its positions of privilege and power. For example, the Burger Court was careful to ensure that the rich and powerful had the most say in determining the types of messages reaching the American public at the most critical sites of information reception.<sup>194</sup> Newspaper owners were found not to be obligated to provide their readership with alternative viewpoints.<sup>195</sup> Likewise the rights of electronic media owners, while not as absolute, were comparably extended.<sup>196</sup> In the workplace, the right of the employer to control discourse was similarly ratified.<sup>197</sup> The Court also held that there is no first amendment right of access to a shopping mall when those rights are unrelated to the mall's operations.<sup>198</sup>

While the rights of corporate entities such as unions were constricted,<sup>199</sup> the rights of business corporations and other

<sup>193</sup> *Id.* at 75. Journalists Silk and Vogel concluded that, "[f]or an executive, democracy in America is working all too well—that is the problem." *Id.* at 43.

<sup>194</sup> Americans spend most of their time at home, work, and shopping malls, in that order. J. NAISBITT, *MEGATRENDS* 45 (1982). "[M]all culture now dominates the nation's urban[,] social and commercial life . . . [S]hopping centers . . . currently produce more than one-half of the nation's annual retail sales, and serve as the homogenized community centers for beauty contests, art, boat, and auto shows, and local craft fairs." Louv, *AMERICA* II 45 (1985).

<sup>195</sup> *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (state cannot require newspaper to provide equal space to political candidate who wishes to respond to criticisms). *Cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (state can prohibit gender-based newspaper advertising).

<sup>196</sup> *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (broadcasters not required to accept paid editorial ads).

<sup>197</sup> *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180 (1978) (state trespass laws held applicable to union picketing on company property).

<sup>198</sup> *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (state courts might establish state "first amendment" rights of access which have and have not been exercised); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). See, e.g., *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed*, 455 U.S. 100 (1980); *State v. Felmet*, 302 N.C. 173, 273 S.E.2d 708 (1981). The Burger Court overruled a Warren Court decision which had at least allowed participants in a labor dispute to picket in a shopping center. *Hudgens v. NLRB*, 424 U.S. 507 (1976), *overruling*, *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.* 391 U.S. 308 (1968).

<sup>199</sup> *Bill Johnson's Restaurant, Inc. v. NLRB*, 461 U.S. 731 (1983) (company allowed to use state courts to suppress union statements through libel actions when reasonable);



wealthy "personages" were enhanced.<sup>200</sup> The Court affirmed the right of corporations to first amendment free speech.<sup>201</sup> Similarly, it denied the right of the states to influence propaganda which publicly regulated utilities might enclose in their mailings.<sup>202</sup> Additionally, the Court restricted Congress' means of controlling inordinate amounts of spending in election campaigns.<sup>203</sup>

While the Court preserved and enhanced the first amendment rights of the affluent, it was equally zealous in undercutting the capacities of Justice Black's "little people" to communicate, organize and mobilize.<sup>204</sup> In addition to denying "little people" access to significant public fora such as newspapers, television programs, work sites and shopping malls, the Court held that common grounds at state fairs can be placed out of bounds for certain proselytizers.<sup>205</sup> Even telephone poles were denied the status of free speech sites.<sup>206</sup> The crowning irony is that "private" mailboxes were also held to be off limits to the leafletting citizen.<sup>207</sup> Equally significant is the fact that the Burger Court ratified governmental and anti-union efforts to undermine the fund raising capacities of Leftist organizations.<sup>208</sup>

The Burger Court ensured that significant first amendment options will be the prerogative of those who have the power to purchase them. Those who bemoan their lack of resources—

First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) (companies not required to bargain with labor union over decisions to shut down portions of business).

<sup>200</sup> While state power in the labor relations field was upheld when companies wanted to use it against unions, it was denied when states tried to employ it against companies. Wisconsin Dep't of Indus. v. Gould, Inc., 475 U.S. 282 (1986) (state precluded from refusing to do business with repeat violators of the NLRA).

<sup>201</sup> First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (corporations allowed to spend money to influence the vote on referendum proposals).

<sup>202</sup> Pacific Gas & Elec. v. Public Util. Comm'n, 475 U.S. 1 (1986) (state utility commission prohibited from ordering utility to afford space to alternative viewpoints in its monthly mailings).

<sup>203</sup> Federal Election Comm'n v. National Conservative PAC, 470 U.S. 480 (1985) (Congress cannot limit expenditures of independent political action committees); Buckley v. Valeo, 424 U.S. 1 (1976) (Congress cannot limit campaign expenditures by parties independent of a political campaign).

<sup>204</sup> See *supra* text accompanying note 137.

<sup>205</sup> Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (state allowed to restrict solicitors to particular sites on public fairgrounds).

<sup>206</sup> City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) (city may regulate access to public property like utility poles).

<sup>207</sup> United States Postal Serv. v. Greenburgh Civic Ass'n, 453 U.S. 114 (1981) (U.S. Post Office may restrict general access to letter boxes).

<sup>208</sup> Chicago Teachers Union Local No. 1 v. Hudson, 475 U.S. 292 (1986) (unions required to provide detailed accounting and explanations to justify agency fees charged to non-union members); Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985) (government allowed to restrict participation of groups in nonpublic government-sponsored charity drive aimed at federal employees).

communicative, political, economic, or otherwise—find their powerlessness intensified.<sup>209</sup>

## V. CONCLUSION

Based upon the foregoing analysis, one may conclude that the development and expansion of first amendment freedoms will be limited in the immediate future. There is little to suggest that the present trends will not continue. On the Right, the rich grow richer and their organizations stronger.<sup>210</sup> The Burger Court happily conceded all but exclusive rights to the exercise of free speech.<sup>211</sup> On the Left, the resources of the poor grow poorer. Its capacity to organize was also constricted by the Burger Court.<sup>212</sup> It is not clear whether the Rehnquist Court will follow or reverse the trends set in motion by the Burger Court.

Historical trends are subject to reversal by the vagaries of history. Crises such as political scandals,<sup>213</sup> economic problems,<sup>214</sup> and foreign policy disasters<sup>215</sup> create momentum shifts from Right to Left. Such incidents tend to shatter the resolve of the Right while they simultaneously inspire grassroots mobilization on the Left.<sup>216</sup> From when and where the crisis will come is speculative. The Reagan experience suggests that with the help of the Burger Court, the Right has learned to weather scandals.<sup>217</sup> Part of the Burger Court's intention was to enhance

<sup>209</sup> Admittedly, the Burger Court did sanction some first amendment rights of access to the sidewalks and doorbells of America. *United States v. Grace*, 461 U.S. 171 (1983) (public sidewalks); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (door-to-door appeal for charitable funds). However, these cases are generally in keeping with precedents established in cases like *Hague v. CIO*, 307 U.S. 496 (1939) (first amendment right to distribute printed matter and hold public meetings in the street without a permit) and *Lovell v. Griffin*, 303 U.S. 444 (1938) (first amendment right to distribute pamphlets and leaflets without a permit). In more recent cases, the Burger Court has tended to take the conservative fork. See *supra* notes 202, 205-07. Additionally, it should be noted that in cases like *Hudgens* where working class mobilization is directly at stake, the conservative majority has not hesitated to repudiate precedent.

<sup>210</sup> See *supra* notes 185, 190.

<sup>211</sup> See *supra* notes 195-98.

<sup>212</sup> *Id.*

<sup>213</sup> The Watergate scandal sustained the Democratic majorities in both the House and Senate. See *supra* note 170.

<sup>214</sup> The Great Depression of 1929 enhanced the Democratic majorities in both the House and Senate. See *supra* note 170.

<sup>215</sup> During the Vietnam era, peace candidates discouraged Lyndon Johnson from pursuing an additional presidential term. While Nixon ultimately won the White House, the radicalizing and mobilizing effects that the Vietnam experience had on the youth in America was undeniable. M. VORST, *FIRE IN THE STREETS* 383-549 (1979). The impact in France was even more dramatic where American failures in Vietnam inspired students to challenge and nearly topple the Gaullist system. D. SINGER, *PRELUDE TO REVOLUTION* 61-62 (1970).

<sup>216</sup> See *supra* notes 147-54, 215.

<sup>217</sup> Under the "political scandals" category, there is the Reagan "sleaze factor." A



the capacity of the Right to survive such eruptions. It remains to be seen what events, if any, will occur to change the political equilibrium and thus the direction of the Supreme Court.

number of Reagan associates were accused of dubious financially related transactions. For example, Labor Secretary Raymond Donovan (mob payments), CIA Director William Casey (failing to disclose various assets and foreign clients in government disclosure form), Attorney General William French Smith (acceptance of unusually large severance from steel company and questionable tax write-offs), National Security Advisor Richard Allen (payments from Japanese journalists). L. BARRETT, GAMBLING WITH HISTORY 455-66 (1983).

Under the "economic problems" category, the American economy experienced a recession in 1982 which was particularly hard on welfare recipients and the working poor. *Id.* at 413-14.

Under the "foreign policy disasters" category, there was Lebanon. In 1983, Reagan justified the presence of American troops in Lebanon by characterizing Lebanon as critical to American interests. When terrorists killed a large number of them, Reagan withdrew in what historian Arthur Schlesinger called an "indefensible fiasco." A. SCHLESINGER, JR., THE CYCLES OF AMERICAN HISTORY 294 (1986). The historical implications of the Iran-Contra Scandal remains to be seen.

## LAW, DECONSTRUCTION AND RESISTANCE: THE CRITICAL STANCES OF DERRIDA AND FOUCAULT

DANIEL WILLIAMS\*

### I. INTRODUCTION

Derrida and Foucault currently stand for two powerful modes of criticism, and their power has not gone unrecognized among critical legal scholars.<sup>1</sup> This Article disentangles these two modes of criticism or critical stances. By doing so, one may begin "to think about law in a way that will allow one to enter into it, to criticize it without utterly rejecting it, and to manipulate it without self-abandonment to *their* [the liberal legalist culture's] system of thinking and doing."<sup>2</sup> The critical stances of Derrida and Foucault are two ways of not abandoning one's "system of thinking and doing," but of operating powerfully from within the very premises of liberal legality, of lifting out of legal texts the submerged metaphorical aspects of legal reasoning and legal legitimation.<sup>3</sup> Ultimately, and if approached gingerly, the critical stances discussed here can empower one to gain control over legal discourse so as to realize its transformative possibilities. One direction such empowerment may take us is towards showing that the world is constituted of competing visions of social life; that the established order, with its own metaphor of free market initiative, is no less utopian than other more radical visions.

\* B.A. (Econ.) University of California at Berkeley, 1983; J.D. Harvard University, 1986. The Author would like to acknowledge the invaluable assistance and guidance of the members of the Legal Theory Seminar at Harvard. In particular, the critical comments of Professor Gerald Frug, Professor Duncan Kennedy and Ben Gibson were especially helpful. Of course, the Author assumes full responsibility for the content of this Article.

<sup>1</sup> See, e.g., Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987); Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985).

This Article follows the lead of Tiefenbrun, *Legal Semiotics*, 5 CARDOZO ARTS & ENT. L.J. 89 (1986). Whereas Tiefenbrun engages in an exegesis of wide-ranging topics within semiology and the philosophy of language, this Article is confined to a detailed account of two exponents of post-structuralist thought. See *infra* notes 4-10 and accompanying text.

<sup>2</sup> Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 40, 50 (D. Kairys ed. 1982) (emphasis in original).

<sup>3</sup> For an example of this type of critique, see Peller, *supra* note 1.