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The United States Supreme Court and the Freedom of Expression

ELISABETH ZOLLER*

Despite its long history of over two centuries, the Supreme Court did not take an interest in freedom of expression until 1919. It was not until after Congress enacted the Espionage Act in 1917[1]—which punished those who hindered the war effort—that the Court provided an initial interpretation of the First Amendment to the Constitution, which states that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Justice Oliver Wendell Holmes, in his opinion for the Court regarding the criminal conviction of Charles T. Schenck, Secretary of the Socialist Party, for having published and distributed leaflets calling citizens to resist and to refuse to enroll in the draft (at the time the draft was purely voluntary), declared:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[2]

Judging that in circumstances of this kind, the requisite danger was present, the Court validated Schenck's heavy prison sentence.[3]

Today it is agreed that Schenck's statements would attract no attention and that, even if they managed to stir a few sensibilities, Schenck would be protected by the very amendment that did not protect him nearly a century ago. At the end of a jurisprudential voyage that occupied the entire previous century, the First Amendment has become the symbol of freedom of expression. The story is peculiar because the text does not speak of "freedom of expression," but rather speaks of "freedom of speech" and "freedom of the press." At the time of the First Amendment's adoption in 1791, these terms were interpreted as conveying an absolute immunity for remarks made in the confines of Congress and a prohibition of censorship. These interpretations reflected the standard British usage of the terms "freedom of speech" and "freedom of

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1. Espionage Act of 1917, ch. 30, § 3, 40 Stat. 217, 219 (repealed 1948).
2. Schenck v. United States, 249 U.S. 47, 52 (1919) (citation omitted).
3. *Id.* ("[M]any things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight.").

press" during that time period.[4] However, it is likely that they also indicated more than that—particularly citizens' rights to speak freely about political issues.[5] Freedom of speech and freedom of the press are so united in American culture today that, in practice, the Court makes almost no distinction between the two.

Justice Brandeis suggested the more modern term "freedom of expression" in 1921 in a case related to graduated postal charges applicable to publications,[6] and Justice Black reiterated it in a case involving the right to strike.[7] The term definitively entered the Court's jurisprudence in 1941 in order to limit the particularly drastic effects of the common law rule of "contempt of court," which prohibited all commentary on trials in progress.[8] We owe the term "freedom of expression" to John Stuart Mill, whose essay *On Liberty* demonstrated that "freedom of opinion" and "freedom of the expression of opinion" contributed to the well-being of humanity.[9] Today the phrase "freedom of expression" is frequently used in Supreme Court opinions, often in relation to freedom of association,[10] but the Court seems to prefer the terminology "freedom of speech" over that of "freedom of expression," probably because it is the exact language of the Constitution. In any event, whichever term is employed, "freedom of speech," "freedom of expression," and "freedom of the press" are always treated equally because, according to the Court, "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[11] What the Court says about freedom of speech is also valid for freedom of the press, and vice versa.[12]

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4. Freedom of speech and freedom of the press constituted the two great achievements of the Glorious Revolution, which completely changed the English political system at the end of the seventeenth century. Freedom of speech in Parliament—and also during trials questioning Parliament's debates or proceedings—was consecrated in the Bill of Rights in 1689: "[T]he freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M. (Eng.), *available at* http://avalon.law.yale.edu/17th_century/england.asp. Freedom of the press resulted, as Blackstone explained, from the absence of all prior censorship. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 119–20 (Wayne Morrison ed., Cavendish Publ'g 2001) (1769). It was consecrated by Lord Mansfield in 1784 in *The King v. Dean of St. Asaph*, (1784) 100 Eng. Rep. 657 (K.B.). *See* ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 247–48 (10th ed., MacMillan 1961) (1885).

5. This question has been debated among historians. *See, e.g.*, DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870–1920, at 6 (1997); Leonard W. Levy, *Liberty and the First Amendment: 1790–1800*, 68 AM. HIST. REV. 22, 28–30 (1962).

6. United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 431 (1921) (Brandeis, J., dissenting).

7. Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 303 (1941) (Black, J., dissenting).

8. Bridges v. California, 314 U.S. 252, 262 (1941).

9. JOHN STUART MILL, ON LIBERTY 50 (David Spitz ed., W.W. Norton 1975) (1859). For an illustrious antecedent to Mill's essay, see JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND (1644).

10. *See, e.g.*, McConnell v. Fed. Election Comm'n, 540 U.S. 93, 121 (2003).

11. First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978).

12. The important division on the subject of the First Amendment is not between freedom

The exceptionally extensive freedom of expression concept that reigns in the United States today is essentially the work of the Supreme Court. It is thanks to the Court that the right to speak one's mind has been progressively imposed as one of the fundamental values of American society.[13] The right encompasses the right to dissent and the right to disagree.[14] These encompassed rights also are connected to the right to safety because they support an assurance that one will not be bothered for one's statements, even if the recipient is not in agreement or believes himself to be hurt or insulted.[15] By virtue of the fact that it has been made entirely by judges, the right to

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of speech and freedom of the press, but between expression over the airwaves (radio or television) and other forms of expression. Since the airwaves are a limited resource, expression over the airwaves is subject to certain constraints that are not required for other forms of expression. For example, the audio-visual press is obligated to obtain prior authorization in the form of a license, which is an infringement of the "no prior restraint" rule. *See infra* Part II.B.1. Likewise, unlike the written press, which is not obligated to allow the right to respond, *see* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974), the audio-visual press is subject to the double obligation of the "fairness doctrine." *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969). *Red Lion* requires, on the one hand, notification of the support that it decides to give to a particular candidate in order to give his or her adversaries the possibility to respond (political editorial rule), and on the other hand, giving the right to respond to a political candidate on whom it casts doubt (personal attack rule). Despite several appeals, the Court has always refused to extend these principles to cable airwaves, Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622 (1994), or to new technologies, such as the Internet. The only obligation that the Court has permitted Congress to impose on cable providers is the requirement to offer local television stations access to the network (must carry rule), Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180 (1997). On several occasions, the Court has emphasized that its refusal was motivated by the need to reject all restrictions that concern, or that would have consequences on, the content of expression in order to preserve only neutral restrictions. *See* LYRISSA BARNETT LIDSKY & R. GEORGE WRIGHT, FREEDOM OF THE PRESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 9–13 (2004).

13. The very old expression "to speak their minds" was used, for example, by Justice Clarence Thomas in a recent case. Morse v. Frederick, 127 S. Ct. 2618, 2633 (2007) (Thomas, J., concurring).

14. *See, e.g.*, STEVEN SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 86–109 (1990); Steven Shiffrin, *The First Amendment and the Meaning of America*, *in* IDENTITIES, POLITICS, AND RIGHTS 307 (Austin Sarat & Thomas R. Kearns eds., 1995).

15. The liberal philosophy inspiring a broad interpretation of freedom of expression was reiterated by the European Court of Human Rights in *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976). The European Court explained that a democratic society is one that can withstand all expression and welcome all information and all ideas, including "those that offend, shock or disturb the State or any sector of the population," to which it added, "[s]uch are the demands of . . . pluralism, tolerance and broadmindedness." *Id.* at 23.

Many scholarly works have evaluated the American experiment compared to the European experiments (Germany, France, and the European Court of Human Rights). *See, e.g.*, PIERRE-FRANÇOIS DOCQUIR, VARIABLES ET VARIATIONS DE LA LIBERTÉ D'EXPRESSION EN EUROPE ET AUX ÉTATS-UNIS (2007); LAURENT PECH, LA LIBERTÉ D'EXPRESSION ET SA LIMITATION (2003); Laurent Pech, *Le marché des idées une métaphore américaine*, *in* ALAIN KIYINDOU & MICHEL MATHIEN, ÉVOLUTION DE L'ÉCONOMIE LIBÉRALE ET LIBERTÉ D'EXPRESSION 59–77 (2007).

The Venice Commission of the Council of Europe organized a colloquium in the series "Science and Technique of Democracy" that addresses freedom of expression in Europe and the United States. *See, e.g.*, Roger Errera, *Freedom of Speech in Europe*, *in* EUROPEAN AND US CONSTITUTIONALISM 23 (Georg Nolte ed., 2005); Frederick Schauer, *Freedom of Expression*

freedom of expression in the United States is a pure product of the common law method.[16] It is thus a difficult, complex, and technical right—one that has even been compared to the Internal Revenue Code in its technicality.[17] However it is also an engaging right and, in a larger sense, an excellent field of observation in which to uncover the extraordinary work by which, decision by decision, the Court has deconstructed and reconstructed the law in order to respond to the needs of society. Indeed, the Court has performed a veritable *tour de force* considering the difference between the initial right to the freedom of expression and what it is today. Stone after stone, case after case, the Court demolished the old common law institutions that bound freedom of expression in order to reconstruct the law on new and more liberal foundations.

I. THE DECONSTRUCTION OF THE OLD LAW

There are essentially two reasons that can explain, as mentioned earlier, why the Supreme Court did not take an interest in freedom of expression until 1919. The first is connected to the fact that the few laws or resolutions that Congress was able to pass in violation of the First Amendment were either never brought before the Court[18] or, on the rare occasions that they were, the Court did not find them incompatible with freedom of speech or of the press.[19] The second, more fundamental reason is that in the legal system of the United States, freedom of expression concerns criminal law (calling for rebellion or defamation) or civil law (calumny, libel, or slander), which are areas within the jurisdiction of the states.[20] Yet, to the extent that criminal law and civil law

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Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture, *in* EUROPEAN AND US CONSTITUTIONALISM 49 (Georg Nolte ed., 2005).

16. *See* David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 33 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

17. DANIEL A. FARBER, THE FIRST AMENDMENT 15 (2d ed. 2003). Beyond the right's complexity, the Supreme Court's jurisprudence on freedom of expression is extensive in scale. The jurisprudence is so considerable that the first-year course in Constitutional Law is no longer sufficient for a complete analysis, and the majority of law schools offer an optional course on the First Amendment that covers the major freedoms of thought enshrined in it: freedom of religion, freedom of expression, freedom of the press, freedom of assembly, and freedom of association.

18. Such was the case with the 1798 law on sedition which punished with criminal sanctions anyone who, by his statements, discredited the federal government, and again in the so-called Gag Rule Resolution adopted by the House of Representatives in 1840, which prohibited representatives from debating the countless anti-slavery petitions it had received by making the prohibition a permanent rule of parliamentary procedure. *See* CHARLES C. HAYNES, SAM CHALTAIN & SUSAN M. GLISSON, FIRST FREEDOMS: A DOCUMENTARY HISTORY OF FIRST AMENDMENT RIGHTS IN AMERICA 50–53, 77–81 (2006).

19. Such was the case with the Comstock Law of March 3, 1873, named for its author, Anthony Comstock, that aimed to prohibit the circulation of all immoral or obscene publications in interstate commerce and postal transport. Comstock Law, ch. 258, 17 Stat. 598 (1873); *see* JAMES MAGEE, FREEDOM OF EXPRESSION 95–119 (2002).

20. One will note that in this country there is no public law, properly speaking, in the sense that French law understands it (i.e., a law of the *res publica*). *See* ELISABETH ZOLLER, INTRODUCTION TO PUBLIC LAW: A COMPARATIVE STUDY 3–4, 270–71 (2008). In the United States, there is one law only, which constantly mixes the State and society, the public and

are still areas of common law, freedom of expression in the United States begins with and ends in common law.

In common law, freedom of expression is a residual freedom;[21] that is to say, it is a freedom that only exists insofar as it does not conflict with other laws—the laws of the elected assemblies as well as the judges' decisions. Common law is not very "welcoming" to freedom of expression. Certainly, it is a recognized freedom (for the simple reason that in common law, anything that is not forbidden is allowed), but Blackstone, in his *Commentaries on the Laws of England*, emphasized that expression exposes its author to sanctions each time that it contains a bad tendency with respect to morals or to the law, and each time that it hides a pernicious tendency for public peace.[22] The sanctions are sometimes civil and sometimes criminal—the distinction is based on the nature of the wrong caused, either private or public. It is the severity of the bad tendency that determines the crime or the offense, depending on whether it tends to cause harm to others (calumny, libel, or slander), to disturb the peace and public order (sedition or defamation), or to attack morals (obscenity) or religion (blasphemy). On the principal question of who assesses the bad tendency of statements, the response in common law is simple: it is a jury, a group of persons chosen from the body of ordinary citizens. In other words, freedom of expression goes only so far as the prejudices of public opinion.[23] In 1872, Justice Bradley gave an accurate assessment of what freedom of expression could be in the United States in the nineteenth century when he evoked the adoption of the Fourteenth Amendment as a way of remedying the "intolerance of free speech and free discussion."[24]

The Supreme Court revolutionized the traditional approach by making freedom of expression a "fundamental" right. This terminology appeared for the first time in the *Gitlow v. New York* decision, which made the First Amendment freedoms of speech and of the press "fundamental" personal rights that the states could not oppose.[25] It is restated in the *Lovell v. City of Griffin* decision: "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress,

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private. *Id.* at 166–67. The result is that the public agent's freedom of expression does not fall under a special law as it does in France, and the cases pertaining to it are judged as a last resort in the civil courts (except, of course, for criminal infractions). In French law, public agents' freedom of expression is not expected to be different depending on whether the expression is related to their public functions or not. *See infra* note 47 and accompanying text.

21. ERIC BARENDT, FREEDOM OF SPEECH 40 (2d ed. 2005).

22. 4 BLACKSTONE, *supra* note 4, at 118–20.

23. The observations of Dicey on the status of freedom of expression in English law at the end of the nineteenth century could have applied *mutatis mutandis* to the United States. The decisive factor in England, as in the United States, was the fundamental role of the jury in the definition of the limits on freedom of expression. An English judge acknowledged it in these terms in a 1799 decision:

> The truth of the matter is very simple when stripped of all ornaments of speech, and a man of plain common sense may easily understand it. It is neither more nor less than this: that a man may publish anything which twelve of his countrymen think is not blamable, but that he ought to be punished if he publishes that which is blamable [*i.e.* that which twelve of his countrymen think is blamable]. This in plain common sense is the substance of all that has been said on the matter.

DICEY, *supra* note 4, at 246 n.1 (quoting Rex v. Cutbill, 27 St. Tr. 642, 675 (1799)).

24. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 123 (1872) (Bradley, J., dissenting).

25. 268 U.S. 652, 666 (1925).

are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by State action."[26] What does the adjective "fundamental" signify? The Court gave a response a year later when—commenting on the elevation of freedom of expression to the rank of a "fundamental right"—it declared: "The phrase is not an empty one and was not lightly used. . . . It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties."[27]

By saying that it considered the freedom of expression to be a fundamental right, the Court signaled to the judicial community that, from then on, it would protect this right with the same care that it protected the other common law rights—those rights mentioned in the Fourteenth Amendment (the right to life, liberty, and above all, the right of property). After a twelve-year delay, the Court agreed with Justice Brandeis's 1927 concurring opinion in *Whitney v. California*, in which he stated: "The power of the courts to strike down an offending law is no less when the interests involved are not property rights."[28] Even after the New Deal crisis, in which the Court lost its power to protect property or contractual freedom with its former zeal, the Court made no mystery of its refusal to apply the minimum control to freedoms of thought that it had imposed in economic matters:

> [A] public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.[29]

In this way, armed with techniques of maximum control, the Court was able to deconstruct the old common law institutions that hindered and bound freedom of expression. Its action concerned two essential points: the rights of public authority and the offenses of common law.

A. The Orientation of the Rights of Public Authority

The life source of all of the rights in a common law system is the right to property, and the idea of the right of public authority in such a system—in short, the rights of the State—is an almost medieval concept. The State (or the government, we make no

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26. 303 U.S. 444, 450 (1938).

27. Schneider v. New Jersey, 308 U.S. 147, 161 (1939).

28. 274 U.S. 357, 374 (1927) (Brandeis, J., concurring).

29. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1944). The opinion of the Court was written by Justice Robert H. Jackson—a "New Dealer" completely vested in the politics of President Roosevelt—who had already said in his work dedicated to the New Deal crisis that the presumption of constitutionality (which was thereafter attributed to all the laws that come before the Court) could not be applied to freedoms of thought: "The presumption of validity which attach[es] in general to legislative acts is frankly reversed in the case of interference with free speech and free assembly, and for a perfectly cogent reason." ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWERS POLITICS 285 (1941). The contemporary American doctrine put into question the dualism of judicial control with regards to freedoms of thought and economic freedoms. *See* Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 950–51 (1995).

distinction) is the proprietor of its domain, or of its space if one prefers, in the same way that a private person is the proprietor of his land. The State dominates its domain completely and, on that account, commands its property, including those who work for the State, in the manner best conforming to its interests. The control that the State exercises over its domain is such that nothing is easier for the State than to suppress all freedom of speech—either by refusing to allow its property to support freedom of expression or by requiring the silence and fidelity owed to a lord and master of its public employees. In the span of three decades, the Supreme Court has shattered this antediluvian system with, on one hand, the public forum doctrine and, on the other hand, the advent of the rights of the public employee as a citizen.

1. Public Forum Doctrine

Traditionally, applying the secular principles of common law, the State and all public persons in the United States were more powerful property owners than others, in a manner of speaking. There was not (and there still is not) a distinction between the public and private domain, and even less of a notion of a domain allocated for public use. The public authority thus, in principle, has the power to exclude others, which is considered to be the quintessence of the right to property. This dated system is illustrated in the case *Commonwealth v. Davis*,[30] a case decided by the Massachusetts Supreme Court. Davis, a preacher, had been sentenced for spreading his beliefs in the commons of Boston without a permit from the mayor, as required by a city law. The court (by the voice of Justice Holmes, who had not yet joined the United States Supreme Court) upheld his conviction on the grounds that "[f]or 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."[31] The promotion of freedom of expression to the rank of a fundamental right would radically change this approach.

The decision in *Hague v. Committee for Industrial Organization*[32] was a decisive turn in which the Court had to determine the constitutionality of an ordinance that prohibited any meeting in a public thoroughfare without a permit from the mayor. Without a majority of Justices behind him, Justice Roberts, who delivered the judgment of the Court, rejected the doctrine of the *Davis* decision. In a short paragraph that later would have a considerable influence on constructing the public forum doctrine, he declared:

> 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

30. 39 N.E. 113 (Mass. 1895), *aff'd*, 167 U.S. 43 (1897).
31. *Id.*
32. 307 U.S. 496 (1939).

> 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.[33]

The confirmation of a right to freedom of expression in streets and public parks did not, however, engender a general right to freedom of expression in the public forum. The dictum in *Hague* concerning those areas of the public forum that are neither streets nor public parks did not reach as far as it might have. The old principles of the common law held firm to preserve the absolute and unconditional right of public authority to exclude from its domain those entering without permission. Thus, the Court upheld the convictions of students who assembled at the entrance of a prison to express their support for prisoners who had been incarcerated for fighting in favor of civil rights on the grounds that the entrance to a prison was not a traditional public thoroughfare.[34] Likewise, the sidewalk adjacent to a post office was not considered a public thoroughfare because it was solely a means of access between the post office and the parking lot.[35] The same can be said for an airport terminal; it is not a public forum, and the airport authority has full latitude to forbid soliciting and religious proselytizing.[36]

One of the most controversial points of the public forum doctrine is that it does not apply to large spaces that are frequented by the public but are privately owned.[37] Such is the case for a considerable number of private properties in the United States, as well as for certain urban development corporations that become owners of large areas (even suburbs) following urban renewal projects,[38] or for private corporations that build large malls. The Court refused to regard the Federal Constitution as requiring these vast properties to be part of the public forum; the freedom of expression can thus be severely restricted in these places, even when it concerns employees in a collective labor dispute using a picket line and signs.[39] However, the states can fill in this gap. For example, California's constitution has been expressly interpreted to permit citizens to enjoy the right to freedom of expression in malls.[40] The Supreme Court considered this right to be perfectly in compliance with the Federal Constitution and rejected the request of the mall owner who tried to prevent high school students from putting up a booth to collect signatures opposing a United Nation's resolution equating Zionism with racism.[41]

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33. *Id.* at 515–16.

34. Adderley v. Florida, 385 U.S. 39, 43–48 (1966).

35. United States v. Kokinda, 497 U.S. 720, 726–28 (1990).

36. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679–85 (1992).

37. *See* Patrick Morvan, *A Comparaison of the the Freedom of Speech of Workers in French and American Law*, 84 IND. L.J.1015, 1025 (2009).

38. *But cf.* Marsh v. Alabama, 326 U.S. 501, 505–07 (1946) (holding that the mere fact that all the property interests in a town are held by a single company does not give that company the power, enforceable by a state statute, to abridge the freedom of press and freedom of religion).

39. The Court held the opposite in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), but this decision was reversed by *Hudgens v. NLRB*, 424 U.S. 507 (1976).

40. *See* Robins v. Pruneyard Shopping Ctr., 592 P.2d 341 (Cal. 1979).

41. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 85–88 (1980).

The public forum doctrine was established in 1983 in *Perry Education Association v. Perry Local Educators' Association.*[42] The Court in that case determined whether or not teachers' school mailboxes could be considered public property and a public forum so that an independent trade union—which was not recognized by the school, was not part of the collective labor agreement, and was opposed by the official union—could distribute literature to teachers in their mailboxes. The Court responded in the negative because the public right to access public property depends on the nature of the property. In substance, there are three sorts of public property: (1) streets and public parks; (2) public property that the public authority has chosen to open to the public for expression (such as the campus of a public university); and (3) public property that is not considered a forum for public communication either by tradition or designation (such as teachers' mailboxes, in this case).[43] The *Perry* decision shows that, despite its fundamental character, the right to freedom of expression has only partially modified the traditional principles of property as it is understood in common law, even when it is a question of public property.

2. The Advent of the Rights of the Public Employee as a Citizen

In the United States, nothing better illustrates the extraordinary dependency that subordinated the public employee to his superiors than the spoils system. Above all, the public servant had no freedom to speak regarding the person who appointed him unless he was offering praise. The consequences of this frame of mind were felt far beyond what we in France call *emplois à la discrétion du gouvernement.*[44] The public service as a whole—at least to the extent that this term is understood in the United States—suffered from it at both the state and federal levels. In *Pickering v. Board of Education*, the Supreme Court revolutionized this approach by holding that the public employee, though a public agent, remains no less a citizen.[45]

Marvin L. Pickering was a schoolteacher in an Illinois school district. Because the management of school finances is local in the United States, the Township Board of Education decided to propose a tax increase in order to create new schools. In numerous newspaper articles, the administration emphasized that the new expenses were essential in order to maintain the quality of the district's education system. Pickering responded by sending to the same paper a letter in which he explained that, far from going to education, a considerable portion of the funds went to sports. The letter was published and his employment was terminated. The Supreme Court judged the termination unfair on the grounds that

> [t]o the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the *First Amendment* rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work,

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42. 460 U.S. 37 (1983).

43. *Id.* at 44–46.

44. "*Emplois à la discrétion du gouvernement*" are positions that may be filled by reference to political affiliation or inclination. These positions are limited in number by law and require loyalty toward the government.

45. 391 U.S. 563, 574 (1968).

> it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. . . . The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[46]

The balance evoked by the Court—which is expressed concretely in French administrative law by the *obligation de réserve*[47]—has not yet been found in the United States. Many public employees view the *Pickering* decision as giving them carte blanche to speak about anything, particularly their personal problems with their superiors. The Court seems to have had difficulty conveying the reach of *Pickering* and clarifying the idea embodied in the concept of citizen-servant. The Court, however, came close to that idea when it held that *Pickering* does not give an Assistant District Attorney permission to campaign and raise a scandal within her public service to protest against a job transfer she did not like,[48] or similarly when it decided that *Pickering* does not authorize a public employee to consider an internal memo relevant to his work as protected by the First Amendment in such a way that the memo's content would elude the judgment of his superiors.[49]

In the absence of an authentic tradition of public law, the notion of a "matter of public interest" is not very clear in the United States. Ultimately—insofar that what the public speaks is public—the Court seems to struggle to find the right balance between the rights of the citizen-servant and the needs of public service. Employees from whom we expect a commitment to strengthened reserve, notably military personnel, have most suffered from this uncertain balance. Regarding this group, the Court has said—without much reflection—that they form "a specialized community governed by a separate discipline from that of a civilian,"[50] which deprives them as a whole of any right to freedom of expression.[51] Generally speaking, in the public service, the border between public and private—or rather between what is public and what is, and must remain, internal to the public service—is unstable.

B. Common Law Crimes and Offenses

At the end of the 1930s, when the Court classified freedom of expression as a fundamental right, state statutory law proscribed all manners of offenses and illegal acts. Inherited from common law, these laws were often made worse by the legislator

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46. *Id.* at 568 (emphasis added).

47. "*Obligation de réserve*" compels public servants to refrain from publicizing their personal/political comments upon matters internal to the public service.

48. Connick v. Myers, 461 U.S. 138, 144–47 (1983).

49. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

50. Parker v. Levy, 417 U.S. 733, 744 (1974) (internal quotation marks omitted) (quoting Orloff v. Willoughby, 345 U.S. 83, 94 (1953)).

51. *See* Elisabeth Zoller, *La Liberté d'Expression des Fonctionnaires en Uniforme aux Etats-Unis*, *in* LA LIBERTÉ D'EXPRESSION DES FONCTIONNAIRES EN UNIFORME 39, 39–49 (Roseline Letteron ed., 2000).

who muzzled freedom of expression by exposing the authors of biased statements or writings to heavy sanctions, either criminal (in cases of breach of the peace or seditious libel) or civil (in cases of defamation). Over the span of three decades, the Court has completely revolutionized these categories.

1. Breach of the Peace

At common law, any act that breached or was likely to breach the peace was a misdemeanor.[52] Breach of the peace was broadly understood to punish the smallest act, gesture, or idea that was likely to disturb the peace and safety that each citizen could legitimately expect. This old common law concept was general and undefined, and it was capable of applying to anything and everything. Any unauthorized march, protest, or demonstration, even purely peaceful demonstrations involving only a handful of individuals, could have been considered a crime. Even the most harmless of those who breached the peace risked prison sentences.

Due to the indefinite scope of this common law concept, the Jehovah's Witnesses encountered some of the worst difficulties in preaching their beliefs, because despite what they did, they were always guilty of breaching the peace. In *Cantwell v. Connecticut*, the Supreme Court completely redefined and narrowly construed the boundless concept.[53] Jesse Cantwell, a Jehovah's Witness, stopped pedestrians on public streets and offered to play them a recording that strongly criticized the practices of the Catholic Church. After listening, he suggested that they purchase a book explaining the merits of his sect.[54] Cantwell was arrested and convicted of inciting a breach of the peace.[55] The Supreme Court agreed to hear his appeal because his conviction was based on a "common law concept of the most general and undefined nature,"[56] which it redefined in the following terms:

> The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious. Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.[57]

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52. 3 MODERN AMERICAN LAW: A SYSTEMATIC AND COMPREHENSIVE COMMENTARY ON THE FUNDAMENTAL PRINCIPLES OF AMERICAN LAW AND PROCEDURE 79 (Eugene Allen Gilmore & William Charles Wermuth eds., 1914).

53. 310 U.S. 296 (1940).

54. *Id.* at 301.

55. *Id.* at 300.

56. *Id.* at 308.

57. *Id.*

The Court reversed his conviction, concluding that on the day of his arrest Cantwell had the right to be where he was and to impart his views to others; that his behavior was neither "noisy, truculent, overbearing, [nor] offensive"; and that he always asked the pedestrians if they wanted to hear the recording.[58]

In addition to public disturbance, the vast breach of the peace concept also imposed criminal sanctions for publicly uttering inappropriate or vulgar language and swearwords—called "improper language" in criminal law treatises.[59] The Supreme Court confronted this "breach of the peace" subcategory in *Chaplinsky v. New Hampshire*.[60] A fervent Jehovah's Witness was convicted for accusing a public official of being a "God damned racketeer" and calling the same official, along with the entire Rochester City Council, "a damned Fascist."[61] The Court affirmed Chaplinsky's conviction, but at the same time it reduced the potentially infinite category of *improper language* to the narrower category of "fighting words."[62] This typically American expression refers to words that, unless pronounced with a "disarming smile"—as stated by the lower court in the case—are so outrageous as to inspire violence by starting fights and riots.[63]

That said, outside the fighting words context, today one can say what one wants in the United States: one can express anger, even with shouts and insults, to the point of provoking an angry crowd;[64] march as a group around a city hall to protest against racial segregation;[65] call for black students to enter and sit down to eat in establishments refusing persons of color;[66] and shout on a street corner in Brooklyn that "[i]f [the government] let that happen to Meredith[, a black civil rights activist who had been assassinated], we don't need an American flag" and then burn the flag.[67] One can even demonstrate against the Vietnam War by wearing a jacket with "Fuck the Draft!" written on the back, and people with sensibilities (who used to be protected by the old law) can now protect themselves perfectly well, adds the Court somewhat mischievously, "simply by averting their eyes."[68]

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58. *Id.* at 308–09.

59. *See, e.g.*, 4 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW §§ 511–15 (15th ed. 1996).

60. 315 U.S. 568 (1942).

61. *Id.* at 569.

62. *Id.* at 572.

63. *Id.* at 573.

64. Terminiello v. Chicago, 337 U.S. 1 (1949).

65. Edwards v. South Carolina, 372 U.S. 229 (1963).

66. Cox v. Louisiana, 379 U.S. 559 (1965).

67. Street v. New York, 394 U.S. 576, 579 (1969).

68. Cohen v. California, 403 U.S. 15, 21 (1971). Involuntary recipients of expression whose morality would be offended by contraceptive advertising, Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977), or by commercial contraceptive mailings, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 70–73 (1983), do not have the right to protection by the public authority; it is up to them to protect themselves by not paying attention. An exception to this rule is the mailing of obscene publications. Rowan v. Post Office Dep't, 397 U.S. 728, 737 (1970).

2. Seditious Libel

A rudimentary form of seditious libel existed in a 1275 English law prohibiting stories and news of a nature inspiring discord between the King and his people.[69] By the seventeenth century, seditious libel was defined in England as "written censure upon any public man whatever for any conduct whatever, or upon any law or institution whatever."[70] Although trials for seditious libel were frequent in England, which effectively dissuaded and stifled the press, trials for seditious libel were relatively rare in the colonies.[71] The idea that one cannot criticize the government was not consistent with the democratic culture that had been established across the Atlantic. However, in 1798, the ideals of the French Revolution becoming too popular in the eyes of conservatives, Federalists in Congress passed the Sedition Act which forbade the editing, printing, or publishing of

> any false, scandalous, and malicious writing or writings against the government of the United States, or either house of Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or said President, 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.[72]

The Sedition Act's objective was to prevent a violent overthrow of the government, similar to the French Revolution. The Supreme Court never ruled on the constitutionality of the Sedition Act and the Act expired in 1801. After its expiration, President Thomas Jefferson, a Republican, pardoned everyone who had been convicted, and Congress even passed a law to reimburse the imposed fines.[73]

Fears of sedition were awakened following the First World War, the Bolshevik Revolution, and the success of Communist ideology. In 1918, Congress amended the Espionage Act to punish anyone whose statements or publications were disloyal, profane, scurrilous, abusive toward, or incited resistance against, the United States government or the Constitution.[74] Shortly thereafter, the states fell in line and adopted laws of a similar spirit in order to curb Revolutionary Unionism and combat Communism. The Supreme Court confirmed the convictions of militant Socialists and

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69. GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, CONSTITUTIONAL LAW 1050 (5th ed. 2005).

70. *Id.* at 1051 (quoting 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 350 (1883)).

71. The most well-known and oft-cited example is that of John Peter Zenger, a New York printer, who in 1735 was tried for criticizing the colony's governor in his weekly publication. Zenger's lawyers argued that the veracity of the facts absolved him, but the judge instructed the jury not to accept this argument. Rejecting the judge's instructions, the jury acquitted Zenger. The case attracted great attention; it established the rule that, in America, the truth of the facts was always reason for exoneration from the liability incurred for seditious defamation. *See* Levy, *supra* note 5, at 24.

72. An Act for the Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596 (1798) (expired 1801).

73. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

74. Espionage Act of 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219 (amended 1918).

Communists in accordance with these villainous laws, giving two Justices, Holmes and Brandeis, occasion to write opinions that are today among the most celebrated defenses of freedom of expression ever written.[75] Justice Holmes dissented in *Abrams v. United States* and stated that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[76] Several years later in *Whitney v. California*, Justice Brandeis would vigorously explain that the fundamental value attached to the freedom of expression required drawing a distinction between the exposition of certain ideas with the goal of rallying sympathizers (advocacy) and the provocation of immediate violent action.[77] This distinction was the first step toward a new concept of freedom of expression, which would only reach maturity in the second half of the twentieth century.

After the Second World War, proceedings against Communists, under the Smith Act of 1940, for crimes of sedition increased. The Smith Act prohibited the diffusion of any doctrine advocating violent overthrow of the government.[78] The Supreme Court refused to stop the suppression of opinion in the early 1950s, at the height of McCarthyist hysteria.[79] It was 1957 before the Court restricted the effects of the Smith Act by requiring authorities—in an extension of Justice Brandeis's distinction in *Whitney*—to distinguish between Communist advocacy and the incitement of illegal action. The Court indicated that while the suppression of the latter was constitutional, suppression of the former was not.[80] The distinction was reformulated and consecrated in the seminal decision of *Brandenburg v. Ohio*, which declared that only the suppression of incitement to imminent lawless action complied with the First Amendment.[81] Even if it remains potentially broader than the French notion of *rébellion*,[82] the incitement test has largely rendered harmless the old common law crime of seditious libel.

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75. *E.g.*, Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring); *Abrams*, 250 U.S. at 630.

76. 250 U.S. at 630.

77. *Whitney*, 274 U.S. at 375–76. The distinction was present in a rudimentary form in a fine opinion by Learned Hand, a federal judge of the Southern District Court of New York, in the case *Masses Publishing Co. v. Patten*, which questioned the interpretation of the Espionage Act of 1917. 244 F. 535 (S.D.N.Y. 1917). The judge limited the bad-tendency theory to only those writings that constituted a direct incitement to violate the law, or in other words, direct advocacy to resist the draft. *Id.* at 540. His reasoning remains of interest because he paved the way for the distinction between "advocacy" and "incitement" put forth by Justice Brandeis and later used by the Court to limit the suppression of Communists. *E.g.*, Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 720 (1975).

78. 18 U.S.C. § 2385 (2006).

79. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951).

80. Yates v. United States, 354 U.S. 298, 318 (1957); *see also* JEAN-PIERRE LASSALE, LA COUR SUPRÊME ET LE PROBLÈME COMMUNISTE AUX ÉTATS-UNIS 70–77 (1960).

81. 395 U.S. 444, 449 (1969).

82. C. PÉN art. 433-6 (defining *rébellion* as "opposing violent resistance to a person holding public authority").

3. Defamation

In common law, defamation was a strict liability tort.[83] Regardless of the intentions of the author of the supposedly defamatory remarks, if the published biased writings were tainted with the "bad tendency," of which Blackstone spoke, and harmed the reputation or the honor of a citizen by casting public disgrace on him, the author was subject to liability.[84] In common law, the essential purpose of a libel suit was not the protection of the rights of an individual's reputation or honor, but rather the need to prevent and eliminate the tendency of any defamatory remarks to disturb the peace.[85] The point was strongly emphasized by Sir Edward Coke in his famous report on libel for the Court of Star Chamber.[86] The English judge explained that defamation of a private person should be punished because it was likely to provoke revenge, which would in turn result in a breach of the peace, and that defamation of a public figure deserved to be punished even more, not only because it disturbed public order, but because it also cast doubt on the government, the guardian of public order. Defamation was punishable civilly as well as criminally.

Civil libel suits had particularly strong effects. The author of the supposedly defamatory statements was held responsible in the case of deliberate lies, as well as if his statements contained inaccurate facts, whether inadvertent or not.[87] The author was automatically accountable, unless he could prove the veracity of the reported facts or declare himself privileged to act in such a way (the privilege could be drawn from the rules guaranteeing the proper administration of justice or the orderly functioning of the elected assembly). The victim could prove injury, but did not need to do so insofar as the judge was entitled to assume the injury was suffered. Moreover, punitive damages could be inflicted according to criteria that varied depending on the state. As it was devised, the system had a severely dissuasive effect on the press. In theory, the press could say anything because there was no censorship; in practice, it dared say nothing because it knew that it risked pecuniary punishments that would likely drive a publisher into bankruptcy.

In one single decision—according to at least one scholar, "the best and most important it has ever produced in the realm of freedom of speech"[88]—the Court transformed from top to bottom the system inherited from the common law.

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83. 2 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS 3 (3d ed. 2006).

84. In common law, defamation can occur either by libel or by slander. The distinction between the two is that libel is of a permanent nature, while slander is temporary. *Cf. id.* at 92–94 (describing the historical view of libel as a spiritual harm and slander as a temporal one).

85. *Id.* at 92. This is why, even before the United Kingdom incorporated the European Convention on Human Rights, English freedom of expression law protected speech that contributed to a public interest. *See* YVONNE CRIPPS, THE LEGAL IMPLICATIONS OF DISCLOSURE IN THE PUBLIC INTEREST 233 (2d ed. 1994); Alan Boyle, *Freedom of Expression as a Public Interest in English Law*, 1982 PUB. L. 574, 576–79.

86. *See* 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 526–33 (Steve Sheppard ed., 2003), *available at* http://files.libertyfund.org/files/911/Coke_0462-01_EBk_v4.pdf.

87. HARPER ET AL., *supra* note 83, at 3–4.

88. Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the*

The case *New York Times Co. v. Sullivan* was born of a defamation suit brought by the chief of police of Montgomery, Alabama, against the prominent newspaper for the manner in which it reported his actions and those of his men during the race riots in his city.[89] The Supreme Court reversed the substantial punitive damages ($500,000) that Sullivan had been awarded by the lower court and found the Alabama law (which codified the common law) unconstitutional, because its dissuasive effect on the press curtailed the possibility of "uninhibited, robust, and wide-open"[90] debate on public issues. The Court noted that this debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[91] The Court leaned on a long national tradition valorizing democratic debate on questions of public interest and held it necessary to put in place

> a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[92]

This decision liberated the press from the self-censorship to which the prior law had condemned it. By allowing the press to speak of a public official without fear of retaliation, the Court permitted the press to maintain the role of "watchdog" it has had since the 1960s[93] and which the European Court embraced much later in the case *Goodwin v. United Kingdom*.[94]

Beyond public officials, the *New York Times* precedent was also extended to public figures.[95] In 1971, a plurality of the Supreme Court went so far as to attempt to extend the *New York Times* precedent to a "private individual['s] . . . involvement in an event of public or general interest."[96] However, three years later, in *Gertz v. Robert Welch, Inc.*, the Court moderated the effects of this extension by declaring that the private person could obtain damages for defamation without having to submit to the demanding "actual malice" standard of *New York Times*.[97] With these extensions of *New York Times*, defamation, as it was conceived under the prior common law, has

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First Amendment," 1964 SUP. CT. REV. 191, 194.

89. 376 U.S. 254, 256–58 (1964).

90. *Id.* at 270.

91. *Id.*

92. *Id.* 279–80.

93. The term "watchdog" was originally borrowed and applied to the press in the Reardon committee report set up by the American Bar Association in the aftermath of the conclusions of the Warren Commission on the assassination of President John F. Kennedy in 1963. Norman E. Isaacs, *Standards Relating to Fair Trial and Free Press*, 82 HARV. L. REV. 960, 961, 964 (1969) (book review). The Warren Commission worriedly pointed out that, if it had been necessary to judge Lee Oswald, himself assassinated by Jack Ruby after the President's murder, it would have been nearly impossible to assemble an impartial jury due to the media overexposure of the case. A special committee was thus created, presided over by Judge Reardon, to study the compatibility of free press with the requirements of fair trial. *Id.* at 961.

94. 1996-II Eur. Ct. H.R. 484, 500.

95. Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).

96. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971) (Brennan, J., plurality opinion), *abrogated by* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

97. 418 U.S. 323, 346–47 (1974).

been profoundly changed, although it has not disappeared. The traditional rules of defamation in common law protected private persons who were not public officials. However, the states can no longer impose systems of strict liability on the press for publications implicating private persons. Today, in order to obtain damages, a private person who feels he has been slandered must always prove the fault of the journalist. To be sure, it is only negligence—not the actual malice that a public person must demonstrate—but it is fault nonetheless, and it is no longer possible (as it previously was under the common law that considered only the "bad tendency" of the remarks) to obtain damages without proving negligence on the part of the journalist.

The only case in which defamation seems to still be a strict liability offense is that of group libel. Under the terms of the *Beauharnais v. Illinois* decision, the First Amendment does not prohibit the states from suppressing slanderous or degrading remarks against a group of persons.[98] A state may, for example, punish the author of remarks insulting racial groups (e.g., blacks) or religious groups (e.g., Jews or Muslims).[99] Indeed, the vestiges of *Beauharnais* have been debated in the literature, especially concerning the Nazi march in Skokie in 1970 (even though the example is only partially convincing, because the march planned by the American Nazi movement in the largely Jewish suburb of Chicago, inhabited mainly by the survivors of the Shoah, never took place, its organizers giving up after having obtained all the necessary authorizations).[100]

That said, group libel laws may still be constitutional in the United States for at least two reasons. First, *Beauharnais* was never overturned; second, defamation's function, as common law conceived of it, was first and foremost to protect public peace. If the standards for defamation have perhaps changed, the purpose has remained the same. Yet, if slanderous statements aimed at an entire group actually cause riots, then it is conceivable that group libel subsists in American law only to prevent this disruption of the peace. In concrete terms this means that, even after the revolution of *New York Times Co. v. Sullivan*, the First Amendment does not give one the right to declare that Blacks, as did the defendant in *Beauharnais*, are "rapist[s], robber[s], [and] carrier[s] of knives."[101] Certainly, the states have no obligation to legislate in order to suppress such statements, but the First Amendment does not prohibit them from doing so.

II. THE PRINCIPLES OF THE NEW LAW

From its previous status of residual freedom in common law, freedom of expression has become a fundamental freedom. In other words, freedom of expression is henceforth the rule, and its restriction the exception. Contrary to the prior law, which gave public authorities a responsibility to anticipate the "bad tendency" of oral and written statements, the fundamental character of the freedom of expression obligates them to pay no attention. Under the paradigm of a fundamental freedom, the common law was overturned and relegated to being the exception. Accordingly, now public

98. 343 U.S. 250, 266 (1952).
99. *See id.* at 263 & n.18.
100. *See* STONE ET AL., *supra* note 69, at 1123.
101. *Beauharnais*, 343 U.S. at 257.

authorities are justified in concerning themselves only tangentially with the events or acts related to the exercise of the freedom of expression.[102]

Now that the fundamental character of the right to freedom of expression has been established, it is necessary to assess its scope. Despite the two words "no law," which Justice Hugo Black liked to emphasize in order to give prominence to what he considered the absolute nature of the First Amendment,[103] the First Amendment does not forbid all regulation of expression. It prohibits only regulation abridging freedom of speech or of the press. Throughout its construction of the freedom of expression doctrine, the Court has concerned itself with the question of what kinds of regulation do not abridge the freedom of expression. Currently, the Court seems to have provided two responses. First, a regulation may abridge the freedom of expression if it is a neutral regulation—the obligation of absolute neutrality is the founding principle of the new law. Second, a regulation may not contain any *ex ante* restrictions.

A. Absolute Neutrality of Regulation

The first to have understood that the "fundamental" nature of the freedom of expression required the public authorities—the legislator, as well as the judge and the jury—to disregard the content of expression in order to concentrate only on its effects was Oliver Wendell Holmes. His famous "clear and present danger" test for evaluating the validity of crimes of sedition can be summarized as follows: to judge the truth of the crime, it is necessary to focus on the effects produced by the statements, and not their content.[104] Thus, it is not the content of statements that is important, but the consequences they produce, and these consequences vary according to the circumstances. Holmes emphasized, "[i]t is a question of proximity and degree. . . . Many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight."[105] Much time was necessary

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102. As the French deputy Charles Floquet said to the Chamber during a debate on the 1881 Freedom of the Press Act, when freedom of expression is considered a fundamental right, ideas or opinions—"the operations of the mind," said Floquet—are "untouchable." JEAN-PIERRE MACHELON, LA RÉPUBLIQUE CONTRE LES LIBERTÉS?: LES RESTRICTIONS AUX LIBERTÉS PUBLIQUES DE 1879 À 1914, at 427 (1976).

103. Colloquy, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 553 (1962).

104. Schenck v. United States, 249 U.S. 47, 52 (1919). Viewed from an historical perspective, Holmes's ideas were more advanced than those of Learned Hand, a federal judge on the Southern District Court of New York, who identified the crime of sedition by using a test touching the "content" of speech, namely—in a case like *Schenck*—the direct incitement not to answer the draft. Holmes's ideas eventually prevailed over those of Learned Hand in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which did away with the subjective criteria of the speech content, focused instead on its effects (i.e., "imminent lawless *action*"), and refused "to punish mere advocacy." *Id.* at 449 (emphasis added).

105. *Schenck*, 249 U.S. at 52. Holmes never wavered on this point; *see* Sheldon M. Novick, *The Unrevised Holmes and Freedom of Expression*, 1991 SUP. CT. REV. 303. *But see* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 198–211 (2004); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1332 (1983). Holmes's fundamental idea was always that one can only limit freedom of expression in order to prevent "clear and present danger," *Schenck*, 249 U.S. at 52, or "clear and imminent danger."

before the Court aligned itself with this prophetic vision. For a long time the Court accepted that the government could both regulate expression on the basis of mere potential and largely hypothetical danger as well as freely dissect the contents of a statement in an effort to predict the consequences that it might produce. It only gave up this approach upon the erosion of the categories of expression that prevailed in the common law. Gradually, another approach, characterized by the growing importance that the Court accorded to the categories of regulation, imposed itself.

1. The Erosion of Categories of Expression

Common law concerned itself with the content of expression; it punished lack of respect for the State (sedition), for God (blasphemy), for other individuals (defamation), and for morals (obscenity). In each case, the real consequences were of little importance. The decisive point was in the potential bad tendencies that the statements held for government, religion, social codes, or proper morals. After the judicial revolution that promoted the freedom of expression to the level of a fundamental freedom, these traditional modes of thought should have disappeared. This was not the case. The categories of expression were certainly emptied of their substance, as we have seen; however, the categories remain.[106] These classifications of the content of expression are essential to the understanding of this freedom in the United States. The responsibility of this tradition lies with the Court, which, while recognizing the necessity for objective criteria in the regulation of the freedom of expression, never abandoned the age-old classifications of expression according to content.

In principle, the moment freedom of expression became a fundamental right, the legislator no longer had a right to concern himself or herself with it. The expression, whatever it is—spoken, written, or symbolic—can no longer be prohibited in itself, but only according to objective, content-neutral criteria that takes into consideration the circumstances surrounding the expression. In *Cox v. New Hampshire*, the Court regrouped these objective criteria under the phrase: "considerations of time, place and manner."[107] However, at the same time that it imposed purely objective criteria on the

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Abrams v. United States, 250 U.S. 616, 627 (1918) (Holmes, J., dissenting). He supported the federal government in *Schenck*, because the country was at war; on the other hand, he opposed it in *Abrams*, because the United States was no longer at war and there was no "clear and present danger" that required the few Socialists who opposed the Russian Campaign to be stifled. His philosophy is that of the Enlightenment, the same one that inspired the French Revolutionaries. It is necessary to allow the free circulation of ideas and opinions, or rather "[t]he free communication of thoughts and opinions is one of the most precious of the rights of man," THE DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 11(1789) (Fr.), with the result that the government should concern itself only with the "abuse," real and imagined, that the expression is likely to engender.

106. *See generally* Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917 (2009).

107. 312 U.S. 569, 575 (1941). The phrase "considerations of time, place and manner" seems borrowed from the Federal Constitution, which provided that the election of representatives and senators be organized according to "times, places and manners" dictated by the legislature of each state. U.S. CONST. art. I, § 4, cl. 1. In 1932, the Court gave a very broad interpretation of the regulation of elections that can be undertaken by the states in the name of the objective criteria of times, places, and manners. *See* Smiley v. Holmes, 285 U.S. 355, 366

regulation of expression, the Court also confirmed the traditional subjective criteria related to the content of expression.

The *Chaplinsky v. New Hampshire* case is exemplary of the Court's attachment to the categorization of expression according to the common law subjective, content-based criteria.[108] In *Chaplinsky*, the Court concerned itself with a New Hampshire statute forbidding the use of "offensive, derisive or annoying word[s]" and "offensive or derisive name[s]" when directed at another person in public.[109] The Court justified the limits placed on freedom of expression by the New Hampshire legislature by explaining that:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words.[110]

A month later, the Court identified a fifth category, commercial speech.[111]

The classification of expression based on its content negates the idea that the freedom of expression is a fundamental right. It proved particularly difficult to implement when, upon the evolution of morals, the aforementioned categories began to crack and crumble away, one after another. First, one category of expression has never had a concrete existence: the profanation of the sacred, or blasphemy. This offense, which existed in common law, and seems to still partially exist in the United Kingdom,[112] does not exist in the United States. Since the nineteenth century, the Supreme Court has declared that "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[113]

The other categories of expression have not fared better and seem, at least in some cases, to have practically disappeared. This is notably the case for "fighting words"—those verbal provocations to violence. The Court has almost systematically reversed all of the convictions for insults, profanity, and every kind of slander against the government that abounded during both the battles against racial discrimination and the Vietnam War.[114] Consequently, it seems that this category is currently reduced to only threats to commit violence against a person, or to arouse immediate breach of the peace and public disturbance.

Another category currently being reduced, albeit to a lesser degree, is obscenity. Since the 1950s, obscenity has proved difficult to distinguish from eroticism[115] and, since the 1960s, pornography, adult film, and their lucrative businesses have reduced

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(1932).

108. 315 U.S. 568 (1942).

109. *Id.* at 569.

110. *Id.* at 571–72 (citation omitted).

111. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942).

112. BARENDT, *supra* note 21, at 260.

113. Watson v. Jones, 80 U.S. 679, 728 (1871).

114. *See e.g.*, Lewis v. City of New Orleans, 415 U.S. 130 (1974); Gooding v. Wilson, 405 U.S. 518 (1972); Mark C. Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.-C.L. L. REV. 1, 22–27 (1974).

115. *See* Roth v. United States, 354 U.S. 476, 495 (1957) (Warren, C.J., concurring).

the category by drastic proportions.[116] However, the Court is staying its course and does not yet want to completely renounce the idea that the law may suppress obscenity in itself, and not uniquely in relation to its context, such that, even in a strip club, nudity can be regulated.[117]

The category of defamatory statements has also been considerably narrowed following the *New York Times Co. v. Sullivan* decision, notably for public officials, public figures, and more generally, any person in whom the public has legitimate reason to be interested.[118] On the other hand, defamation continues to prohibit communicating lies concerning a purely private person.[119]

Finally, even the category of advertising (commercial expression) has been reduced by considerable proportions. In 1976, the Court removed advertising from the place of infamy it had occupied since 1942. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court recognized that publicity could be, in certain circumstances, a mode of expression protected by the First Amendment because:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[120]

After the *Central Hudson Gas v. Public Service Commission of New York*[121] decision, the old category of unprotected commercial speech today contains only advertising for illegal products and false advertising.

Ultimately, what is left of the five broad categories of expression that the Court defined in 1942 in order to separate protected and unprotected speech? In light of the aforementioned jurisprudence, one is tempted to respond casually, "not a whole lot." The Court has little by little emptied these categories of their substance. Flourishing during the 1950s, the categories of speech now resemble wilted flowers in the field of

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116. *See* Miller v. California, 413 U.S. 15, 27 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 70 (1973).

117. Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (plurality opinion) (validating a state law that required strip club dancers to wear pasties on their breasts and a G-string). Ten years later, the evolution is noticeable: a plurality of the Court upheld a similar statute, but only for the reason that erotic dancing has "negative secondary effects" unrelated to expression, such as increased rates of prostitution and crime in the neighborhoods near erotic dance establishments. City of Erie v. Pap's A.M., 529 U.S. 277, 290 (2000) (plurality opinion). Some conservative judges, who have not given up the idea that obscenity itself should be punished, bypass this construction. They justify the traditional solution of common law, which does not protect what it considers immoral, by explaining that obscenity (notably in the case of nude dancing) is not an expression (speech), but conduct, and that the First Amendment affords no protection to conduct. *E.g.*, *id.* at 307–08 (Scalia, J., concurring); *Barnes*, 501 U.S. at 572 (Scalia, J., dissenting).

118. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

119. *Gertz*, 418 U.S. 323.

120. 425 U.S. 748, 765 (1976).

121. 447 U.S. 557, 564–65 (1980).

the First Amendment. And yet they persist. First, there are judges who do not wish to abandon them.[122] Second, practically all of the doctrine remains faithful to them.[123]

When we examine the jurisprudence over the long term, it is clear that the Court is becoming interested less in the content of speech and more in the content of regulation.

2. The Importance of Categories of Regulation

The decision that marked a turn in the categorical approach was *Tinker v. Des Moines School District*, in which the Court recognized the right of two high school students to wear a black armband to school as a sign of protest against the Vietnam War.[124] The Court declared: "prohibition of a particular expression of opinion . . . must be . . . caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[125] If we wish to admit that the four categories of unprotected speech outlined in *Chaplinsky* have precisely the object of saving the public the embarrassment or the displeasure always caused by obscenity, profanity, defamation, and foul language, it is certain that the *Tinker* decision seriously wounded the *Chaplinsky* doctrine. Reduced to its most simple expression, it signifies that in order to remain within the limits of the First Amendment, the public authority must not seek to punish the content of expression; the regulation must be "neutral."[126] The Court conceived of the idea of neutrality of regulation a year earlier in *United States v. O'Brien*.[127]

On March 31, 1966, O'Brien and three of his comrades burned their draft cards on the steps of the South Boston Courthouse to protest against the draft (by lottery) that supplied the American troops fighting in Vietnam. Arrested by the FBI, he was sentenced by the U.S. District Court for the District of Massachusetts to six years of supervision and treatment. In his defense, he evoked his right to free speech. The case went before the Supreme Court, which rejected his appeal on the grounds that the

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122. *See, e.g.*, Morse v. Frederick, 127 S. Ct. 2618, 2630 (2007) (Thomas, J., concurring).

123. The American doctrine does not present freedom of expression as it is typically referred to in France, by "facets" such as freedom of the press, freedom of association, and freedom of audio visual communication. *See* Jean Morange, *Liberté*, *in* DICTIONNAIRE DE LA CULTURE JURIDIQUE 945, 949 (Denis Alland & Stéphane Rials eds., 2003). It is concerned first with its contents, and American authors distinguish between good and bad content, centering the analysis on unprotected speech: defamation, sedition, obscenity, and insults. *E.g.*, STONE ET AL., *supra* note 69, 956–1153 (discussing "'Low' Value Speech"); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 956 (14th ed. 2001). *But see, e.g.*, JESSE H. CHOPER, RICHARD H. FALLON, JR., YALE KAMISAR & STEVEN H. SHIFFRIN, CONSTITUTIONAL LAW 587–737 (10th ed. 2006) (asking "What Speech is Not Protected?"); FARBER, *supra* note 17, at 57–169 (choosing a more reserved title, "The Categorical Approach").

124. 393 U.S. 503 (1969).

125. *Id.* at 509. In 2007, the Court ruled that the *Tinker* decision does not protect expressions that do not contribute to political debate or that could reasonably be considered as encouraging the use of drugs. *Morse*, 127 S. Ct. at 2624–25. It thus upheld the punishment of a student who had displayed a banner outside a school because its incomprehensible and incoherent message (Bong Hits 4 Jesus) seemed, if not to encourage, at least to absolve, those who smoke marijuana. *Id.* at 2618.

126. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

127. 391 U.S. 367 (1968).

federal law providing for sanctions against anyone "who forges, alters, . . . knowingly destroys, [or] knowingly mutilates" a draft card was found to be "unrelated to the suppression of free expression."[128] The law was impartial and objective, and thus valid because, as would be said in the 1960s, it was content neutral and not content based. This approach, which simply passed over the content of speech without even considering it—as the categorical approach advised—has had exceptional fortune.

Already partially present in the *Tinker* and *O'Brien* decisions, "neutral regulation" was defined in a precise manner for the first time in *Police Department of Chicago v. Mosley* decision.[129] The *Mosley* case questioned a Chicago city ordinance that restricted the right to hold a picket or demonstration within 150 feet of a school to only cases involving labor disputes, such that only strike pickets were legal. The problem was that, during the preceding seven months, Mosley stood on the sidewalk next to the entrance of the school holding a large sign stating the following: "Jones High School practices black discrimination. Jones High School has a black quota."[130] Unanimously, the Court considered the narrow exemption of a single type of lawful picket to be discriminatory in its impact, and it invalidated the city ordinance as contrary to the Equal Protection Clause. It held (through the words of Justice Thurgood Marshall):

> There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. . . . The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.[131]

The *Mosley* decision was based on the Equal Protection Clause, and not on the First Amendment.[132] The reason is that, from a First Amendment standpoint, the city ordinance was a faultless content-neutral regulation; it did not regulate the content of speech, but rather its context and, more precisely, the "manner" of speech by picketing. In doing so, the city ordinance breached the principle of equality under the law because it discriminated against the particular viewpoint of those citizens who used picketing as "speech" for purposes other than demonstrating in labor disputes. The significance of the decision is that it brings to light the very strong link that unites freedom of expression and equality before the law. If the freedom of expression is truly a fundamental right, it must be accorded to everyone on a strictly egalitarian basis and,

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128. *Id.* at 377.
129. 408 U.S. 92 (1972).
130. *Id.* at 92.
131. *Id.* at 95–96.
132. *Id.* at 102.

therefore, it necessarily covers all expression without exclusion. It is nonetheless certain that some members of the Court did not wish the right to go so far.[133]

From the *Mosley* case, two lessons have emerged. The first confirms what could already be sensed based on the *Tinker* and *Cohen v. California* decisions, as well as the decisions overturning the convictions of civil rights and Vietnam War protestors for public order offenses. This lesson is that, in order to pass the obstacle of the First Amendment, the regulation of expression must be neutral, impartial (that is, not take sides), and based on objective criteria (content neutral). Any indication that a restriction is tainted by discrimination either in favor of or against certain points of view (content based) irremediably brands the text as unconstitutional.[134] The second lesson, which follows from the first, is that, because freedom of expression must be combined with the principle of equal protection, all expressions are equally protected and the State does not have to judge them; this implies (1) that the classifications of protected and unprotected speech no longer have reason to exist, and (2) that all expressions are the same and that they should all be able to make themselves heard.

In the mid-1960s, just after *Mosley*, the idea of absolute neutrality of the State with regard to freedom of expression was formed, which is so important today in American law. A legitimate restriction of freedom of expression is one that does not discriminate between points of view, but that is neutral and never chooses sides. The neutrality of a regulation is key to its constitutionality. The result is that, as Justice Powell forcefully stated in *Gertz*, "[U]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[135] This decision finally breathed life into the "free trade in ideas," of which Justice Holmes spoke in his dissenting opinion in *Abrams*[136] and which is so close to the French Revolutionary concept of the free communication of ideas and opinions.

The Court judged the restriction of campaign expenditures by the yardstick of free trade in ideas and rejected the idea of a limitation on the grounds that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"; but it

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133. In his concurrence, Chief Justice Burger warned against the errors that one would commit in interpreting the consequences of the decision for the First Amendment out of context, on the grounds that "[n]umerous holdings of this Court attest to the fact that the First Amendment does not literally mean that we 'are guaranteed the right to express any thought, free from government censorship.'" *Id.* at 102–03.

134. The jurisprudence is consistent. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." Regan v. Time, Inc., 468 U.S. 641, 648–49 (1984); *see also* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229 (1987) (holding that a state cannot vary a magazine's tax status because of its content).

135. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974). Justice Powell nonetheless added that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Id.* at 340.

136. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For an examination of the differences between the trade in ideas and the market for goods, see generally R. H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1974).

allowed the principle of a limitation on contributions given to candidates.[137] Likewise, the Court ruled that the necessity to protect under all circumstances the free trade in ideas prohibited the legislature from punishing a form of expression for the sole reason that the said form displeased, upset, or irritated, even when it consisted of burning the stars and stripes.[138] The free trade in ideas prohibited the regulation of provocative expression based on sympathy or repulsion for the ideas it promoted; on this account, the Court invalidated state laws prohibiting only provocations such as cross burning or brandishing swastikas when practiced for racist, religious, or sexist motives, but not for other motives.[139] The idea is that no one point of view should be prevented from being heard in the marketplace of ideas. With the sole exception of ideas, opinions, gestures, or statements that call for or cause immediate acts of violence, all ideas are equal in the United States, and the State, whether by its legislators or its judges, cannot take sides among them. Nothing is more foreign to the philosophy of the First Amendment than being judgmental. In the same way that American law does not discriminate between religions and sects,[140] neither does it discriminate among ideas; they are all the same. The result is that a judge may not separate (as in Germany) between opinion and declaration of fact[141] or (like the Strasbourg Court, seemingly inspired by the German law, which in turn seems to draw its inspiration from John Stuart Mill) between debates "capable of contributing to the well being of humanity"[142] and those which do not have this virtue.[143]

The principle of absolute neutrality of the State concerning the content of statements does not signify that expression is never restricted; rather, where the Constitution does not prohibit restriction, the rules adopted must be content neutral and objective, or in other words, impartial. For example, a New York City ordinance that authorizes a rock group to perform a concert in Central Park, but with amplifiers provided by the city, constitutes a neutral restriction.[144] Many authors like to point out that the impartiality requirement is essentially theoretical and that, in practice, it is easy for the federal government and for the states to get around it by means of financial awards.[145]

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137. Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

138. *See* United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

139. R.A.V. v. City of Saint Paul, 505 U.S. 377 (1992); *cf.* Virginia v. Black, 538 U.S. 343 (2003) (finding that a state may ban cross burning done for the purpose of intimidation, but invalidating a statute that presumed all cross burning was prima facie evidence of intent to intimidate). *See generally* Jeannine Bell, *Restraining the Heartless: Racist Speech and Minority Rights*, 84 IND. L.J. 963 (2009) (discussing the Supreme Court's history of striking down laws banning or limiting hate speech).

140. *See* Elisabeth Zoller, *Laïcité in the United States or the Separation of Church and State in a Pluralist Society*, 13 IND. J. GLOBAL LEGAL STUD. 561, 571–72 (2006).

141. *See* Olivier Jouanjan, *Freedom of Expression in the Federal Republic of Germany*, 84 IND. L.J. 867, 871 & nn.18–19 (2009).

142. *See supra* note 9 and accompanying text.

143. *See* Jean-François Flauss, *The European Court of Human Rights and the Freedom of Expression*, 84 IND. L.J. 809, 814 n.26 (2009).

144. Ward v. Rock Against Racism, 491 U.S. 781 (1989).

145. *See e.g.*, Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 562–63 (1996); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 610–11 (1980); Mark G. Yudof, *When Government Speaks: Toward a*

Currently a significant portion of expression, whether it is of a scientific, artistic, or cultural nature, cannot take shape and circulate in the market for ideas without financial help (particularly concerning government subsidies in the field of academic research). Because of this, they explain, the State can very easily control and influence ideas by giving subsidies to ideas it likes and refusing subsidies to those it does not. We are often told that the free market for ideas is an abstract and theoretical notion.

The constitutionality of conditional government subsidies with regard to the right to free expression was questioned in *Rust v. Sullivan*.[146] An administrative regulation, enacted under the Public Health Service Act,[147] tried to give effect to Title X Family Planning and, more precisely, the intention of Congress to refuse federal funding for abortion. It thus prohibited medical personnel from evoking or mentioning abortion as an available means of family planning. In practical terms, a doctor who worked within this program could not bring up abortion on his own initiative and, if asked about the procedure by a patient, was required to respond that the federal program that employed him did not fund it. Following an appeal by several doctors who felt that the restriction was contrary to the First Amendment because it discriminated on the basis of viewpoint, the Supreme Court held: (1) that the government may exercise a value judgment favoring childbirth over abortion and that it could support the first, and not the second, by the allocation of public funds; (2) that the Constitution authorized the government to encourage programs that it believed to be in the public interest by subsidizing them, without being required to finance other alternative programs; and (3) that in acting in this way, the government did not discriminate on the basis of viewpoint, but simply chose to finance one activity to the exclusion of another.[148] As for the argument that the restriction would limit the freedom of expression of doctors in violation of the First Amendment, the Court explained: (1) that the regulation did not deny anyone any benefits, stressing rather the requirement that public funds be used for the purpose to which Congress had allocated them; (2) that the condition, in this particular case, was not unconstitutional as would have been the case if it had been placed on the recipient of the subsidy and not the public program, denying the individual the right to exercise his freedom of expression outside the federally funded program; and (3) that the doctors remained perfectly free to discuss abortion, as private individuals, outside their public health activities.[149]

Ten years later, the constitutionality of conditional subsidies with regard to freedom of expression again came before the Court. The Court invalidated a federal law prohibiting all lawyers representing clients receiving federally funded free legal assistance from challenging the constitutionality of welfare laws.[150] It reasoned that, while the government may orient the content of expression when the government itself is the speaker, or when it transmits its message through another speaker (as in *Rust*), it does not have this right when the expression is strictly private.[151] The same concern for preventing public authorities from orienting private expression through monetary

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Theory of Government Expression and the First Amendment, 57 TEX. L. REV. 863 (1979). *But see* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164 (1996).

146. 500 U.S. 173 (1991).

147. 42. U.S.C. §§ 201–300ii (2000).

148. *Rust*, 500 U.S. at 192–94.

149. *Id.* at 196–97.

150. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).

151. *Id.* at 541–42.

means explains the *Rosenberg v. Rector and Visitors of the University of Virginia* decision, in which the Court invalidated the University of Virginia's choice to fund the publication of student newspapers, excluding those that promoted religion or that defended atheism.[152] On the other hand, Congress can orient the private expression of artists by instructing the National Endowment for the Arts to subsidize works of art and theatrical productions while taking into consideration "general standards of decency and respect for the diverse beliefs and values of the American public."[153] This hesitant jurisprudence inspires questioning and controversy.

3. The Doctrinal Controversies

The distinction between content-neutral regulations and content-based regulations has not replaced the classification of categories of expression. They have simply been juxtaposed. The right to freedom of expression in the United States is thus in a grey area, in between an old law that no one wants to renounce and a new law that continually rejects the other. It is this uncertainty that we find to be the principal reason for the extraordinary doctrinal tumult that rules over the subject and that makes its presentation so complicated. As long as a content-based classification of expression remains in effect, we can say that the foundations of the right to freedom of expression will not be solidly established in the United States. In practical terms, if the Supreme Court has succeeded in disrupting the formerly corseted domain of freedom of expression by giving it the breathing room that it did not have, it has not abandoned the old categories that confined it. As a result, the Court seems not to have settled on a consistent philosophy regarding freedom of expression, and the critics are rushing to suggest one for it.

There are three leading theories on the foundation of freedom of expression and the values it serves: (1) the theory of truth that, in a continuation of Enlightenment ideals, holds the free communication of ideas and opinions to be the surest path to truth;[154] (2) the theory of democracy that views freedom of expression as serving, first and foremost, government for the people and by the people, but ignores the importance of this freedom for the arts and humanities;[155] and (3) the theory of subjective autonomy that sees freedom of expression as the best means for the complete freedom of the individual,[156] which is today often tempered with an obligation to respect the dignity of

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152. 515 U.S. 819 (1995).

153. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572 (1998).

154. This foundation of freedom of expression is the one held by the Chancelier Malesherbes in the opening of his *Mémoire sur la liberté de la presse* (1788). "The public discussion of opinions is a sure means to draw forth the truth, and it is perhaps the only one." CHRÉTIEN-GUILLAUME DE LAMOIGNON DE MALESHERBES, MÉMOIRE SUR LA LIBRAIRIE ET SUR LA LIBERTÉ DE LA PRESSE 265 (1809); *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); MILL, *supra* note 9. The American jurist Zechariah Chafee, Jr., whose name remains associated with the theory of truth, is the author of the first doctrinal study on the First Amendment. *See generally* ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH IN THE UNITED STATES (1941).

155. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

156. *See generally* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

others.[157] A fourth theory exists, the theory of the skeptics, for whom the development of a broad theory to explain the entirety of the Supreme Court jurisprudence on the First Amendment is nothing but a dream that ought to be abandoned.[158]

B. The Prohibition of Ex Ante *Restrictions*

Beyond regulations founded on the content of expression, the First Amendment has also long prohibited regulations that contain *ex ante* restrictions, those that intervene even before the opinion or idea has been expressed. An example would be a regulation that provides for a system of prior restraint or that has a dissuasive effect (chilling effect).

1. Prior Restraint

If there is one thing that the First Amendment prohibits, it is censorship. The prohibition of censorship, which historically marked the conquest of the freedom of the press in England in the seventeenth century, was considered by the Supreme Court in 1907 to be the first consequence of the freedoms of speech and of the press.[159]

The principle of prohibition of censorship is a favored grounds for reversal in all cases related to freedom of expression. In 1938, in *Lovell v. City of Griffin*—which made freedom of expression a fundamental right—the Court invalidated a city ordinance that subjected the distribution and sale of any publication to prior approval by the mayor on the grounds that the act "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship."[160] This motivation revealed that beyond actual censorship, the principle prohibiting prior restraints was inclined to invalidate any administrative system of prior authorization. For the Court, the very idea of such systems is tainted, and it only tolerates them on the condition that they are carefully organized, even restrained, by concrete standards that effectively limit the discretionary power of the administrative authority.

Justice Brennan theorized the requirement for concrete standards in the opinion he authored in *City of Lakewood v. Plain Dealer Publishing Co.*[161] If the Court desires concrete standards, Brennan said, it is because it fears first that the system of prior restraint will provoke self-censorship out of the fear of not obtaining authorization; but the Court also fears not being able to distinguish, in contentious cases, "between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power."[162] In Brennan's view, "[s]tandards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech."[163]

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157. *See generally* SUSAN H. WILLIAMS, TRUTH, AUTONOMY, AND SPEECH: FEMINIST THEORY AND THE FIRST AMENDMENT (2004).

158. *See, e.g.*, FARBER, *supra* note 17, at 7.

159. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

160. 303 U.S. 444, 451 (1938).

161. 486 U.S. 750 (1988).

162. *Id.* at 758.

163. *Id.*

The prohibition of prior restrictions is applicable to film and, of course, condemns the censorship of films. This does not, however, prevent the public authorities from demanding to see all films before their distribution "in order to proceed effectively to bar all showings of unprotected films"; this is allowed only on the condition that the authorities respect the battery of procedural criteria that was put forth in *Freedman v. Maryland*.[164] These criteria can be reduced to the following goal: to assure, with the least possible delay, the possibility for an immediate judicial intervention since "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, [and] only a procedure requiring a judicial determination suffices to impose a valid final restraint."[165]

The system of prior restraint has undergone interesting developments when imposed by the judge herself. Such was the case when a state law provided that a judge would have the power to grant an injunction prohibiting a newspaper from reporting a scandal or publishing defamatory statements against the authorities. This law came before the Court in *Near v. Minnesota*.[166] While recognizing that no one would refuse the government the right to prevent the publication of sensitive military information (for example, the date of troop movements, or the number and position of forces), the Court invalidated the Minnesota law, emphasizing that the judicial system of punishing abuses committed by the press *a posteriori* constituted an adequate reparation.[167]

Judicial restrictions on freedom of the press underwent important changes during the Vietnam War. In the Pentagon Papers affair, the United States government tried to prevent the *New York Times* and the *Washington Post* from publishing excerpts of a classified study entitled *History of U.S. Decision-Making Process on the Vietnam Policy*. In an extremely short per curiam opinion, the Court reminded that when bringing actions to enjoin publication, the initiator has a heavy burden to show justification for the imposition of such a restraint and to produce proof of the risk to national security that it fears.[168] Finding that these conditions had not been met, the Court rejected the request of the United States government.

2. Chilling Effect

Dissuasive restrictions—those that are said to have a chilling effect—present the possibility of invalidating the law on its face, without the judge questioning the actual effects in the particular situation of the claimant. In other words, the dissuasive restrictions have the effect of granting a dispensation from the sufficient interest requirement. When they are verified, they lead to the invalidation of the law with consequences that are very close to those of invalidation for *excès de pouvoir* (ultra vires) in French administrative law, since the law ceases to produce legal effects.[169] This result is drastically contrary to the rule according to which the invalidations

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164. Freedman v. Maryland, 380 U.S. 51, 58 (1965).

165. *Id.*

166. 283 U.S. 697 (1931).

167. *Id.* at 720.

168. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971).

169. Conseil d'Etat [CE] [highest administrative court], Dec. 26, 1925, Rec. Lebon 1065. For a summary of this decision, see Le Conseil d'Etat—26 décembre 1925—Rodière—Rec. Lebon p 1065, http://www.conseil-etat.fr/ce/jurisp/index_ju_la19.shtml.

pronounced by the judge have no absolute effect, but rather relative effects limited to the parties in question. Under the latter principle, the law is invalidated as applied, not on its face, which means that it stands and may find other applications. This is not the case when the text is marred by dissuasive restrictions, which can be of two types: the problem of overbreadth, and the problem of vagueness. In theory, the two restrictions are distinct; however, in practice, they frequently intersect.

The problem of overbreadth—one could also say "undefined breadth" in the sense that the text has virtually no limits, this being precisely the reason it is criticized—is particular to the subject of the First Amendment.[170] It permits the judge to evaluate the constitutionality of a text in relation to its potential applications and, if it seems that the text is susceptible to ulterior unconstitutional applications, invalidate the law for preventative reasons. An exception to the rule of sufficient interest, the overbreadth doctrine revives *actio popularis*. It is less about protecting one party in the exercise of his rights than protecting an entire group of persons in the exercise of their fundamental right to freedom of expression. This doctrine, which already existed in the first decisions delivered in the 1930s,[171] was reinforced by the jurisprudence of the Court in the beginning of the 1960s in order to permit the free development of the movements against racial segregation. In order to fully understand its importance, it is necessary to remember the circumstances in which the doctrine was born and which are intimately linked to the battle for civil rights.

In order to hinder the protest movement against school segregation that continued to gain strength in the 1960s, some states undertook to criminalize the practices by which the National Association for the Advancement of Colored People (NAACP)—the principal organization for the defense of Black Americans—conducted its battle.[172] This association fought against segregation notably, given the political role of the judge in the American system, by legal proceedings against State authorities in the federal courts. To counteract the NAACP's actions, Virginia prohibited any individual not holding a degree in law and who was not a member of the bar from entering into a relationship with anyone for the purpose of the solicitation and the representation of his interests, and more generally with the purpose of informing citizens of their rights, informing them of the legal battle of the organizations defending the rights of people of color, or indicating to them the paths and means to defend themselves.[173]

In other words, Virginia law criminalized the activity of legal counsel that was so important to the NAACP: initiating contact, through its volunteers, with victims of segregation in order to put them in contact with the association's lawyers, who then brought legal action against the schools who refused (or at least dragged their feet) to put desegregation into practice.

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170. United States v. Salerno, 481 U.S. 739, 745 (1987).

171. *See* Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940); Schneider v. State, 308 U.S. 147, 162–65 (1939); Hague v. Comm. for Indus. Org., 307 U.S. 496, 516 (1939); Lovell v. City of Griffin, 303 U.S. 444, 451 (1938).

172. Remember here that *Brown v. Board of Education*, 347 U.S. 483 (1954), led to a mass of cases where it was necessary to fight step-by-step, establishment-by-establishment, in order to obtain truly integrated schools. Even today, the great ambition of perfectly integrated schools has not been entirely realized. *See* LAUREN ROBEL & ELISABETH ZOLLER, LES ETATS DES NOIRS: FEDÉRALISME ET QUESTION RACIALE AUX ÉTATS-UNIS 57–65 (2000).

173. *See* NAACP v. Button, 371 U.S. 415 (1963).

Considering that this litigation, in the context of the NAACP's fight, was in no way a technique for resolving disputes between private interests, but a means of achieving equality for everyone under the law—thus "a form of political expression"—the Court invalidated the Virginia law on the grounds that it was "susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. . . . [They] need breathing space to survive."[174] The Court then moderated the scope of this doctrine, describing it as "strong medicine."[175] Its reason was that the doctrine opened the possibility for challenging a law on the grounds that it could be susceptible to a single unconstitutional application.[176]

The problem of vagueness is not unique to the subject of the First Amendment. It extends far beyond because it constitutes one of the guarantees of due process of law. The particularity of the problem of vagueness in the domain of the First Amendment, contrary to criminal procedure, is that it leads to the nullification of the law on its face, that is, *ab initio*. A law must be considered intrinsically void for vagueness when "men of common intelligence must necessarily guess at its meaning and differ as to its application."[177] In the domain of the First Amendment, the litigation on the doctrine of vagueness is not abundant; moreover, it intersects with that of the doctrine of overbreadth, since an overbroad law is often a vague law.[178] The Court has applied it, for example, to invalidate a Massachusetts law prohibiting the disrespectful treatment of the American flag, holding that the words "treats contemptuously" were too vague to validly convict a young man who had stitched a small flag on the seat of his pants.[179]

CONCLUSION

The Supreme Court's jurisprudence on freedom of expression represents one of the most important developments of United States constitutional law over the course of the twentieth century. Just as the right to property and contractual freedom formed the litigation that permitted the Court to leave its mark on the economy and capitalism in

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174. *Id.* at 429, 433.

175. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

176. Furthermore, on the appeal of public employees against a law limiting their political activity by prohibiting them from helping to collect funds for political candidates, the Court rejected the argument of the employees who held that the law was unconstitutional because it was likely to be interpreted as prohibiting them from placing partisan stickers on their bumpers. The Court emphasized that the First Amendment protects expression that conveys itself through conduct as much as expression manifested through written or spoken language. However, if nonverbal, the expression is only protected if it is expressive or communicative conduct; that is to say, if it is an act that promotes a clearly identifiable idea. The Court held that, in the case of laws concerning conduct and not only speech, the overbreadth of the law must not only be real, but also substantial. *Id.* at 615. Ten years later, the Court further restrained the scope of the doctrine of overbreadth, holding that a federal law against pedophilia is not unconstitutional because it risks preventing the distribution of publications of real literary, scientific, or educational value. New York v. Ferber, 458 U.S. 747 (1982).

177. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

178. *See, e.g.*, Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569 (1987) (finding the "vagueness" and substantial "overbreadth" of a prohibition by the Los Angeles Airport on all "First Amendment activities" to violate the First Amendment).

179. Smith v. Goguen, 415 U.S. 566, 568 (1974).

the nineteenth century, the litigation on the right to freedom of expression in the twentieth century gave it the power to shape mores and to change morals. In both examples, the Court proved its capacity to transform society and its laws. In this sense, the freedom of expression permitted the Court to win back the role it had lost in 1937 as the oracle of the Constitution, the same role that Charles Evans Hughes evoked in 1908 when he told voters in the State of New York, "We are under a Constitution, but the Constitution is what the judges say it is."[180] Hughes would become Chief Justice of the Supreme Court, but at the time he was only a political candidate. His witticism evoked the excessive role the judges played in contractual freedom and property rights disputes. It is clear that today, contractual freedom and property rights are no longer what the Court says they are, but instead, what the elected assemblies say they are. The contrary situation exists on freedoms of thought (freedom of expression and freedom of the press). The First Amendment is what the judges say it is. Still, we should not be misled. The Court has followed the social evolution, but it did not start it.

The veritable initiators of the transformation of freedom of expression in the United States are not the Supreme Court Justices themselves, but the myriad groups that form American society; religious groups (the Jehovah's Witnesses were the actors in nearly all the major cases on freedom of expression between 1938 and 1949); Blacks who revolutionized speech in public affairs through the fight for racial equality; and the rebellious youths who, in their radicalism against prejudice, did more to dismantle Puritanism than the most antiauthoritarian religious groups. Their demands—it would be better to say their complaints in the context of the civil rights battle—to be heard by all of society have gone before the Court, which accepted some and rejected others, according not to one theory, but to many. On the subject of freedom of expression, as in so many other domains, the jurisprudence of the Supreme Court is pragmatic, keeping with the dominant thinking in the United States. The new law has settled not on any one theory, but on many that (combined with one another) are incorporated in the great liberal ideal that the government should not concern itself with what the people may think, say, or do—except, as Justice Holmes said in 1919, in the case of "substantive evils."[181] It is on the scope of these substantive evils that the United States and Europe depart from one another. Like all other freedoms in the United States, the freedom of expression is a negative liberty. In contrast, the freedom of expression in Europe is a positive liberty.[182] Thus, the freedom of expression in the United States imposes prohibitions on the State, but rarely imposes duties.

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180. THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 144 (David J. Danelski & Joseph S. Tulchin eds., 1973).

181. Schenck v. United States, 249 U.S. 47, 52 (1919).

182. The "negative liberty/positive liberty" distinction is borrowed from Isaiah Berlin. ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY: AN INAUGURAL LECTURE DELIVERED BEFORE THE UNIVERSITY OF OXFORD ON 31 OCTOBER 1958 (1958).