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The Formative Period of First Amendment Theory, 1870-1915

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The constitutional grant could not have been simpler: the Framers needed just ten words to codify America's free speech ideal. Yet the stark brevity of the First Amendment is inherently deceptive. Couched within that naked license lie definitional complexities which have confounded the nation's legal elite ever since 1791. Despite this legal ambiguity, the prevailing historiography of free speech can be briefly summarized. The broad libertarian potential of the First Amendment was never realized by antebellum America; more than a century later a rash of repressive antisocialist legislation spawned debate and test cases which laid the groundwork for the post-World War I doctrinal development of a mature free speech principle.[1] Perhaps it is the disarming simplicity of this theory which is both perplexing and troubling. Clearly the trilogy of 1919, which found Justice Holmes writing for the majority in *Schenck*,[2] *Frohwerk*,[3] and *Debs*[4] did mark the first prolonged onslaught by free speech advocates at the Supreme Court level.[5] And the first treatise devoted to free speech was published the following year. When Professor Zechariah Chafee of Harvard Law School undertook the

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1. See, generally, Paul Murphy, *The Meaning of Freedom of Speech* (Connecticut, 1972). See also, Gerald Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine," 27 *Stan. L. Rev.* 719, 720 (1975) (commenting on the dearth of free speech histories). One notable exception, cited by Gunther, at 723, n.14, is David Rabban's "The Meaning of the First Amendment in the Generation Before World War One," (unpublished seminar paper, 1974), which has proved a valuable secondary source.

2. *Schenck v. U.S.*, 249 U.S. 47 (1919).

3. *Frohwerk v. U.S.*, 249 U.S. 204 (1919).

4. *Debs v. U.S.*, 249 U.S. 211 (1919).

5. Ernest Freund. "The *Debs* Case and *Freedom of Speech*," 19 New Republic 13, 14 (May 31, 1919), reprinted in Harry Kalven, "Ernest Freund and the First Amendment Tradition," 40 *U. Chi. L. Rev.* 235, 240 (1973) (concluding that only prior censorship was constitutionally suspect before Holmes' *Abrams* dissent). *Abrams v. United States*, 250 U.S. 616 (1919).

task of writing *Freedom of Speech,* he was struck by the paucity of legal material.

> The cases are too few, too varied in their character and often too easily solved, to develop any definite boundary between lawful and unlawful speech. . . . Nearly every free speech decision . . . appears to have been decided largely by intuition.[6]

Like Chafee, most commentators have dwelt only on federal court developments.

Those critics who have placed the roots of free speech doctrine in the post-World War I era have a ready explanation. Paul Murphy, the leading modern analyst of the legal history of free speech from the War to the New Deal, has acknowledged only a handful of pre-1915 national issues which tested the bounds of democratic rhetoric when confronted with vocal minority sentiment: the embodiment of the libertarian ideal in the Bill of Rights, the challenge posed by Federalist prosecutions under the Alien and Sedition Acts, and the trials of Copperheads and abolitionists censored for pamphleteering. The logical inference of such a portrait is that First Amendment values escaped regular governmental check. Murphy characterized the early twentieth century American as unschooled in the First Amendment, concluding:

> Freedom of speech had been an operational reality largely outside the area of either legal definition from the adoption of the Bill of Rights until World War I. It was generally accepted as a tradition and a practice, although it had few public guarantees. . . . Thus, freedom of speech was treated as a dearly won prize, but not used from day to day. . . .[7]

According to most critics from Chafee to Murphy, America entered World War I with the practical bounds of free speech doctrine still to be defined.

This study suggests that the current geneology of First Amendment doctrine is far too abbreviated.[8] Rather than hypothesize a

6. Zechariah Chafee, *Freedom of Speech* (New York, 1920), 16.

7. Murphy, *supra,* n.1, 100.

8. It is admitted that our modern libertarian notions did not arise from Anti-Federalist philosophy. As Leonard Levy has persuasively argued in his seminal work, *The Legacy of Suppression,* post-Revolutionary Americans grappled more with delineating federal-state boundaries than defining the parameters of the First Amendment. Leonard Levy, *The Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge, 1960). See also, John Roche. "American Liberty: An Examination of the Tradition of Freedom," in Milton Konvitz and Clinton Rossiter, *Aspects of Liberty* (Ithaca, 1958), 129 at 135. ("One finds few earmarks of libertarianism . . . in early American society.") The partisan debates over the Alien and Sedition Acts, combined with their politically opportune use by the Jeffersonians themselves, amply attest to the lack of principled free speech pro-

mature First Amendment theory springing into full blown existence after 1916, this study would interpose a middle period running from Reconstruction until World War I when free speech ideals were first systematically repressed by arbitrary enforcement of municipal ordinances. To suggest that an earlier period nurtured free speech advocates is not to embrace a monolithic vision of the Amendment's development. Indeed contemporary case law and official action reveal a mixed bag: some noteworthy protection, some notorious restriction. But it was from 1870-1915 that a new concept of freedom of speech developed which freed it from the mainstream of democratic privileges. From that period forward, the principle would remain intimately connected with the protection of minority rights. Clearly there was an evolution underway in the meaning and scope of the liberty, a process that has continued to the present.

Support for this periodization comes from material largely ignored by previous commentators. To reconstruct the formative period of First Amendment theory requires an analysis of more than just Supreme Court decisions and Congressional enactments. Since formal incorporation of the strictures of the First Amendment into the Fourteenth Amendment's due process clause did not occur until the 1920s,[9] this review explores state as well as federal developments. Therefore the rubric of "First Amendment theory" must be broadened to encompass local as well as national contributions, whether derived specifically from the Bill of Rights or from similar state constitutional protections. Once the case law sample includes litigation spawned by state and municipal repression of civil liberties, a new chapter in the history of free speech can be written.

Actually it should not be surprising that post-Reconstruction America was a fertile period for raising free speech concerns: the socio-economic disruptions of that era were ripe for challenges to First Amendment guarantees by a variety of minority groups. The broad value consensus which had characterized the antebellum scene was supplanted by post-War class conflict. Urbanization, industrialization, and immigration fueled the breakdown of America's homogeneity in the late nineteenth century.[10]

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tection as America entered the nineteenth century. *U.S. v. Hudson & Godwin*, 11 U.S. 32 (1812). Even though our initial premises are consistent, however, this essay suggests that the social dislocations of the late nineteenth century fostered a fertile period for raising free speech concerns.

9. *Gitlow v. New York*, 268 U.S. 652 (1925).

10. Robert Wiebe's *The Search for Order* (New York, 1967), chronicles this demise of eighteenth century rural Americana, peopled by Jefferson's yeomanry, and its transformation into the social welfare state which typifies the modern collectivist nation. Labor unrest, an influx of immigrants, and influential party bosses irreparably destroyed the nation's consensus and left the country a decentralized "society without a core."

In the country's search for mechanisms to stablize the new social order, society reassessed the antebellum model of unfettered exercise of individual rights.[11] The new found strength of the state's regulatory arm jeopardized free speech guarantees. By 1919 Roscoe Pound found that, individual liberty had to be subordinated to the public interest. "We are forced to admit," he wrote,

> that wise engineering may hold down free self-assertion in many situations and is not bound as a condition of right existence to leave all men free to contract enterprises with the minimum of restriction to keep the peace.[12]

Thus these newly usurped state powers, coupled with the shattered value consensus characteristic of urban America, boded ill for the vindication of First Amendment freedoms when invoked by minority dissidents.

But it was this social milieu that spawned the numerous test cases where minorities, claiming repression, asserted their First Amendment rights. By confronting the public with their free speech concerns, these nineteenth century individuals were instrumental in hammering out the principles behind a mature theory for protecting the free speech guarantee during the twentieth century. Part I of this article will review the contradictory thoughts of contemporary academics on free speech, and Part II will address the extent to which political speech won both recognition and protection from majoritarian pressure.[13] Once the ambit and level of free speech protection during the formative period is revealed,[14] the need for historical revision will be apparent.[15]

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11. *Id.*, 12, 100, 102, 105, 170-1, 136, 146; Harold Hyman, *A More Perfect Union* (Boston, 1975), 385, 391, 402, 397-8; John Roche, *Quest for the Dream* (New York, 1963), 8-40. The organizational impulse and bureaucratic vision noted by historians like Wiebe and Harold Hyman served to aggrandize the government's role. But see Morton Keller, *Affairs of State* (Cambridge, Mass., 1977) (Society's consensus had been weakened at least but not destroyed.)

12. Roscoe Pound, "The Administrative Application of Legal Standards," 4 *Reports of the ABA* (1919), 450.

13. Lillian BeVier, "The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle," 30 *Stan. L. Rev.* 299, 300 (1978). For convenience, I shall adopt her definition of political speech:

> Speech that participates in the processes of representative democracy and does not in principle protect either advocacy of violent overthrow of the government, incitement to unlawful acts or non-political speech.

14. These labels and approach to First Amendment analysis are suggested in Harry Kalven, "The Reasonable Man and the First Amendment," 1967 *S. Ct. Rev.* 267, 278, 295 (1967).

15. I wish to clarify at the outset that this investigation does not encompass libel law, religious toleration, obscenity prosecution, or freedom of the press adjudications.

I. ACADEMIC DEBATE

Zechariah Chafee intimated in *Freedom of Speech* that his generation was the first to articulate free speech issues. Yet by Chafee's own admission he has had no interest in free speech prior to a new teaching assignment in 1916 and thus assumed his contemporaries were equally remiss.[16] Actually the enthusiasm of others, legal scholars and popular commentators alike, had been kindled earlier. Writing a history of civil liberties for the ACLU, Leon Whipple remarked that the generation before 1917 witnessed a flowering of free speech debate. The signs of such increased awareness included guarantees provided by new state constitutional provisions (such as Oklahoma's 1908 amendment); formation of the Free Speech League in 1911, followed by other similar legal defense groups; devotion of an entire annual meeting of the American Sociological Society to the issue; investigation of academic freedom by the newly formed American Association of University Professors and reports by the recently convened Industrial Commission on the status of civil liberties.[17] Thus, rather than the anticipated dearth of academic discussion, quite a lively debate raged both through the law reviews, and in the popular journals where men of various libertarian persuasions aired their views.

A review of the constitutional theory of one nineteenth century legal giant, provides an apt departure for this synopsis of contemporary academic sentiment. In his *Treatise on Constitutional Limitations*, which first appeared in 1868, Thomas Cooley devoted an entire chapter to the liberties of speech and press. Among the first to note that each state's constitution contained some equivalent of the First Amendment guarantee, Cooley wrote in an oft-quoted passage that free speech was "almost universally recognized not only as highly important, but as being essential to the very existence and perpetuity of free government."[18] Impressed by its common law origins,[19] Cooley proposed and persuasively defended a seemingly libertarian protection for political speech going far beyond the narrow Blackstonian notion of freedom from prior restraint:

> But while we concede that the liberty of speech . . . does not imply complete exemption from responsibility for every thing a

16. Zechariah Chafee, *Thirty-five Years with Free Speech* (New York, 1952), 2.

17. Leon Whipple, *The Story of Civil Liberties in the United States* (New York, 1927; reprinted, 1970), 327.

18. Thomas Cooley, *A Treatise on the Constitutional Limitations* (7th ed., 1903), 5960.

19. Id., 604. By thus differentiating between a public right and private wrong, Cooley could justify legal remedy for libel suits while promoting political debate.

> citizen may utter, it is nevertheless believed that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions inasmuch as of words to be uttered orally there can be no previous censorship.[20]

Cooley, when read literally, would have permitted unbridled license for speech with the important caveat of subsequent responsibility for injury caused by false, malicious, scandalous, blasphemous or obscene speech.[21] Even if limited to the sphere of political discussion, Cooley's interpretation of the free speech guarantee offered much guidance to his generation: it identified the public character of the free speech liberty; it rejected a literal textual approach to the First Amendment (i.e., this natural right was never meant to encompass some utterances like obscenity, libel, blasphemy); and it proscribed governmental regulation of, or subsequent punishment for, purely political speech.[22]

Cooley had launched the era's free speech debate on a most theoretical plane. Following events such as the Haymarket riot which put the guarantee to the practical test, other commentators stopped well short of embracing an absolutist position. In 1887, a contributor to the *Albany Law Journal* found "no shibboleth more absurd than the cry of free speech."[23] Although that analyst would have punished those who merely advocated the commission of a crime and would bar peaceful assemblies which obstructed public streets,[24] a contemporaneous editorial in the *Dailey Register* drew the line at punishment for only those crimes actually instigated by the speech.[25] The editors of *Case and Comment,* in announcing the devotion of an entire issue to free speech, concluded:

> That there is or can be an absolute right of free speech may well be doubted. If it denigrates into slanderous vituperation or seditious harangue it loses its dignity and its privilege.[26]

Defamation, obscenity, and sedition clearly lay outside the protection for most academics from Blackstone to Chafee; instead the crux

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20. Id., 603.

21. Id., 604.

22. Id., 614.

23. Note, 36 *Alb. L. J.* 421 (1887).

24. Id.

25. Id., citing the *Dailey Register* editorial at 421.

26. "Coming in November Free Speech Issue," 22 *Case & Comment* viii (Oct. 1915). See also, William Ackerly, "Constitutional Freedom of Speech and of the Press," 22 *Case & Comment* 457, 460 (Nov., 1915). ("It is the golden mean between these two untolerable extremes [oppression and license] which our fundamental law as interpreted by the courts seeks to maintain.")

of their discussion concerned whether additional governmental interests might tip the scale against free speech.

The previous catalogue of free speech sentiment does not exhaust the wealth of libertarian dialogue in the generation before World War I. Though never representative of the majority view, the advocates of the extreme absolutist position further broadened the scope of First Amendment rhetoric. The *Yale Law Journal* carried one diatribe which found the restraints posed by modern agencies to be more severe than any Russian scheme for repression and a major contributor to the current decay of personal rights.[27] A member of the New York bar singled out instead the rampant police power as the most pernicious threat to individual liberties by describing the inherent tension between majoritarian regulation and minority values.[28]

Perhaps no critic better personified the absolutist position in the free speech struggle than Theodore Schroeder whose works profoundly influenced the course of free speech theory. This activist, whose seminal essay, *Free Speech for Radicals*, appeared in 1916, lamented the judicial treatment of First Amendment values.[29] Secretary of the Free Speech League, founded in California in response to the San Diego free speech fights of 1911, he was allied with agitators like Emma Goldman. The national policy of the organization became opposition to all government restrictions of free expression.[30] Out of these events, Schroeder culled an early libertarian definition of free speech, remarkably consistent with our modern conception:

> I do not mean the right to agree with the majority but the right to say with impunity anything and everything which anyone chooses to say and to speak it with impunity so long as no actual material injury results to anyone and when it results then to punish only for the contribution to that material injury and not for the mere speech itself.[31]

Chiding many of his liberal friends who would place socialist dogma and obscenity outside the Amendment's protection, Schroeder cited English conservatives in support of his position.[32]

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27. Richard Byrd, "The Decay of Personal Rights and Guarantees," 18 *Yale L. J.* 252, 253-4 (1907).

28. James Morton, Jr., "Free Speech and Its Enemies," 22 *Case & Comment* 471 (Nov., 1915).

29. Theodore Schroeder, *Free Speech for Radicals* (New York, 1969).

30. Id., frontispiece.

31. Id., 20.

32. Id., 68-70.

Devising a legal protection for mere advocacy of admittedly criminal behavior proved his central concern. Schroeder asked, "Can a man under our Constitution guaranteeing liberty of speech and press be properly punished for his fruitless advocacy of crime?"[33] Rejecting any legal standard which punished mere words, he felt that even seditious sentiments must be tolerated.[34] Schroeder's solution may have been novel for his generation; however, he and his contemporaries shared the search for a principled theory of free speech that could shield a minority from majoritarian excesses.

By the eve of World War I, Roscoe Pound summarized the period's consensus on the extent of the freedom of public discussion. Rejecting the extremes of prior repression and unfettered license, Pound outlined a balancing standard: "the social interest in the free development of the individual must be weighed with the social interest in the state as a social institution."[35] He reflected the era's concern with mob violence, but proposed time, place, and manner restrictions as the only constitutionally permissible restraint on protected speech.[36] Chafee in his treatise proposed a similar test which drew heavily upon the pre-War debate: a society's legitimate interests in order and self-protection outweigh individual expression "close to the point where words will give rise to unlawful acts."[37] From these various expressions of the balancing test, Justice Holmes would lead the Supreme Court to a limited protection for even potentially incendiary political speech through the medium of his pliable "clear and present danger" standard.[38] Though the direct influence of Chafee on this legal transformation has been noted,[39] the seminal influence of the earlier legal commentators must now also be recognized.

The debate had stretched the breadth of the legal spectrum. Some critics preached government repression, other unbridled license. But well before World War I a vocal minority already clas-

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33. Theodore Schroeder, "On Suppressing the Advocacy of Crime," 1 *Mother Earth* 7, 13 (Jan., 1907).

34. Theodore Schroeder, "Historical Interpretation of Freedom of Speech and of the Press," 70 *Cent. L. J.* 184, 185 (1910).

35. Roscoe Pound, "Interests of Personality and Honor," 28 *Harv. L. Rev.* 445, 455 (1915).

36. Id.

37. *Chafee*, supra n.6, 38.

38. See Frank Strong, "Fifty Years of Clear and Present Danger: From Schenck to Brandenburg and Beyond," 1969 *S. Ct. Rev.* 41 (1969); Yosal Rogat, "The Judge as Spectator," 31 *U. Chi. L. Rev.* 213 (1964).

39. Fred Ragan, "Justice O. W. Holmes, Jr., Zechariah Chafee, and the Clear and Present Danger Test for Free Speech," 58 *J. Amer. Hist.* 24 (1971).

sified the core value of free speech—political expression—as inviolate. Furthermore the free speech advocate now branded the state and its various regulatory arms, from agencies to courts, *the* potential source for oppression. Lastly, while opinion differed on which types of utterances were to be protected, punishment for its abuse became the emerging standard. Having sampled the range of the free speech debate, the stage is set for analysis of the relevant case law.

II. MUNICIPAL ORDINANCES

Early in the formative period, a state Supreme Court found the leaders of the Industrial Alliance (IA), an anarchist workers' alliance, guilty of conspiracy to commit murder as a result of the 1886 Haymarket riot. In *Spies v. Illinois*,[40] the co-defendants were charged and ultimately sentenced to hang not for murder but for their utterances. Their convictions met with popular support. Henry Adams' article "Shall We Muzzle the Anarchists?" concluded that a society which permitted peaceful redress of grievances need not countenance their terrorism. "Free discussion does not contemplate such license to press and speech as will endanger the peace and tranquility of the community."[41]

"Haymarket" and subsequent cases involving the state police power reveal two issues which demanded legal resolution: first, what was the scope of the free speech guarantee (i.e., what types of utterances belonged within the ambit of protected speech) and, second, even if the expression could be protected, what state interests existed which outweighed individual rights (i.e., in balance, the extent to which protection could be afforded). To map out the judicial solutions to these puzzles, a survey of political speech cases follows. Confrontations between free speech advocates and the police power in the guise of municipal ordinances will be reviewed to shed light on the era's understanding of the most fundamental aspect of the free speech guarantee.

A. Police Power in Theory

The 1960s left us with memories of clashes between local officials attempting to enforce municipal ordinances and free speech advocates protesting the Vietnam War. Similarly post-Reconstruction America, marked by its own social dislocations, witnessed the continuing tension between the police power and First Amendment guarantees. Though the era produced many legendary

40. *Spies v. Illinois*, 122 Ill. 1 (1887).

41. Henry Adams, "Shall We Muzzle the Anarchists," 1 *Forum* 445, 448-9 (1886).

court battles, we should begin by sampling the ideas of its legal elite on the extent of local police power.

Few commentators, would have objected to John Dillon's 1873 assessment of the extent of a municipal corporation's regulatory power:

> Our city governments usually possess the power either by express grant, or by virtue of their authority, to make bylaws relating to the public safety and good order of their inhabitants. . . .[42]

Eugene McQuillen seconded Dillon's view, noting that reasonable municipal ordinances falling within the realm of delegated legislative power had uniformly received judicial affirmation.[43] Probably the leading treatise writer of the period on the subject of the police power, Christopher Tiedeman, acknowledged that constitutional prohibitions were no absolute bar to the enforcement of local regulations since "permissible restraints upon the freedom of speech and of the press are not confined to responsibility for private injury."[44] But a caveat was in order: such infringement on individual liberty, especially when cloaked in official discretion, required a close nexus between the means employed and the intended goal of promoting the public welfare.[45] Thus in 1881 one lawyer was conscious of the possible pretextual uses of the police power and demanded that local regulations have for their "immediate object the promotion of the public good."[46]

Under the guise of the state police power, local officials protected the public's health, safety, and morals through various con-

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42. John Dillon, *Commentaries on the Law of Municipal Corporations*, §326 (2nd ed., New York, 1873), 423.

43. Eugene McQuillen, "Validity of Municipal Ordinances Vesting Discretion in Public Officials or Departments," 65 *Cent. L. J.* 2, 6 (1907).

44. Christopher Tiedeman, *A Treatise on the Limitations of Police Power in the United States* §81 (St. Louis, 1886), 192, 67; see also H. G. Wood, *A Practical Treatise on the Law of Nuisance* §741 (Albany, 1875), 773.

45. Id., Eugene McQuillen, "Some Observations on State Laws and Municipal Ordinances in Contravention of Common Rights," 64 *Cent. L. J.* 209, 212 (1907). See also, *Mayor of Baltimore v. Radecke*, 49 Md. 217, 228 (1878) (oft-cited case which voided the mayor's licensing authority over steam engine construction). "It has been well said in reference to such general grants of power that as to the *degree of necessity* for municipal legislation on the subjects thus committed to their charge, the Mayor and City Council are the *exclusive judges* while the selection of the means and manner . . . of exercising the power which they may deem requisite to the accomplishment of the objects of which they are made the guardians, is committed to their [state legislatures'] sound discretion."

46. W. P. Wade, "Subjection of Private Rights to Police Power of the State," 6 *South. L. Rev.*, 59, 63 (n.s.) (1881).

trol mechanisms. These legal theories included: prosecution for nuisance[47] or breach of the peace,[48] censorship boards, and licensing schemes.[49] Society's general acceptance of the reasonableness of official discretion irked Lincoln Steffens, organizer of the Free Speech League. He admonished his contemporaries: "Any censorship by authority is unsatisfactory. . . . Free speech always becomes an acute issue when a spirited people realize that they haven't free speech. And we Americans haven't it."[50] While not all observers were so caustic, none could have helped but be impressed by the continuing strength of the police power arsenal, armed to protect the public safety, health, and morals.[51]

B. Police Power in Practice

Having highlighted the academics' opinions on minority dissent, it should come as no surprise that individuals asserting a constitutional right to a public forum faced stern local opposition. As McQuillen summarized:

> Although the right to speak freely in public or private is sufficiently guaranteed by fundamental law, the privilege of delivering sermons, lectures, addresses and discourses in the streets and other public places may be restricted . . . if in the discretion of the constituted public authorities the public welfare demands it; and such exercise of the police power is a legal restraint on the liberty of the individual.[52]

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47. See for example, *City of Rochester v. West*, 64 N.Y. 510 (1900) (prosecution of billboard owners for nuisance). See, also, the numerous trials of disseminators of the *Sunday Sun*, a midwest scandal sheet: State *v. Van Wye*, 136 Mo. 227, 37 S.W. 938, 939 (1896); *Strohm v. People*, 160 Ill. 582, 43 N.E. 622 (Ill. S. Ct. 1896); *In re Banks*, 56 Kan. 242, 42 P. 693 (Kan. S. Ct. 1895); *Fox v. Washington*, 236 U.S. 273 (1915).

48. See, for example, *City of Glasgow v. Bazan*, 96 Mo. App. 412, 415 (Kansas City Ct. Apps. 1902); *St. v. Russell*, 45 N.H. 83, 85 (1864); *Bonnville v. St.*, 53 Wis. 680 (1882). But see, City of St. *Charles v. Meyer*, 58 Mo. 86 (1874) (conviction of wedding party serenaders reversed on grounds of implied consent to breach of peace); *Pinkerton v. Verberg*, 78 Mich. 573, 584 (1889) (conviction of local prostitute overturned on insufficient evidence). See generally, Benjamin Dean, "Curfew Ordinances and Constitutional Law," 4 *Law Notes* 107, 110 (1900).

49. *Mutual Film Co. & Industrial Common of Ohio*, 236 U.S. 230, 243 (1915), *aff'ing*, 215 F.138 (N.D. Ohio 1914) (censorship board); *Commonwealth of McGann*, 213 Mass. 213, 215 (1913) (licensing scheme). But see, *Dailey v. Sup. Ct.*, 112 Cal. 94, 97 (1896) (injunction of scandalous play denied on free speech grounds).

50. Lincoln Steffens, "Letter to Editor," 25 *Everybody's* 717 (Nov., 1911) (response to editor Erman Ridgeway's editorial which called for the ban of two current New York City plays as indecent) 25 *Everybody's* 575 (Oct. 1911).

51. Whipple, supra n.20 274-5.

52. McQuillen, supra n.48 at 212-213.

Editorials in the *Evening Sun* and *Outlook* expressed similar reservations about the extent of the guarantee in practice.[53]

The cases confirmed the presence of restraints on unbridled free speech; indeed at first blush Steffans' charge seems all too apt. While some libertarian rhetoric can be culled from dicta in *U.S. v. Cruickshank*,[54] or state court opinions,[55] the bulk of decisions ultimately rejected free speech defenses. The Salvation Army parade cases are both legal and representative. Some courts summarily affirmed the local licensing power under traditional police power rationale where proper delegation of the state's authority to the municipality existed.[56] The proffered defenses of other Salvation Army members were more creative. Eliza Mashburn unsuccessfully challenged the Bloomington, Illinois anti-noise ordinance by asserting her freedom of religion and speech. Not only did the defense fail because her drum beating had attracted a crowd and frightened several horses, but the court in *Mashburn v. Bloomington*[57] also remarked that the First Amendment did not reach such disturbances.

The next year the same court was called upon to reassess the Bloomington ordinance in *City v. Richardson*.[58] This time a husband-wife duet were acquitted, forcing the court to distinguish *Mashburn* on factual grounds. Even though these Salvation Army members also had not been licensed, their actions had not blocked the public streets. Further, the court intimated that a municipal ordinance which attempted to forbid all parades *per se* (i.e., outright prohibition rather than licensing) would be void. In 1891 the case of *Rich v. City of Naperville*,[59] completed the trilogy. Though that city's parade permit scheme was indistinguishable from Bloomington's, the Salvation Army defendants' convictions for unlawful assembly were reversed. The ramifications of such prosecutions on civil liberties no longer escaped the courts:

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53. "Right to Assembly," 13 *Bench & Bar* 7, 8 (1908) citing from the *Evening Sun* editorial of April 4, 1908 and from *The Outlook* of April 11, 1908.

54. "The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States." *U.S. v. Cruickshank*, 92 U.S. 542, 551 (1875).

55. See for example, *Aron v. City of Wausaw*, 74 N.W. 354 355 (Wis. S. Ct. 1898) (tort action against city for injury incurred by exploding firecracker at Fourth of July celebration dismissed since no violation of the city's unlawful assembly ordinance had occurred).

56. *Commonwealth v. Plaisted*, 19 N.E. 224, 226 (Mass. S. Ct. 1889) (licensing power of Boston police affirmed under police power).

57. *Mashburn v. Bloomington*, 32 Ill. App. 245, 246 (Ill. App. Ct. 1889).

58. *City of Bloomington v. Richardson*, 38 Ill. App. 60, 65 (Ill. App. Ct. 1890).

59. *Rich v. City of Naperville*, 42 Ill. App. 222 (Ill. App. Ct. 1891).

> Ever since the landing of the Pilgrims from the Mayflower the right to assemble . . . and the right to parade in a peaceable manner and for a lawful purpose have been fostered and regarded as among the fundamental rights of a free people. The spirit of our free institutions allows great latitude in public parades and demonstrations, whether religious, or political and if they do not threaten the public peace, or *substantially* interfere with the rights of others, *every* measure repressing them whether by legislative enactment or municipal ordinance is an encroachment upon fundamental and constitutional rights.[60]
>
> (emphasis added)

But the court was not content to rest its decision merely on general libertarian principles. In addition, the arbitrary discretion vested in local officials raised the spectre of discrimination: "If this ordinance is held valid, then may the city council shut off the parades of those whose notions do not suit their views and tastes in politics or religion and permit like parades of those whose notions do."[61]

Memorable for the abrupt about face which this one court underwent over a two year span, the *Rich* decision was neither the first nor most typical of those which recognized paraders' First Amendment rights.[62] The most frequently cited litigation voiding municipal licensing schemes came from outside Illinois. Back in 1886 the Michigan Supreme Court acknowledged the Salvation Army's right to peacefully parade with or without a permit in *In re Frazee*.[63] Alluding to the social value of such group acts accruing to participants and spectators alike, the court warned:

> It is only when political, religious, social or other demonstrations create public disturbances or operate as nuisances or *create* or *manifestly* threaten some *tangible* public or private mischief that the law interferes.[64]
>
> (emphasis added)

Other states soon followed the Michigan lead. The Kansas Supreme Court in *Anderson v. City of Wellington*[65] held peaceful parades lawful regardless of the absence of a permit, seconded the *Frazee*

60. Id., 223.

61. Id., 225.

62. *City of Chicago v. Trotter*, 136 Ill. 430, 432-3 (1891) (earlier state Supreme Court decision concluding that parades were not *per se* actionable nuisances under prevailing corporation principles; impermissible redelegation voided ordinance).

63. *In re Frazee*, 63 Mich. 396 (1886) (relied on in *Trotter*).

64. Id., 405.

65. *Anderson v. City of Wellington*, 40 Kan. 173 (1888).

court's libertarian description of the defendant's rights, and noted the decision's positive effect on political speech. In reversing the Salvation Army leader's misdemeanor conviction, the court said: "The right of the people in this state by organization to cooperate in a common effort . . . to influence public opinion and impress their strength upon the public mind . . . has been too often exercised to be now questioned."[66] Wisconsin followed suit, becoming the fourth state to find similar justifications for permitting the Salvation Army parade. The court in *State v. Dering* warned municipal officials that: "The people do not hold rights as important and well-settled as the right to assemble and have public parades . . . subject to the power of any public officer to interdict or prevent them."[67] The licensing days of the local "petty tyrants" seemed numbered.

But change proved less sweeping. The ordinances in *Frazee*, *Anderson* and *Dering* all had expressly exempted certain assemblies (like funeral processions, fire brigades, and military marches) from the permit requirement, and other jurisdictions found this distinction controlling on the constitutionality of their more inclusive ordinances.[68] Since no equal protection challenge could be made by the Salvation Army petitioner in *In re Flaherty*,[69] the California Supreme Court affirmed his conviction on a finding of nuisance over the vocal protest of one judge, who found *Rich*, *Frazee*, and *Dering* controlling. Though Flaherty's request for the daily right to beat his drum and parade struck even the dissenter as bizarre, he felt that the state constitution demanded that the permit be issued.

Yet these cases, while a blow to the individual defendants, did not mark a wholesale retreat to pre-*Frazee* days. Though the courts might still reject the libertarian position, their rulings reflected a new sensitivity to the public's interest in peaceful expression. Those decisions which affirmed the police power thus took on new meaning. Where the court was convinced that safeguards existed against arbitrary, discriminatory licensing, the ordinance was upheld.[70] But where the court found only a pretextual use of the police power its

66. Id., 179.

67. *St. ex rel Garrabad v. Dering*, 84 Wis. 585, 595 (1893).

68. See, *Commonwealth v. Mervis*, 55 Pa. Sup. Ct. 178 (1913) (conviction reversed on grounds of class discrimination after the court rejected the free speech defense); *Commonwealth v. Curtis*, 55 Pa. Sup. Ct. 184 (1913) (all inclusive ordinance led to conviction).

69. *In re Flaherty*, 38 P. 981, 983, 985 (Cal. S. Ct. 1895); see also, *Roderick v. Whitson*, 22 N.Y. 858 (1889) (habeas corpus petition dismissed when village's permit scheme upheld under corporation law).

70. See generally, *City of Charetan v. Simmons*, 87 Iowa 226, 233 (1893) (citing defendant's due process rights as a potential remedy against arbitrary official action).

exercise would be prohibited.[71] Furthermore where only time, place, and manner restrictions were imposed by the local authorities, the courts were loathe to overturn the convictions.[72]

The Massachusetts Supreme Judicial Court faced the era's first major prosecution of a street speaker, and the judges' concern with the threat to the public peace posed by the speaker is evident. This eleven year court battle, which reached the United States Supreme Court, arose out of defendant William Davis' attempt to preach without permit on the Boston Commons in Contravention of municipal ordinance on May 17, 1885.[73] While Justice White's Supreme Court opinion shed no light on the free speech issue, he premised the decision on Davis' lack of property interest in the Commons:

> For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for an owner of a private house to forbid it in his house.[74]

The Justices still refused to incorporate the limitations of the First Amendment into the Fourteenth Amendment. Therefore there were no constitutional grounds for usurping the state police power, and the majority reasoning was straightforward: there was a valid delegation to the mayor and city council who had exercised their licensing power reasonably to promote the general enjoyment of public land by regulating, not prohibiting, speech.

Though Holmes, who authored the second state court decision, had similarly rejected Davis' proprietary interests, he did briefly touch the free speech claim. Direct restraints of public debate were constitutionally deficient, but indirect restrictions on the mode of expression like the Boston plan were permissible. Even though these courts seemed oblivious to the chilling possibilities of regulation, arguably the opinions did not sound the death knell for protected speech.[75] Indeed free speech advocates could have read the decisions as legitimating only general time, place, and manner re-

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71. *In re Gribben*, 47 P. 1074, 1078 (Okla. S. Ct. 1897) (Salvation Army parade control held not an "essential indispensible" municipal duty); *Village of des Plaines v. Poyer*, 123 Ill. 348 (1888) (insufficient evidence that defendant's picnic-dance was a nuisance).

72. *Commonwealth v. Remmel*, 48 Pittsb. L. J. 125 (Pa. Q. Sess. 1900); *Mackall v. Ratchford*, 82 F.41, 42 (Cir. Ct. W. Va. 1897).

73. *Commonwealth v. Davis*, 140 Mass. 485 (1886), *aff'd*, 162 Mass. 510 (1895), *aff'd*, 167 U.S. 43 (1897).

74. Id., 167 U.S. at 47.

75. See the Court's subsequent reading of *Davis* in *Hague v. CIO*, 387 U.S. 495, 515-16 (1939) which interpreted the ordinance as a general ban on various activities deemed inconsistent with the general public enjoyment of the park.

strictions. At least one contemporary observor suggested this narrowing construction:

> The rule of common sense and of the public interest [is] not to allow public property set aside for one purpose to be used at the whim of a few individuals for another purpose.[76]

Thus if personal liberty forbids absolute prohibition of speech, public order demanded its reasonable regulation.

Massachusetts had a second chance in *Commonw. v. Abrahams.*[77] At issue was the constitutionality of another Boston ordinance which delegated the licensing power to Franklin Park Commissioners. Despite Secretary of Central Labor Union Abrahams' prior request for a permit, none was granted and litigation ensued over his abbreviated July 4th speech. When Abrahams admitted at bar (citing *Davis*) that such harangues would be improper in the streets or on the Commons because of their dedication to the public interest, he had proved too much. The Court readily extended his argument and *Davis* to uphold this municipal regulation against both the free assembly attack and an equal protection challenge. Like swine, reasoned the Court,[78] the public speaker could be restricted by reasonable regulation.

Other jurisdictions also weighed the street speaker's right to public access against the municipality's duty to promote the general welfare, and in each socialists were silenced by the police power. Party members Pierce and Wallace had chosen the streets of Amsterdam, New York as their forum in contravention of a local ordinance banning street gatherings. Sizable crowds had assembled to hear both men, rendering these instigators guilty of breaching the peace. Because the public right of free street access was deemed paramount, the judges summarily rejected the First Amendment claim.[79] In Atlanta, Professor Fitts decided not to leave an audience to chance so he distributed circulars in advance billing his speech as:

> Testing a City Ordinance/Free Street Lecture on Socialism by Professor J. L. Fitts of South Carolina. Shall we who built the streets be deprived of their use for lawfully assembling to discuss our condition and needs? Come and see. Be early and get a good place. Don't block the sidewalks or streets.

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76. James Reynolds, "Reasonable Restrictions Upon Freedom of Speech," 9 *Amer. Soc. Soc'y.* 46, 56 (1914).

77. *Commonwealth v. Abrahams,* 156 Mass. 57 (1892).

78. *Abrahams* relied on *Quincey v. Kennard,* 151 Mass. 563 (1890) (upheld municipal ordinance regulating the raising of swine).

79. *People v. Wallace,* 85 App. Div. 170, 172 (N.Y.S.Ct. 1903); *People v. Pierce,* 85 App. Div. 125 (N.Y.S.Ct. 1903).

Fitts v. City of Atlanta, categorically denied the defendant's free speech claim: "Professor Fitts has confused in his mind the constitutional right of freedom of speech with an imaginary, though non-existing right to hold public meetings and make speeches in the public streets."[80]

Another socialist, Abe Sugarman, starred in a similar scenario which opened for a short run in Minneapolis. Again the ordinance carried the imprimater of legality because it aimed at preserving the public order through reasonable regulation and it was upheld.[81] The subordination of radical activism to majority peace occurred also in the red flag parade cases. Socialists in both Massachusetts and Michigan were forbidden the right to parade through the downtown streets while waving their emblems on the rationale of public order.[82] While one can only wonder whether these socialists had not lost more supporters than they had won for the free speech cause, the results of the socialists' crusade must be attributed to the dislocations of the era.

The socialist cases however were not unique: even defendants freed of the radical taint were denied the unbridled right of free speech by various carefully drafted municipal ordinances. Only the half-mile radius around Detroit's City Hall was off-limits in *Love v. Phalen*.[83] Citing *Davis*, the court denied the speaker's First Amendment challenge finding no individual proprietary interest, but rather a public concern for order. Similar police power rationales were cited when a Los Angeles ordinance forbidding public assemblies within certain districts was held to raise no constitutional issue.[84]

Such perfunctory treatment of the free speech mandate was clearly not universal practice. A series of New York cases attest to the judicial scrutiny more commonly applied to municipal regulations. Though suffragette Maude Malone's conviction for disorderly conduct was eventually upheld, the court defended her right at a public political rally to verbally attack Presidential candidate, and

80. *Fitts v. City of Atlanta*, 49 S.E. 793, 795 (1905).

81. *State V. Sugarman*, 126 Minn. 477 (1914). The courts professed no illicit motive in handling the socialist cases. "Professed" motive is used advisedly since the court permitted cross-examination of witnesses which highlighted their socialist beliefs. Id., 479.

82. *People v. Beirnman*, 154 Mich. 150 (1908) (conviction under municipal breach of peace ordinance); *Commonwealth v. Karvonen*, 219 Mass. 30 (1914) (conviction under 1913 Massachusetts statute).

83. *Love v. Phalen*, 87 N.W. 785, 788 (Mich. S. Ct. 1901).

84. *Ex parte Thomas*, 103 P. 19, 20 (Cal. Ct. Apps. 1909).

then Governor, Woodrow Wilson.[85] Only when Wilson lost patience with her insinuations, and the meeting's chairman requested her silence, did Malone overstep her right to political debate. The vocal attack on another public figure, John Rockefeller, by an industrial worker prompted his arrest for breach of the peace. Enraged by Rockefeller's handling of labor unrest in Colorado, defendant Sinclair organized a peaceful vigil outside the Standard oil magnate's residence. Some participants carried a bleeding heart flag (in violation of a town ordinance), and the crowd blocked the street. In finally affirming Sinclair's conviction the court held the combination of various independently legal acts to be lethal:

> That the conduct reprobated was reprehensible does not legalize the act. This view does not militate against the right of free speech or against the right of assembly nor is it primarily for the protection of the one reprobated. Its sanction is the public interest in the enforcement of law and the preservation of order.[86]

In both cases the mixture of conduct with pure speech had fatally tainted the First Amendment claims. But at least the numerous free speech cases had insured that judicial review would be a meaningful, though not always victorious, step.

Having explored the diversity of litigation involving the conflict between free speech and municipal ordinances, some preliminary conclusions are in order. First, ignorance of the prevalence of the free speech debate at the state level can no longer be countenanced. The existence of the evidence alone suggests the need for revision of constitutional analyses which traditionally stress the later Supreme Court role to the detriment of earlier state developments.[87] Further the road toward a principled First Amendment theory had its share of detours imposed by a society caught in the throes of cultural change. Thus, when a court sidestepped the constitutional claim, one of the trilogy of police power concerns (safety, health, or mor-

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85. *People v. Malone*, 29 N.Y. Crim. Rpts. 325, 327 (N.Y.S. Ct. 1913). a sample of the Malone-Wilson interchange:

Malone: "You have just been talking about monopolies and what about women's suffrage? The men have a monopoly of the suffrage."

Wilson: "I'm here to discuss national not state issues."

Malone: "I'm speaking to you as an American." Id., 326.

See also, R. E. Falkner, "Free Speech and Its Limits," (Preliminary Report to the Free Speech Commission of the National Civic Federation), 22 *Case & Comment* 455 (Nov. 1915).

86. *People v. Sinclair*, 149 N.Y. Supp. 54, 61 (1914).

87. Cf., Gerald Gunther, *Cases and Materials on Constitutional Law* (9th ed. 1975), 104 *et seq.*

als) was invariably cited. These regulatory principles had been a traditional subject of nineteenth century jurisprudence; First Amendment doctrines were only now being hammered out.[88] Thus the novelty of the constitutional claims, coupled with the era's understandable fear of mass violence,[89] goes far in explaining the deference paid local officials.

In the wake of the 1886 Haymarket embroglio, Henry Adams had reduced any claim of protected political expression, to symbolic, but impractical rhetoric. Not only did the legal right exist to suppress utterance that threatened public security, but courts and local authorities had the affirmative moral duty to command the entire free speech controversy, to "sink into oblivion."[90]

A generation later Ernest Freund on the eve of World War I announced the emerging constitutional theory: mere advocacy could not be condemned.[91] Written in 1904, his treatise, *The Police Power*, signalled a marked departure from the earlier approaches of Cooley and Tiedeman. A product of a different age, Freund verified that a heightened judicial review was appropriate when free speech concerns were implicated. He counselled:

> The exercise of the police power might conceivably serve the purpose of guiding or checking intellectual movements so as to further the ideas of the government of what is beneficial to society or state. Such a purpose is however disclaimed by liberal governments and the guaranty of freedom of religion and of speech and press removes the pursuit of ideal interests on the whole from the operation of the police power.[92]

Never oblivious to the repressive check on free speech which the police power posed, Freund distinguished between reasonable regulation and outright suppression.[93] Individual rights could be subjected to "uniform, impartial, and reasonable regulation" to insure the general welfare, but he admitted that a society "which assigns to

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88. See text, supra, n.8.

89. "Nativist resurgence" in the late 19th century is often blamed for the public's link between radical sentiment and social violence. Such events as the economic depression of mid-1870s, a 1877 railroad strike with federal intervention, the rise of the Socialist Labor Party culminating in the 1886 Haymarket incident fueled the popular view. See, for example, William Preston, *Aliens and Dissenters, 1903-33* (Cambridge, 1963), 23-26.

90. Adams, supra n.44, 530.

91. Ernest Freund, *The Police Power* (Chicago, 1904), 513 (concluding that New Jersey's and New York's criminal advocacy laws of 1902 were unconstitutional).

92. Id., 11.

93. Id., 521.

state compulsion the narrowest possible limits invites social self-protection."[94]

Even the New York City Police Commissioner proved attune to an assemblage's constitutional rights when he ordered his force not only to permit free speech, but also to protect its untrammelled exercise. For him, constitutional liberty extended to the point of actual incitement to violence, obstruction of the sidewalks, or tangible interference with the rights of others. Even his definition of incitement to riot—"provocation of immediate violence"—forbade the suppression of mere advocacy.[95]

Lastly some attempt should be made to explain why these cases, nearly all of which could be classified under the political speech title, did not result in more victories for the free speech defendant. The dichotomy repeatedly drawn in the cases between the individual's liberty and the public interest suggests one tentative hypothesis: the courts did not yet fully comprehend their role as protectors of minority concerns.[96] The author of the Preliminary Report to Free Speech Commission of the National Civic Federation suggested just how deeply entrenched the majoritarian emphasis of the Founding Fathers still was: "A common-sense respect for the rights of others has embodied in the law certain restrictions on the right of free speech. . . ."[97] Another lawyer put it more bluntly:

> I have found in a somewhat extensive examination of cases bearing on free speech almost no instance where these alleged mouthpieces of the people had any authority from a majority of the people to speak for them.[98]

Perhaps in an age with a strong faith in the democratic process, repeated legitimization of the majority will by the courts made sense. Even so, the groundwork for free speech protection had been laid: the speech/conduct distinction surfaced; regulation rather than prohibition was the order of the day; time, place, and manner rules were developed; and access to the public forum became a central issue. Though products of a different age and inclined to judge the era's accomplishments by modern free speech standards, even we should not fault that record.

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94. Id.

95. Hon. Arthur Woods, "Reasonable Restrictions Upon Freedom of Assemblage," 9 *Amer. Soc. Soc'y* 29, 30-2 (1914). See also the reactions to Wood's address by Gilbert Roe, J. Q. Dealey and Paul Douglas, 9 *Amer. Soc. Soc'y* 35 *et seq.*

96. William Nelson, "Changing Conceptions of Judicial Review," 120 *U. Pa. L. Rev.* 1166, 1177 (1972); cf. Wiebe, supra n.11, at 107; Murphy, supra n.1 at 286-7.

97. Falkner, supra n.88, 455.

98. Reynolds, supra n.79, at 57.