MISSING THE POINT OF THE PAST (AND THE PRESENT) OF FREE EXPRESSION

*Stephen M. Feldman**

I. INTRODUCTION

In *The Invention of Low-Value Speech*, Genevieve Lakier criticizes recent free expression developments from a powerful historical perspective.[1] She launches the article with a discussion of *United States v. Stevens*,[2] which held unconstitutional a statute proscribing the creation, sale, or possession of so-called crush videos, depicting the intentional torture and killing of helpless animals.[3] The *Stevens* Court articulated and relied on the two-level theory of free speech.[4] According to this theory, the First Amendment fully protects most expression but does not protect (or weakly protects) certain low-value categories of expression, such as obscenity and fighting words.[5] *Stevens* added that a low-value category could be either previously recognized as such or a "historically unprotected"—albeit judicially unrecognized—type of expression.[6] For expression to fit into the latter category, there must be a "long-settled tradition of subjecting [such] speech to regulation."[7] *Stevens* concluded that crush videos fell into neither a previously recognized nor otherwise historically unprotected category of expression.[8] As Lakier emphasizes, the Court implied that its historical approach harmonized with the original understanding of the First Amendment and, as such, closely confined judicial discretion.[9]

The crux of *The Invention of Low-Value Speech* is Lakier's challenge to the historical underpinning of *Stevens* and the entire two-level theory.[10] She correctly explains that this theory cannot be rooted in the original understanding of the

* Visiting Scholar, Harvard Law School. Jerry W. Housel/Carl F. Arnold Distinguished Professor of Law and Adjunct Professor of Political Science, University of Wyoming.

1. Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015).

2. 559 U.S. 460 (2010).

3. *Stevens*, 559 U.S. at 474, 482.

4. *See id.* at 468–69 (describing certain classes of speech, the restriction of which generally does not raise any First Amendment concerns).

5. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790–91 (2011).

6. *Stevens*, 559 U.S. at 468–72 ("Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.").

7. *Id.* at 469.

8. *Id.* at 472.

9. Lakier, *supra* note 1, at 2176 (citing *Stevens*, 559 U.S. at 469–70).

10. For a more comprehensive history of the development of free expression in the twentieth century, see STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 241–462 (2008).

First Amendment.[11] To a great degree, the post-1937 New Deal Court invented the two-level theory while simultaneously suggesting that it was historically grounded.[12] Subsequent Courts have generally accepted this historical mistake.[13] Moreover, according to Lakier, this mistake has serious ramifications for current free expression disputes.[14] First, Lakier contends that the Court pretends that such disputes can be resolved by reference to history and the historically rooted low-value categories. But because the historical grounding of the two-level theory is false, the Justices are practically unconstrained in deciding the cases.[15] Second, Lakier argues that the Court should stop relying on mythical history and instead should adopt a functional approach to decide cases. That is, the Justices should emphasize the underlying purposes of the First Amendment protection of free expression.[16]

Lakier gets much of this history correct. While her historical argument is not novel, she has performed a valuable service by highlighting this often overlooked history.[17] My problem is not with the history that she elucidates, but rather with the history that she ignores. When she explains the New Deal Court's historical sleight of hand vis-à-vis the low-value categories, Lakier misses a large and crucial part of the story. During the 1930s, the nation's practice of democracy substantially transformed, and that transformation strongly influenced the Court's treatment of First Amendment cases. Moreover, the history of the struggle over democratic government and free expression has important ramifications for our current circumstances.

Section II of this Essay briefly summarizes Lakier's historical critique of the two-level theory. Section III describes the lacuna in Lakier's historical analysis of the post-1937 Court's free expression transition. Section IV, the conclusion, explains why the history that Lakier misses matters to our current understanding of free expression and the Roberts Court.

II. LAKIER'S HISTORY OF THE TWO-LEVEL THEORY

As Lakier explains, from the late eighteenth through the early twentieth centuries, courts decided free expression cases without relying on a two-level theory.[18] From the time of the framing onward, courts widely agreed that both national and state constitutions, in protecting free expression, prohibited the

11. Lakier, *supra* note 1, at 2177–78, 2214–15; *see* FELDMAN, *supra* note 10, at 46–69 (discussing the understanding of free expression in the founding era).

12. *See* Lakier, *supra* note 1, at 2168 (noting that it was only in this period that "courts began to link constitutional protection to a judgment of the value of different kinds of speech").

13. *Id.* at 2168–69.

14. *See id.* at 2223–24 (commenting that the *Stevens* theory "fails to provide courts with a principled basis for making determinations about the scope and limits of constitutional protection for speech" and "threatens to both underprotect and overprotect speech").

15. *Id.* at 2223–25.

16. *Id.* at 2225–29.

17. *See generally* FELDMAN, *supra* note 10, at 392–407 (placing the emergence of the two-level theory within free expression developments shortly after the New Deal Court's 1937 turn).

18. Lakier, *supra* note 1, at 2179–82.

government from imposing prior restraints.[19] The government, however, could punish speakers and writers for "what is improper, mischievous, or illegal," as Justice Story wrote.[20] Nineteenth-century courts often distinguished between liberty and licentiousness.[21] An individual could freely exercise liberty of expression, but could not speak or write licentiously without risking punishment.[22] This approach to free expression is often referred to as the bad tendency doctrine: while the government could not impose prior restraints, it could impose penalties for speech or writing that had bad tendencies or likely harmful consequences.[23]

Lakier aptly characterizes this protection of free expression as broad but shallow.[24] In other words, basically all forms of speech enjoyed constitutional protection, particularly against the imposition of prior restraints, but also any form of speech could be punished if it had bad tendencies. From a legal standpoint, free expression during this long era was not a constitutional "lodestar"—courts often permitted restrictions on speech and writing.[25]

In fact, as Lakier emphasizes, the Supreme Court did not articulate the two-level theory and explicitly recognize low-value categories of expression until 1942 in *Chaplinsky v. New Hampshire*.[26] *Chaplinsky* identified several such categories: "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 . . . ."[27] The *Chaplinsky* Court's

19. *Id.* at 2179.

20. *Id.* at 2180 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1878, at 736 (1833)).

21. *Id.* at 2194.

22. FELDMAN, *supra* note 10, at 222–24; *see also id.* at 8 (explaining Blackstone and his articulation of the distinction between liberty and licentiousness).

23. *See, e.g.*, Castle v. Houston, 19 Kan. 417 (1877); Perkins v. Mitchell, 31 Barb. 461 (N.Y. Gen. Term 1860). Many courts added that a criminal defendant, to be convicted, must also have intended harmful consequences. *See, e.g.*, *Castle*, 19 Kan. at 428 ("[I]n a criminal proceeding . . . the motive of the publication is important . . . ."). Under the doctrine of constructive intent, however, the courts typically reasoned that a defendant was presumed to have intended the natural and probable consequences of his or her statements. *See* Shaffer v. United States, 255 F. 886, 889 (9th Cir. 1919). If a defendant's expression was found to have bad tendencies, then the defendant's criminal intent would be inferred. *See id.* The bad tendency test developed from the truth-conditional standard that first emerged in seditious libel cases. FELDMAN, *supra* note 10, at 110–18; Lakier, *supra* note 1, at 2184–86 (referring to this standard as the "truth-plus defense").

24. Lakier, *supra* note 1, at 2195–97.

25. G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 300–01 (1996). Although Lakier does not go beyond the legal doctrine, it should be added that a vigorous tradition of dissent (or free speech) was sustained throughout this era. In other words, many Americans believed they had extensive rights to free expression, even though they probably were ignorant of the legal doctrine. Simultaneously, there was a tradition of suppression, pursuant to which many Americans believed they could legitimately suppress outsiders. For further discussion on these traditions, see FELDMAN, *supra* note 10, at 118–42, 209–40.

26. 315 U.S. 568 (1942).

27. *Chaplinsky*, 315 U.S. at 571–72 (footnote omitted).

suggestion that these low-value categories had been previously, expressly, and judicially recognized was misleading. Nevertheless, as Lakier underscores, most observers today accept the *Chaplinsky* Court's statement. "It is . . . widely accepted today that the existence of these categories extends back to the ratification of the First Amendment: that, since 1791, low-value speech has been considered unworthy of constitutional protection, or at least of the protection afforded 'high-value' speech."[28]

Lakier argues that the New Deal Court invented the two-level theory and the concomitant low-value categories for two reasons.[29] First, largely because of changes in Court personnel in the late 1930s, a majority of Justices accepted the expansive view of free expression articulated by Justices Holmes and Brandeis.[30] Starting in 1919 with *Abrams v. United States*,[31] Holmes and Brandeis began advocating that the Court abandon the bad tendency standard and recognize stronger First Amendment protections.[32] However, even after the Court vindicated their position, the Justices were unwilling to adopt an absolutist view of free speech. Some expression, they believed, remained constitutionally unprotected.[33] In need of a new doctrinal framework to help distinguish protected from unprotected expression, the Court settled on the two-level theory, an approach that free speech scholar Zechariah Chafee had recommended in 1941.[34]

Second, Lakier argues that the Court sought to mediate tensions within its constitutional jurisprudence. At that time, the Court was suggesting that the government, including the Court, needed to remain neutral with regard to values. In the realm of free expression jurisprudence, this notion would grow into the principle of content neutrality—"the idea that government has no right to discriminate against speech because it disagreed with or disliked the message the speech conveyed."[35] The problem for the Court, as Lakier points out, was that the notion of content neutrality clashed with the concept of judicially recognized low-value categories of expression, The Court itself, in other words, was specifing that certain forms of expression were of lesser value than other forms.[36] The Justices could not merely brush aside this tension with content neutrality because the Court had recently repudiated the jurisprudence of *Lochner v. New York*.[37] After the 1937 turn and the rejection of *Lochner*, the Court stressed deference to democratic decisions and legislative actions, especially in congressional power

28. Lakier, *supra* note 1, at 2168.

29. *Id.* at 2197–207.

30. *Id.* at 2197–200.

31. 250 U.S. 616 (1919).

32. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring) (elaborating Holmes's clear and present danger test), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

33. Lakier, *supra* note 1, at 2197–201.

34. *Id.* at 2206 (citing ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 149–50 (1941)).

35. *Id.* at 2204.

36. *Id.* at 2203–05.

37. 198 U.S. 45 (1905), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

and due process cases.[38] But at least in some free speech cases, the Court was refusing to defer and instead was expanding First Amendment protections.[39] How to reconcile this tension? "It was in this context," writes Lakier, "that the Court proclaimed a continuity with the past that did not in fact exist."[40] In other words, the Court invoked a mythical history to legitimate its new approach to free expression.

III. THE LACUNA IN LAKIER'S HISTORY

While Lakier's rendition of this historical period is accurate, she misses a large part of the story. From the early twentieth century until approximately the beginning of World War II, the United States was in the throes of a sustained political struggle over the meaning of democratic government.[41] Before that time, American government had always been republican democratic. According to the theory of republican democracy, citizens and government officials, imbued with civic virtue, pursue the common good rather than "private and partial interests."[42] While specific conceptions of virtue and the common good changed in America over time,[43] republican democracy proved resilient. It developed and was sustained in an America that was predominantly rural and agrarian.[44] Furthermore, the population was relatively homogeneous, with a large majority of Americans committed to Protestantism and tracing ancestral roots to western or northern Europe.[45]

Unquestionably, many Americans did not fit the mold for this relatively homogenous society. Not all Americans were moderately wealthy, white, Protestant, Anglo-Saxon men. Most of the outliers were denied rights and excluded from political participation pursuant to republican democracy.[46] An alleged lack of civic virtue could, in theory, legitimate the forced political exclusion of a societal group because nonvirtuous people would be unwilling to forgo the pursuit of their own private interests.[47] Partly on this pretext, African Ameri-

38. *See, e.g.*, *Parrish*, 300 U.S. 379 (upholding a state minimum wage statute); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act).

39. White, *supra* note 25, at 340–41.

40. Lakier, *supra* note 1, at 2205.

41. For a thorough explanation of this history, with an emphasis on problems related to judicial review, see generally HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993).

42. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 59 (1969).

43. FELDMAN, *supra* note 10, at 32–40.

44. *Id.* at 34–36.

45. *See* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 218–19 (1986) (discussing the religious homogeneity of the American people); FELDMAN, *supra* note 10, at 14–45 (discussing the development and sustenance of republican democratic government).

46. *See* CURRY, *supra* note 45, at 221 (noting that "eleven of thirteen states restricted officeholding to Christians or Protestants").

47. For a discussion on the exclusion of societal groups from the polity, see ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 54–60 (2000) and ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S.

cans, Irish Catholic immigrants, women, and other peripheral groups were precluded from participating in republican democracy for much of American history.[48] Given such exclusions, conceptions of virtue and the common good typically mirrored the interests and values of wealthy, white, Protestant men.[49]

According to republican democratic theory, individual rights and liberties are protected from undue government interference but are always subordinate to the government's power to act for the common good.[50] These principles, to a great degree, structured republican democratic judicial review. Courts would review government actions to determine whether a disputed action was for the common good, and therefore permissible, or for partial and private interests, and therefore impermissible.[51] Free expression rights were no different from other individual rights. The bad tendency test, the predominant doctrinal framework for analyzing free expression claims, reflected this republican democratic approach to judicial review. Courts upheld government actions punishing expression likely to produce bad tendencies precisely because such speech or writing undermined virtue and contravened the common good.[52] In fact, applying the bad tendency standard, the Supreme Court would reject every free speech claim raised before the 1930s.[53]

In the late nineteenth century, the nation survived the Civil War, but multiple societal forces began to strain the republican democratic system of government. The nation became increasingly industrialized and urbanized.[54] Manufacturers encouraged immigration to create a surplus workforce, with a large percentage of immigrants coming from eastern and southern Europe (rather than from western and northern Europe, as in the past).[55] Because many of these immigrants were Catholic and Jewish rather than Protestant, the population grew religiously diverse.[56] Old-stock Americans fought these changes in different

HISTORY 170–73 (1997).

48. *See, e.g.*, JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925, at 6 (6th prtg. 1967) (discussing the condemnation of Catholic immigrants).

49. *See* FELDMAN, *supra* note 10, at 25–26; Stephen M. Feldman, *Is the Constitution Laissez-Faire?: The Framers, Original Meaning, and the Market*, 81 BROOK. L. REV. 1, 29 (2015).

50. *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 276 (New York, O. Halsted 1827) ("[P]rivate interest must be made subservient to the general interest of the community.").

51. *See, e.g.*, Bank of the State v. Cooper, 10 Tenn. (2 Yer.) 599, 605 (1831); Eakin v. Raub, 12 Serg. & Rawle 330, 372 (Pa. 1825) (opinion of Duncan, J.); *see also* FELDMAN, *supra* note 10, at 26–32; GILLMAN, *supra* note 41, at 51–55.

52. *See, e.g.*, Knowles v. United States, 170 F. 409, 412 (8th Cir. 1909); Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 408–10 (Pa. 1824); Commonwealth v. Morris, 3 Va. (1 Va. Cas.) 176, 179–80 (1811).

53. *E.g.*, Debs v. United States, 249 U.S. 211 (1919) (upholding a conviction under the Espionage Act); Halter v. Nebraska, 205 U.S. 34 (1907) (upholding a conviction under a flag desecration statute).

54. FELDMAN, *supra* note 10, at 166–86.

55. *Id.*

56. *See* JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT 123 (1963) (noting that the political struggle over Prohibition was dominated by Protestants on one side, and the "Eastern upper classes" of Jewish and Catholic immigrants on the other).

ways. For instance, in the 1920s, the government placed severe quotas on the immigration of eastern and southern Europeans, deemed to be racially inferior to Anglo-Saxons.[57] Likewise, surging nativism helped engender Prohibition as a religious and cultural strike against Catholics.[58] States introduced new laws limiting suffrage, supposedly to weed out corruption and create "a more competent electorate," yet these laws typically prevented immigrants and the poor from voting.[59]

Despite this multipronged backlash from old-stock Americans, republican democracy was crumbling by the late 1920s. The onset of the Great Depression ushered in its demise. The old agrarian, rural, and relatively homogeneous American society was no more.[60] Massive numbers of immigrants and their children had now become part of the American polity.[61] As a practical matter, the New Deal of the 1930s weighed the values and interests of the demographically diverse population.[62] No longer were mainstream and old-stock Protestant values enshrined in conceptions of virtue and the common good. By the end of the 1930s, scholars were beginning to develop a theory of pluralist democracy to match these new democratic practices.[63] The crux of pluralist democracy lay not in the specification of supposedly objective goals, such as the common good, but rather in the following of processes that allowed all citizens to voice their particular values and interests within a free and open democratic arena.[64] Each individual citizen, in theory, had an equal right to express his or her respective interests and values.[65] Legislative actions arose from negotiation, persuasion, and the exertion of pressure through the normal channels of the democratic process.[66] After World War II, numerous political theorists celebrated pluralist democracy as the best means for accommodating "our multigroup society."[67]

57. E. P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965, at 187–92 (1981). *See generally* U.S. IMMIGRATION COMM'N, DICTIONARY OF RACES OR PEOPLES, S. DOC. NO. 61-662 (3d Sess. 1910) (describing racial differences of different immigrant groups).

58. GUSFIELD, *supra* note 56, at 122–23.

59. KEYSSAR, *supra* note 47, at 128; *see also id*. at 128–29 (describing measures that prevented voting); ARTHUR S. LINK & RICHARD L. MCCORMICK, PROGRESSIVISM 53–55 (1983) (emphasizing reduced voting in poor and immigrant communities).

60. FELDMAN, *supra* note 10, at 166–97.

61. ANTHONY J. BADGER, THE NEW DEAL: THE DEPRESSION YEARS, 1933–1940, at 248–49 (1989); WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932–1940, at 183–84 (1963).

62. *See* BADGER, *supra* note 61, at 246–49 (discussing the diverse demographic makeup of the Democratic party in the era of the New Deal).

63. *See, e.g.*, JOHN DEWEY, FREEDOM AND CULTURE 176 (1939) (arguing that "recourse to monistic, wholesale, absolutist procedures is a betrayal of human freedom no matter in what guise it presents itself").

64. *See id.* at 175–76.

65. *See id.* at 176. *See generally* V.O. KEY, POLITICS, PARTIES, AND PRESSURE GROUPS (1942) (discussing the role of individual citizens in the American political process).

66. WILFRED E. BINKLEY & MALCOLM C. MOOS, A GRAMMAR OF AMERICAN POLITICS 8–11 (1949).

67. *See, e.g.*, *id.* at 9. One of the leading theorists of pluralist democracy was Robert Dahl. For a good example of his work, see ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

To be sure, even as the New Deal and pluralist democracy took hold, conservative old-stock Americans did not quietly acquiesce to this new system of government. The conservative Supreme Court Justices continued to stubbornly apply the principles of republican democratic judicial review until 1937 and, in doing so, invalidated numerous New Deal economic programs.[68] After 1937, with pluralist democracy entrenched, conservative lawyers emphasized the assertion of individual rights and liberties. They realized that the judicial enforcement of rights could potentially protect against the new majoritarian threat posed by the democratic empowerment of immigrants and other peripheral groups.[69] Earlier in the decade, many Americans on both the right and left doubted whether democracy of any kind could adequately and efficiently cope with mounting national and international problems.[70]

Regardless, in 1937, the moderately conservative Justice Owen Roberts started to vote consistently with the progressive Justices to uphold New Deal legislative actions.[71] Soon afterward, the conservative Justices began to retire, enabling President Franklin Roosevelt to appoint new Justices supportive of pluralist democracy and the New Deal.[72] The Court, at this point, fully accepted pluralist democracy and repudiated republican democratic judicial review.[73] But this repudiation created a problem: If judicial review had largely revolved around the republican democratic principles of virtue and the common good, how should the Court structure judicial review under pluralist democracy? The Justices experimented with different approaches. For instance, it was during this time period when the Court first began using balancing tests.[74] Most notably, in congressional power cases, the Court emphasized deference to the democratic process.[75] In fact, before the 1930s, the Justices rarely even mentioned democracy, but after the 1937 turn, they regularly discussed democratic participation.[76]

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68. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating the Bituminous Coal Conservation Act of 1935); R.R. Ret. Bd. v. Alton R. Co., 295 U.S. 330 (1935) (invalidating the Railroad Retirement Act).

69. FELDMAN, *supra* note 10, at 364–67.

70. *Id*. at 312–14. For instance, in 1934, the president of the American Political Science Association suggested that some degree of fascism might be helpful. Walter J. Shepard, *Democracy in Transition*, 29 AM. POL. SCI. REV. 1, 19 (1935).

71. *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 142–44, 177 (1995) (discussing Justice Owen Roberts).

72. C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937–1947, at 8–11 (1948).

73. *See* LEUCHTENBURG, *supra* note 71, at 142–43 (documenting the start of this change); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 953–54 (1987) (noting that the "poor fit" between the real world and a constitutional doctrine intended to protect an "ideal structure of federalism and individual rights" led some Justices to "question earlier constitutional truths").

74. Aleinikoff, *supra* note 73, at 948.

75. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 129 (1942) (upholding the production quotas of the Agricultural Adjustment Act of 1938, and noting that "[t]he conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process").

76. Morton J. Horwitz, Foreword, *The Constitution of Change: Legal Fundamentality Without*

In the realm of free expression, the rejection of republican democratic judicial review led the Justices to abandon the bad tendency test. Equally important, the Justices and numerous commentators recognized that the emergent pluralist democracy depended on free speech more fundamentally than had republican democracy. At least as far back as the framing, commentators had linked free expression (most often, a free press) with free government.[77] This link was always conceived from within the parameters of republican democracy, explaining the emphasis on free government rather than self-government. Most commonly, republican democratic theorists would emphasize that free expression helped check the potential for government officials to become corrupt and contravene the common good. The press, in particular, acted like a watchdog, sniffing out the unvirtuous.[78]

But free expression played a different role in pluralist democracy. Soon after the Court began to defer to the democratic process in congressional power and due process cases, Justice Harlan Stone's famous footnote four in *United States v. Carolene Products Co.*[79] questioned whether such deference was appropriate when legislation either infringed liberties protected by the Bill of Rights (including free expression), restricted participation in democratic processes, or discriminated against "discrete and insular minorities."[80] As the Justices and commentators recognized, free expression had become integral to the (pluralist) democratic process itself. The people must be able to openly express their values and interests in the political arena. Without free expression, pluralist democracy could not exist.[81] The so-called self-governance rationale joined the search-for-truth rationale, a favorite of Holmes and Chafee, as an important justification for the constitutional protection of speech and writing.[82] In the late 1930s and early

Fundamentalism, 107 HARV. L. REV. 30, 56–57 (1993) (discussing the emerging importance of democracy). *See generally* JOHN H. ELY, DEMOCRACY AND DISTRUST (1980) (discussing the connections between pluralist democracy and judicial review).

77. Feldman, *supra* note 49, at 42–44.

78. FELDMAN, *supra* note 10, at 56–63. Some republican democratic theorists would add that free expression encouraged virtuous citizens to promote the common good. *Id*. at 383–96. When Justice Brandeis explained free expression in his *Whitney* concurrence, he discussed the relation between free expression and government from this republican democratic perspective. Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969); *see* FELDMAN, *supra* note 10, at 385–86 (explaining Brandeis's viewpoint).

79. 304 U.S. 144 (1938).

80. *Carolene Prods.*, 304 U.S. at 152 n.4. Justice Stone had become a renowned defender of faculty free speech rights when he served as the Dean of Columbia Law School. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 838–39 (Kermit L. Hall et al. eds., 1992).

81. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943); ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 109, 179 (1989); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25–27, 45–46 (1948).

82. Frederick Schauer, *Free Speech and the Argument from Democracy*, *in* LIBERAL DEMOCRACY: NOMOS XXV 241–43 (J. Roland Pennock & John W. Chapman eds., 1983). I do not mean to suggest that Lakier completely ignores the relationship between free expression and democracy. She describes how the post-1937 Court depicted "the First Amendment as a guardian of democracy." Lakier, *supra* note 1, at 2205. Yet, she does not realize that the conception of democracy

1940s, free expression became a constitutional lodestar as the Court upheld one First Amendment claim after another, a stark turnaround from the recent past.[83]

The pluralist democratic regime grew stronger in the United States partly because of the rise of totalitarianism in Europe during the 1930s.[84] Fascists and Nazis dictated to their populaces, arbitrarily imposed punishments, and suppressed minorities. American politicians and commentators emphasized that the United States was different.[85] Americans stressed democracy, the rule of law, and the protection of minorities (though the treatment of African Americans, for example, was conveniently disregarded). From this perspective, the judicial safeguarding of constitutional rights became paramount. During the 1940s, the Justices stressed the protection of "preferred freedoms"—crucial constitutional rights, including free expression.[86] When the Court invalidated the conviction of a Jehovah's Witness for distributing material door-to-door, the majority opinion underscored that "[f]reedom to distribute information . . . is so clearly vital to the preservation of a free society that . . . it must be fully preserved."[87]

It was within this complex context that the two-level theory of free expression arose. The concrete transformation of democratic politics in the 1930s, the subsequent emergence of pluralist democratic theory, and the Court's repudiation of *Lochner*-era (i.e., republican democratic) reasoning all pushed the Justices toward deference to democratic decisions. Yet, pluralist democratic theory itself accentuated the importance of free expression to the democratic process, and international politics highlighted the significance of judicially protecting individual rights. The two-level theory of free expression allowed the Justices to make sense of these multiple factors. The Justices created a presumption in favor of protecting expression, but the government could overcome that presumption if it showed that the expression fell into a low-value category.[88]

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had dramatically changed. Ironically, she hints that the New Deal Court's emphasis on democracy resonated with an originalist approach. The Court's doctrinal changes vis-à-vis free expression arose, according to Lakier, from the Justices' recognition that such changes were necessary "to achieve the purposes long associated with the First Amendment . . . such as the promotion of democratic government." *Id.* at 2198. But there is little evidence suggesting that the framers or ratifiers thought about the relation between republican democracy and free expression. *See* FELDMAN, *supra* note 10, at 46–69 (discussing free expression in the founding era). Further, the framing generation would have condemned as corrupt any government practices resembling pluralist democracy. *See id.* at 14–23 (discussing the framers' conception of republican democratic government).

83. *E.g.*, Thornhill v. Alabama, 310 U.S. 88 (1940) (holding that labor picketing is protected free speech); Schneider v. New Jersey, 308 U.S. 147 (1939) (invalidating conviction for distributing handbills); Hague v. CIO, 307 U.S. 496 (1939) (upholding right of unions to organize in streets).

84. *See* EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 117–38 (1973).

85. *See generally* Clarence A. Dykstra, *The Quest for Responsibility*, 33 AM. POL. SCI. REV. 1 (1939) (emphasizing differences between American and totalitarian governments).

86. Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 640–45 (1994); *see also* Thomas v. Collins, 323 U.S. 516, 529–30 (1945) (using preferred freedoms terminology); Murdock v. Pennsylvania, 319 U.S. 105, 111, 115 (1943) (same).

87. Martin v. City of Struthers, 319 U.S. 141, 146–47 (1943).

88. *See* Herndon v. Lowry, 301 U.S. 242, 258 (1937) ("The power of a state to abridge freedom

How did the Court identify low-value categories? Lakier's inattention to the crucial twentieth-century transformation of democracy led her astray on this point. She asserted that, in identifying low-value categories, "the Court proclaimed a continuity with the past that did not in fact exist."[89] This assertion was only half right. True, before the 1937 turn, the Court had never explicitly identified certain categories of expression as low-value per se, but simultaneously, the Court (and lower courts) had consistently allowed government to punish such expression. In fact, the low-value categories can reasonably be viewed as "remnants of the republican democratic past."[90] For example, throughout the republican democratic era, courts had explained that government could punish libel and obscenity because such expression contravened virtue and the common good.[91] After the 1937 turn, the Justices would not rely on republican democratic principles to justify the suppression of such speech or writing, but they would still reach similar conclusions. They would find libel and obscenity constitutionally unprotected—but now because it fell into a low-value category rather than undermining republican democratic principles.[92] To Lakier's credit, she acknowledges that the post-1937 Court retained "[s]ome vestiges of the nineteenth-century conception" of free expression.[93] Nevertheless, because she never links nineteenth-century free expression to republican democracy, she fails to appreciate the reasons for the overlaps and differences between the respective republican and pluralist eras.

In sum, the two-level theory was forged in the crucible of political crisis. Old- and new-stock Americans struggled for power in the midst of domestic and international exigencies. The United States confronted mass industrialization, urbanization, dramatic changes in population demographics, a massive and long economic depression, the rise of totalitarian and fascist governments abroad, and finally, a World War. Lakier writes a history that revolves primarily around doctrine and theory while largely ignoring these crucial political, social, and economic events.[94] If one instead relates the Court's treatment of free expression to the-

of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government."); FELDMAN, *supra* note 10, at 394–95, 401–04 (discussing this presumption).

89. Lakier, *supra* note 1, at 2205.

90. FELDMAN, *supra* note 10, at 404–05.

91. *See, e.g.*, Riley v. Lee, 11 S.W. 713, 714–15 (Ky. 1889) (holding for plaintiff in civil libel action); People v. Muller, 96 N.Y. 408, 410–11, 413 (1884) (upholding obscenity conviction); *see also* FELDMAN, *supra* note 10, at 210–26 (explaining suppression in the late nineteenth and early twentieth centuries).

92. Lakier, *supra* note 1, at 2168, 2200–03.

93. *Id.* at 2202.

94. Why might Lakier have missed so much of the history of the Court's adoption of the two-level theory? To be sure, she cites some of the key legal histories related to free expression, including LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997); NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL (1986); and GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (2004). Yet, she fails to cite numerous important secondary sources, particularly those by political scientists associated with historical institutionalism. *E.g.*, GILLMAN,

se broader developments, then one can more fully appreciate the realities of the constitutional transition. Most important, the Court articulated First Amendment doctrine that extended stronger protections to speech and writing. Whereas the legal framework for free expression under republican democracy was conducive to suppression, the legal framework under pluralist democracy became more protective of dissent (or free speech and a free press).[95] Even so, the pluralist democratic framework allows and perhaps enables widespread suppression of societal outsiders. Time after time, the Court has concluded that the First Amendment did not protect those outside the mainstream—for instance, during the post-World War II Red Scare,[96] during the Vietnam War protests,[97] and during the civil rights movement of the 1960s.[98] Political struggle between societal insiders and outsiders has remained a persistent feature of the constitutional landscape.[99]

IV. CONCLUSION

Lakier's article focuses on the history of free expression. But she ultimately uses the history to critique the Roberts Court's First Amendment jurisprudence in two ways. First, her history shows that the Roberts Court gets the history of free expression wrong.[100] Second, she argues that the Court, instead of invoking a mythical history, should decide First Amendment issues by analyzing the purposes for constitutionally protecting expression.[101] While I agree with Lakier that the Roberts Court gets the history wrong, I believe her functional approach, emphasizing the purposes of the First Amendment, is too cautious—especially given that she invokes only previously identified purposes. For more than a century, scholars from Chafee to Thomas Emerson have argued that the Court should in-

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supra note 41 (emphasizing a crisis in constitutional jurisprudence arising from the pressures on republican democracy); MARK A. GRABER, TRANSFORMING FREE SPEECH (1991) (emphasizing free expression around the turn of the twentieth century); KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW (2004) (emphasizing the development of civil liberties in the early twentieth century). Lakier also fails to cite Margaret Blanchard, a professor of journalism and mass communication who has contributed important historical work on free expression. *E.g.*, Margaret A. Blanchard, *Filling in the Void: Speech and Press in State Courts Prior to* Gitlow, *in* THE FIRST AMENDMENT RECONSIDERED: NEW PERSPECTIVES ON THE MEANING OF FREEDOM OF SPEECH AND PRESS 14 (Bill F. Chamberlin & Charlene J. Brown eds., 1982).

95. FELDMAN, *supra* note 10, at 1–5.

96. *E.g.*, Dennis v. United States, 341 U.S. 494 (1951) (upholding convictions of members of the Communist Party USA); *see also* FELDMAN, *supra* note 10, at 431–50 (discussing the Red Scare).

97. *E.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (upholding conviction of Vietnam War protestor); *see also* FELDMAN, *supra* note 10, at 450–62 (discussing the Vietnam War era).

98. *E.g.*, Adderley v. Florida, 385 U.S. 39 (1966) (upholding convictions of civil rights protestors); *see also* FELDMAN, *supra* note 10, at 412–18 (discussing the civil rights movement).

99. *See generally* ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO 1976 (2001) (providing a comprehensive account of civil liberties violations committed against political dissidents throughout American history).

100. Lakier, *supra* note 1, at 2223–25.

101. *Id*. at 2225–29.

terpret the First Amendment in accord with its underlying purposes.[102]

Despite Lakier's tepid recommendation, the history of free expression has far more radical implications for the Roberts Court's First Amendment jurisprudence. Lakier misses this possibility primarily because she missed so much of the history. Lakier ignored the broader political, social, and economic context in which the New Deal Court transformed free expression. She disregarded the overwhelming domestic and international crises that Americans confronted in the late 1930s, when the Court was reconsidering its treatment of First Amendment issues. Unsurprisingly, then, Lakier's recommended functional approach does not even attempt to struggle with the enormous political, social, and economic crises facing the nation today. Even if we are to look to the purposes of free expression, as Lakier recommends, we might need to reformulate those purposes in light of current conditions. The self-governance rationale, after all, emerged only because of the development of pluralist democracy. First Amendment purposes can shift in response to historical context.

Just as the New Deal Court faced a changing world at a critical juncture, the Roberts Court today faces a world in critical flux.[103] The Roberts Court confronts a nation and world characterized by digital technology, the Internet, gross income and wealth inequality, mass incarceration, unprecedented political polarization, multinational corporations, globalization, mass surveillance, and terrorism.[104] Yet, the Roberts Court decides free expression cases by invoking originalist history and the traditional free speech purposes, such as the self-governance rationale.[105] What is the consequence of the Roberts Court's approach? The First Amendment now consistently protects the wealthy, corporations, and the economic marketplace.[106] This Court's most important free expression decision, *Citizens United v. Federal Election Commission*,[107] upheld (or created) a right for corporations to spend unlimited sums (via independent expenditures) on politi-

102. *See, e.g.*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879–81 (1963) (arguing for a self-fulfillment rationale).

103. *See generally* KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (2d ed. 2001) (explaining the massive changes of the early twentieth century).

104. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW (2012 ed.) (discussing mass incarceration); NOLAN MCCARTY ET AL., POLARIZED AMERICA (2006) (discussing the root causes of political polarization); KENICHI OHMAE, THE END OF THE NATION STATE (1995) (discussing the role of multinational corporations in the global economy); FRANK PASQUALE, THE BLACK BOX SOCIETY (2015) (discussing digital technology and the Internet); THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014) (discussing growing income inequality); DANI RODRIK, THE GLOBALIZATION PARADOX (2011) (discussing the effects of globalization); BRUCE SCHNEIER, DATA AND GOLIATH (2015) (discussing digital technology and surveillance); JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY (2013 ed.) (discussing inequality).

105. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 353 (2010) (invoking the original meaning of the First Amendment to support invalidation of restrictions on corporate campaign spending); *id.* at 339 (invoking self-governance rationale); *id.* at 354 (invoking search-for-truth rationale).

106. Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1120 (2015) (noting "an attitude of unquestioning deference to the political power of money").

107. 558 U.S. 310 (2010).

cal campaigns.[108]

One of the Roberts Court's most telling First Amendment decisions is *Sorrell v. IMS Health Inc.*[109] because it involved the marketplace and data mining, crucial issues in our digital age.[110] Today, the gathering, analysis, and sale of data is big business.[111] *Sorrell* arose from the gathering and use of medical data in particular.[112] Pharmacies routinely record information about prescriptions, such as the doctor, the patient, and the dosage. In Vermont, IMS Health Inc. bought this information, analyzed it, and sold reports to pharmaceutical manufacturers, which used the reports to market their drugs more effectively to doctors.[113] Vermont passed a statute to stop pharmacies from selling the prescription information.[114] The legislature believed the data sharing threatened patients' privacy as well as public health, the latter because the pharmaceutical marketing was influencing doctors' treatment decisions.[115] In such circumstances, the Court easily could have concluded that the statute was a permissible exercise of the state's police power in regulating the economic marketplace. As such, the statute would not even raise a free speech issue.[116] But the Court's conservative majority instead reasoned that the statute created a commercial speech problem, although the statute did not restrict advertising per se—the usual subject matter of commercial speech cases.[117] The Court proceeded to invoke the First Amendment and apply "heightened judicial scrutiny,"[118] a standard more rigorous than the one typically used for commercial speech.[119] The Court invalidated the statute and, in so doing, blocked the regulation of marketplace activities only tenuously connected to expression.[120]

In the midst of our current political and economic crises, the conservative Justices have staked out a position favoring the wealthy and protecting the mar-

108. *Citizens United*, 558 U.S. at 360–72.

109. 564 U.S. 552 (2011).

110. *Sorrell*, 564 U.S. at 557–62.

111. SCHNEIER, *supra* note 104, at 39–53 (discussing data mining).

112. *Sorrell*, 564 U.S. at 557; *see also* PASQUALE, *supra* note 104, at 27–30 (discussing medical records).

113. *Sorrell*, 564 U.S. at 558.

114. *Id.* at 557–60.

115. *Id*. at 572.

116. *Id*. at 580–81 (Breyer, J., dissenting) ("In my view, this effect on expression is inextricably related to a lawful governmental effort to regulate a commercial enterprise. The First Amendment does not require courts to apply a special 'heightened' standard of review when reviewing such an effort."); *see also* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769–75 (2004) (distinguishing between the scope of the First Amendment's coverage and the protections afforded by the amendment).

117. *Sorrell*, 564 U.S. at 562–64, 570–71 (majority opinion).

118. *Id*. at 565.

119. *Id*. at 563–65, 571–72; *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (articulating a balancing test for commercial speech cases).

120. *See Sorrell*, 564 U.S. at 579–80.

ketplace.[121] Invoking originalism and the traditional philosophical rationales, they mistakenly claim that this position is neutral and apolitical.[122] Given this, *United States v. Stevens*,[123] which served as the springboard for Lakier's article, is cast into a different light. The case now looks like just another one of the Roberts Court's free expression decisions protecting the economic marketplace. For the conservative Justices, the marketplace is sacrosanct.[124]

Of course, Justice Scalia's death was a possible game changer, but the confirmation of the conservative Neil Gorsuch as the newest Justice diminished the likelihood of a change in jurisprudential direction. If, nonetheless, the Court with Gorsuch were to reexamine free expression as did the post-1937 Court, it is difficult to predict where such a reconsideration might lead. An observer in 1935 would have been hard-pressed to foretell that within a decade the Justices would refer to free expression as a preferred freedom, treat it as a constitutional lodestar, and emphasize it as a prerequisite for pluralist democracy.

121. Until Justice Scalia's death, the Roberts Court was the most pro-business Supreme Court since World War II. *See* Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1470–73 (2013) (undertaking a quantitative study of all post-war business-related cases).

122. Feldman, *supra* note 49, at 1–4 (explaining that the framing generation did not endorse capitalism, much less laissez-faire capitalism).

123. 559 U.S. 460 (2010).

124. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011) (invalidating a prohibition on the sale or rental of violent video games to minors).