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Two Steps Forward, One Step Back

On the Decline of Expressive Freedoms under the Roberts and Rehnquist Courts

> "All right," said the Cat; and this time it vanished quite slowly, beginning with the end of the tail, and ending with the grin, which remained some time after the rest of it had gone.
>
> "Well! I've often seen a cat without a grin," thought Alice; "but a grin without a cat! It's the most curious thing I saw in all my life!"[1]
>
> – Lewis Carroll, Alice in Wonderland (1869)

The contemporary Supreme Court's approach to enforcing the First Amendment is not unlike Lewis Carroll's Cheshire Cat: Over time, the Justices have rendered the Free Speech Clause a "grin without a cat," at least if one believes that the First Amendment, properly construed and applied, encompasses not merely freedom from government censorship, particularly in the form of content and viewpoint discrimination, but also the right to government support for expressive activities related to the project of democratic self-government. By way of contrast, during the Warren Court and Burger Court eras, federal judges routinely required government to facilitate private speech activity. This support came in a variety of forms – including access to government property for speech activity, government employment, extending expressive freedoms to students, faculty, and staff at public educational institutions (including public schools, colleges, and universities), and requiring the government to facilitate, rather than impede or disrupt, newsgathering activities by the press.

In times past, the government, unlike a private citizen or corporation, could not pick and choose which speakers, and what kinds of speech, it would lend its assistance.[2] Instead, the federal courts generally assumed a duty on the part of government to facilitate speech activity – unless it could justify with convincing clarity that its decision to withhold its assistance from a would-be speaker was based on considerations founded on the necessity of reserving government resources for their intended purposes in order to achieve them.[3] Something less than impossibility would suffice as a justification – but the government had an obligation to explain refusals to assist would-be speakers.[4] Today, however, the federal courts no longer reliably require the government to facilitate private speech.[5] Instead, the Supreme Court increasingly has permitted government to pick and choose which messages, and messengers, it will lend its assistance – or even tolerate.[6]

Nevertheless, the Cheshire Cat's grin clearly remains. Even as the Supreme Court has reduced government obligations to facilitate private speech, the Justices have been increasingly protective of the rights of private speakers who possess the resources necessary to speak.[7] Although the Supreme Court has not formally tethered speech rights to the ownership of private property, the end results of doctrinal changes over the past forty years have more-or-less led to this outcome.

Thus, if one can speak without the government's assistance, the Supreme Court has aggressively scrutinized government efforts to control – or even shape – the marketplace of ideas.[8] On the other hand, if one requires the government's assistance in order to speak, the government is increasingly free to grant or withhold its assistance as it sees fit.[9] As Kathleen Sullivan has suggested, the Roberts Court's strongly libertarian vision for the First Amendment "emphasizes that freedom of speech is a negative command that protects a system of speech, not individual speakers, and thus invalidates government interference with the background system of expression no matter whether a speaker is individual or collective, for-profit or nonprofit, powerful or marginal."[10]

Several possible explanations exist for this trend toward greater receptivity to a system of "managed speech,"[11] or, alternatively, judicial regard for the government's "managerial domain" over its assets.[12] The most obvious thesis would be to posit that conservative Justices favor a system of speech rights that tethers the ability to exercise such rights to the ownership of property and limits the ability of government to attempt to level the playing field.[13] As the materials that follow will demonstrate, this thesis is entirely plausible. However, I have come to believe that the actual reason for the decline of some speech rights, even as others have expanded radically, is more complicated than judicial class consciousness.

As I will explain in the chapters that follow, the Roberts and Rehnquist Courts seem to detest open-ended balancing tests that involve obvious exercises of judicial discretion to select free speech winners – and free speech losers. The Warren Court, in particular, and to a lesser extent, the Burger Court, both adopted and applied First Amendment tests that involved a kind of proportionality analysis;[14] the reviewing court would weigh the interest of the would-be speaker against the government's interest in denying its support to proposed speech activity. The outcome in any given case would depend on how the scale came to rest.

Of course, this balancing of interests (or proportionality) approach meant that litigants presenting First Amendment cases with very similar facts would, from time to time, and place to place, receive different judicial outcomes. On the other hand, however, this open-ended balancing of interests approach led to the net protection of more speech activity than would have been possible under a system of more rigid, categorical rules. By way of contrast, however, the Roberts Court and Rehnquist Court consistently have abjured balancing tests in favor of bright-line rules that limit, to the extent feasible, judicial discretion to pick and choose free speech winners and losers. One could mount serious normative and policy arguments in

favor of either approach – but one cannot deny that the approach of the Warren and Burger Courts – to embrace judicial discretion in First Amendment cases – created more opportunities for the kind of civic engagement that contributes to the process of democratic deliberation than the rule-based, categorical approach favored by the Roberts and Rehnquist Courts.

This chapter begins, in Part 1.1, by considering the important and underappreciated ways in which speech rights have declined, or eroded, rather than expanded over time. In Part 1.2, it continues by considering the significantly more speech-friendly baselines that existed under the Warren and Burger Courts. Using the Selma-to-Montgomery March as an exemplar of the potential breadth of the government's obligation to facilitate private speech activity, this Part argues that, not too long ago, the federal courts were considerably more willing to use the First Amendment as a basis for imposing positive obligations on the government to facilitate expressive activities.

Part 1.3 posits that the contemporary Supreme Court has increasingly linked the ability to speak to the ownership of property sufficient to support speech activity. Moreover, this trend tends to undermine significantly the equality of citizens within the process of democratic deliberation. If we are truly committed to the principle of equal citizenship and "one person, one vote," then we should be just as concerned about the openness and inclusiveness of the deliberative process that informs voting as we are with the relative weight or strength of a person's vote. Part 1.4 traces the Supreme Court's increasing resistance over time to using open-ended balancing tests to decide First Amendment cases – even at the significant price of providing less net protection to expressive activity. Part 1.5 provides a general overview of the remainder of this book. Finally, Part 1.6 concludes by providing a brief overview and synthesis of both this chapter and the book as a whole.

1.1 THE CONTRACTION UNDER THE ROBERTS AND REHNQUIST COURTS OF THE GOVERNMENT'S FIRST AMENDMENT DUTY TO FACILITATE PRIVATE SPEECH RELATED TO DEMOCRATIC SELF-GOVERNMENT

Notwithstanding a general narrative that emphasizes the ways in which the protection of expressive freedoms has increased over time in the United States,[15] in some important contexts contemporary First Amendment rights have contracted, rather than expanded. In fact, First Amendment analysis increasingly seems to reflect the views and approach expressed by Oliver Wendell Holmes, Jr., in *Davis v. Commonwealth*.[16] One could characterize the approach as reflecting "managed speech" or a "managerial domain" that vests the government with broad discretion to grant, or withhold, its support to those who seek its assistance in order to speak.

Professor Greg Magarian posits that the Roberts Court has embraced a system of "managed speech"[17] that favors some institutional speakers (including the government) and certain messages. He explains that "[m]anaged speech describes a mode of First Amendment jurisprudence that seeks to reconcile substantial First Amendment protection for expressive freedom with aggressive preservation of social and political stability."[18] The "managed speech" approach conveys "a strong measure of managerial control over public discussion," tends to marginalize the "First Amendment claims of *outsider speakers*," including "less powerful, and lesser-financed speakers, political dissenters, and others outside the social mainstream," and a bias in favor of "modes of public discussion that promote social and political stability" and against "modes of discussion that threaten to destabilize existing arrangements of social and political power."[19] Essentially, managed speech involves the federal courts vesting the government and powerful private entities with the discretion to marshal and deploy their resources to shape, if not control, the marketplace of ideas.

Professor Robert Post has advanced a quite similar argument that emphasizes the importance – and difficulty – of disentangling the legitimate managerial claims of the government as a manager from its exercise of more general regulatory authority as a sovereign.[20] As he explains the point, "[i]f government action is viewed as a matter of internal management, the attainment of institutional ends is taken as an unquestioned priority."[21] In the sphere of governance, however, "the significan[ce] and force of all potential objectives are taken as a legitimate subject of inquiry."[22] Accordingly, the distinction between "management" and "governance" is crucially important because the characterization of a particular undertaking as one or the other will prefigure the appropriate degree of judicial skepticism (or solicitude).

When federal judges expand the scope of the managerial domain, the government enjoys a much freer hand to take actions that adversely affect speech activity – when speech activity requires access to government property or other kinds of support.[23] Alternatively, and using Magarian's nomenclature, to the extent that the federal courts embrace a system of managed speech, those who require the government's assistance in order to speak are out of luck – if the government prefers not to facilitate the exercise of First Amendment rights.

Justice Holmes, while serving on the Supreme Judicial Court of Massachusetts, arguably pioneered the concept of "managed speech." Holmes squarely rejected a claim of a right of access to the Boston Common for the purpose of engaging in speech activity, explaining that "[f]or the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of rights of a member of the public than for the owner of a private house to forbid it in the house."[24] The Supreme Court of the United States affirmed, with Justice Edward Douglass White positing that "[t]he right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances

such use may be availed of, as the greater power contains the lesser."[25] In other words,citizens have a right to speak, but not necessarily a right to speak using government-owned property in order to do so. The government may exercise managerial prerogatives over public property – granting or declining access to particular government property for speech activity as it sees fit.[26]

In the United States, we maintain a strong commitment to the theoretical equality of all speakers, and all speech, but contemporary First Amendment doctrine ignores the gross disparities that exist in practice between those with the ability to use money to advance an agenda and those without it. In other places, such as much of Europe, a similar commitment to equality exists, but it is operationalized to advance the actual equality of speakers on the ground, rather than as a merely theoretical commitment to formal equality of opportunity. Substantive equality, not procedural equality, is what counts.

Thus, in France or Germany, limits on campaign contributions and expenditures are quotidian – necessary government policies that seek to keep the playing field of democratic politics level (or reasonably so).[27] In these jurisdictions, the idea that government efforts to equalize the voice of speakers are inconsistent with a meaningful commitment to freedom of expression simply doesn't wash.[28] By way of contrast, modern First Amendment jurisprudence all too often takes the view that if a would-be protestor cannot use a public park, street, or sidewalk for speech activity, that person should instead buy advertising time on a commercial radio or television station or rent a billboard adjacent to a major road or highway.[29]

As Anatole France wryly observed, "the majestic equality of the law forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[30] In the context of speech rights, those with property have an enhanced ability to speak relative to those without it. Yet, as a formal matter, we claim to observe a rule of one person, one vote, and to embrace the formal legal equality of all citizens as voters.[31] Obviously, government efforts to create a level playing field by silencing some voices and enhancing others would present serious normative and doctrinal difficulties.[32] The First Amendment serves as a strong bulwark against both content and viewpoint-based government efforts to regulate speech.[33]

Yet, surely it is possible to imagine a world in which the government may not silence speakers with the means to speak even though it also affirmatively facilitates – by subsidizing those without means – speech related to the project of democratic self-government.[34] Using public resources to facilitate the exercise of expressive freedoms need not imply a generalized power to squelch speech by persons and entities that are able to speak without any government support. An important, and related, question involves whether government support of speech activity should be entirely discretionary – or whether the federal courts might use the First Amendment as a basis for requiring public subsidies of speech activity (particularly if the speech relates to democratic self-government).

I fully appreciate the legal fact that, as a general matter, constitutional rights in the United States are negative, not positive, in nature. Consistent with this general approach, the federal courts do not usually impose positive duties on the government to facilitate the exercise of constitutionally-protected rights by individual citizens.[35] The First Amendment, at least since the 1930s, has been different; the Supreme Court has regularly and consistently required government to facilitate speech even when it would prefer not to do so.[36]

As Justice Owen Roberts explained the proposition in *Hague*:

> Wherever the title of the streets and parks may rest, they have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[37]

Thus, the First Amendment does impose *positive* obligations on the government to use its resources to facilitate speech activity – unlike most constitutional rights in the United States, it possesses both a negative and a positive aspect.

The very same constitutional logic requires the government to protect unpopular speakers from being silenced by a hostile audience – even at considerable and unforeseen public expense.[38] It also prohibits the government from attempting to shift the cost of protecting unpopular speakers to those speakers.[39] Thus, existing doctrinal rules *already require* the government to use its resources to support speech activity – even when it would prefer not to do so. The question, then, is the *scope* of this duty, rather than the *existence* of such a constitutional duty.

The existing jurisprudential trendline is worrisome because it reflects a turn away from the Warren Court's speech-protective stance and back toward an approach that places undue weight on the government's managerial domain.[40] A case upholding a protest ban at the Jefferson Memorial, in Washington, DC, is highly instructive and demonstrates this approach in action.

Would-be speakers sought to use the Jefferson Memorial for collective, public speech activity – but were rebuffed by the National Park Service.[41] In upholding the National Park Service's speech ban, Judge Thomas Griffith, of the US Court of Appeals for the District of Columbia Circuit, unironically observed that "[o]utside the Jefferson Memorial, of course, Oberwetter and her friends [would-be protestors] have always been free to dance to their hearts' content."[42] This sentiment plainly echoes Anatole France's trenchant observation about how formal legal equality can constitute an empty, if not meaningless, form of equality. Moreover, suppose that on the facts presented – as was the case in *Williams v. Wallace*,[43] Judge Frank M. Johnson, Jr.'s bold decision that facilitated the iconic Selma-to-Montgomery March – the only property available to facilitate the protest activity happens to be government-owned property?[44]

Government arguably has both a duty to facilitate speech about democratic self-government and an interest in ensuring that democratic politics function on an inclusive basis. To the extent that the government's legitimacy flows from the consent of the governed, that consent must result from a free, open, and inclusive debate.[45]

1.2 THE PROBLEM DEFINED: COULD THE SELMA MARCH TAKE PLACE TODAY?

In March 2015, major celebrations took place to mark the fiftieth anniversary of the Selma-to-Montgomery March. To be sure, Selma was a defining moment in the nation's long road to equal citizenship for all.[46] The NAACP's Selma Project, including the March 21–25, 1965 protest march from Selma, Alabama to Montgomery, Alabama, and March 25, 1965 mass protest rally on the steps of the Alabama state capitol, helped to secure the enactment of the Voting Rights Act of 1965.[47] As legal historian Jack Bass observes, "[t]he drama of the Selma march produced a sense of national outrage that energized Congress to join the other two branches of government in recognizing the historical dimensions of the problem," and the Voting Rights Act "brought spectacular results."[48]

Speaking at the Selma March's concluding rally, the Rev. Martin Luther King, Jr., observed that "Selma, Alabama, has become a shining moment in the conscience of man."[49] He added that, "[t]he confrontation of good and evil compressed in the tiny community of Selma, generated the massive power that turned the whole nation to a new course."[50] It was, without question, both fitting and proper to take note of this important civil rights milestone on the event's fiftieth anniversary.

Yet, to celebrate Selma as an important historical milestone, and as an exemplar of the systemic legal and social change that peaceful protest activity can bring about, rings somewhat hollow because, under existing First Amendment law, a march of the same majestic scale and scope could not take place – at least if the government now, like Alabama's state government then, did not wish to permit such a large-scale protest event using a main regional transportation artery. This state of affairs should be a matter of some general concern because the process of democratic self-government requires an active and ongoing dialogue within the body politic. Just as government may not condition voting on wealth or property,[51] it should not be permitted to shepherd its considerable resources in ways that limit participation in the process of democratic self-government to those who can afford to purchase access to the political marketplace of ideas.

The active intervention of the federal courts was needed in order to make the Selma March possible. The Selma March took place under an injunction issued by US District Judge Frank M. Johnson, Jr., who creatively read and applied the First Amendment to justify the court's remarkably broad remedial order.

The crux of Judge Johnson's opinion in *Williams v. Wallace*[52] rested on the proposition that the right to protest on public property should be commensurate with the scope of the constitutional wrongs being protested.[53] Johnson reasoned that:

> [I]t seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against. In this case, the wrongs are enormous. The extent of the right to demonstrate against these wrongs should be determined accordingly.[54]

Given the gravity of the constitutional wrongs that the plaintiffs established in open court, Judge Johnson issued an injunction of extraordinary scope; his order required state and federal officials to facilitate a five-day march, using the main highway in the region, and culminated with a mass voting rights rally at the Alabama state capitol attended by over 25,000 marchers.[55]

Then and now, Judge Johnson's "proportionality principle" was controversial. Burke Marshall, who headed the Civil Rights Division of the Department of Justice during the early 1960s, characterized Judge Johnson's opinion as a novelty in the law.[56] Nicholas de Belleville Katzenbach, who served as Attorney General under President Lyndon Johnson, also criticized Judge Johnson's reasoning in the Selma March case. He described the *Williams* decision as an "unusual opinion" and as "interpret[ing] existing doctrine imaginatively."[57] Katzenbach also "question[ed] that rule [the proportionality principle] as a practical measure of the applicability of the first amendment."[58] To be sure, the "proportionality principle" constituted something of a doctrinal innovation.[59] However, if viewed against the larger warp and weft of existing First Amendment law in the 1960s, it was not quite as radical as it might seem today.

Consider, for example, *Brown v. Louisiana*,[60] a 1966 case involving a silent protest against racial discrimination that took place in a local public library. Holding a civil rights protest in a public library might, at first blush, seem incongruous with the very purposes that lead governments to establish and to maintain public libraries in the first place. In fact, Justice Abe Fortas noted this anomaly in his majority opinion: "It is an unhappy circumstance that the locus of these events was a public library – a place dedicated to quiet, to knowledge, and to beauty."[61]

Nevertheless, in *Brown*, the Supreme Court overturned the protestors' criminal trespass convictions, holding the silent protest to be protected under the First Amendment. The Justices did so because the use of the library for the silent protest was not fundamentally inconsistent with its more regular uses:

> Fortunately, the circumstances here were such that no claim can be made that use of the library by others was disturbed by the demonstration. Perhaps the time and method were carefully chosen with this in mind. Were it otherwise, a factor not present in this case would have to be considered. Here, there was no

> disturbance of others, no disruption of library activities, and no violation of any library regulations.[62]

Moreover, this outcome obtained because the facts at bar squarely implicated "a basic constitutional right – the right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the Government for a redress of grievances."[63]

Brown v. Louisiana, like *Williams v. Wallace*, starts from a baseline assumption that government property that can be used for First Amendment activity should be available for such activity, absent a very good reason – a reason, moreover, entirely unrelated to antipathy toward the viewpoint of the would-be speakers or the content of their message. Thus, in the 1960s, federal courts assumed that government had a duty to facilitate peaceful protest by making public space available for First Amendment activity – even non-obvious venues like public libraries and major US highways were potentially available for expressive activities.

However, times have changed since then. Under the public forum doctrine, government may restrict the use of government-owned property for peaceful protest if the specific property at issue does not constitute a public forum.[64] In other words, the analytical baseline has shifted significantly from one that puts the burden on the government to justify excluding expressive activities from its property, to one that requires persons wishing to use government property for speech activity to first establish that the property at issue constitutes either a public forum or a designated public forum.[65]

This development has provoked well-stated criticism from important and highly-regarded legal scholars – including Steven Gey[66] and Tim Zick.[67] Professor Greg Magarian's sustained critique of the contemporary Supreme Court's "managed speech" approach to enforcing the First Amendment offers a related, and equally dyspeptic, assessment of current trends.[68] To date, however, the federal courts have not heeded these calls for a return to a more functional approach to making public property available for the collective exercise of First Amendment rights. In this respect, the scope of public property available for First Amendment activity has contracted, rather than expanded, over time.

1.3 THE EVER-EXPANDING FIRST AMENDMENT UNIVERSE THEORY RECONSIDERED: THE IMPORTANT, BUT UNDERAPPRECIATED, GROWING RELATIONSHIP OF PROPERTY TO SPEECH

Of course, the standard account of the modern First Amendment is one of the triumphs of free speech, and expressive freedoms, including assembly, association, and petition, over a wide variety of government interests.[69] As Professor Marty Redish has argued, "democracy invariably involves an adversarial competition

among competing personal, social, or economic interests."[70] The Supreme Court's efforts to disallow content-based and viewpoint-based speech restrictions, creating and facilitating a marketplace of ideas, permits this "adversarial competition" to take place, largely, if not completely, free of government control or manipulation.[71] Moreover, in many material respects, this generally-accepted narrative holds true: The Supreme Court has vindicated free speech interests in a wide variety of contexts. Moreover, the Justices have done so even when the government offers important interests to justify restricting speech.

For example, in *Snyder v. Phelps*,[72] the Supreme Court held that the First Amendment protected a highly offensive, targeted protest of Marine Lance Corporal Matthew Snyder's funeral. Snyder had been killed while on active duty in Iraq and the Westboro Baptist Church picketed Snyder's funeral to call attention to the church's opposition to homosexuality.[73] Despite the outrageous and highly offensive nature of the church's protest, and the entirely plausible arguments for restricting the protest in order to secure the privacy and dignity interests of the grieving family,[74] the Supreme Court held the church's protest was protected under the First Amendment.[75] Chief Justice John G. Roberts, Jr. explained that "[a]s a Nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[76]

Snyder represented an expansion and extension of an earlier precedent, *Hustler Magazine, Inc. v. Falwell*,[77] which held an intentionally outrageous parody to be protected under the First Amendment.[78] Chief Justice William H. Rehnquist, writing for a unanimous Supreme Court in *Falwell*, explained that "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."[79] Despite the fact that Hustler Magazine intentionally had designed the parody to inflict maximum emotional harm on its target, the Rev. Jerry Falwell, Sr., the Supreme Court squarely held that neither a bad motive nor the inherent "outrageousness" of the parody could serve as a basis for imposing civil liability on Hustler Magazine under the law of tort. This was so because "[s]uch criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to 'vehement, caustic, and sometimes unpleasantly sharp attacks.'"[80]

Moreover, *Snyder* is only one of a whole series of recent Supreme Court decisions that vindicate a wide variety of free speech claims. The contemporary Supreme Court has protected false speech about military honors,[81] violent video games,[82] and depictions of animal cruelty.[83] So too, the Justices have held that data constitutes speech and that a Vermont privacy statute that prohibited the transfer of physicians' prescription data for marketing purposes constituted an impermissible content-based speech regulation.[84]

Perhaps most famously, in *Citizens United v. Federal Election Commission*,[85] the Supreme Court, by a 5–4 vote, invalidated key provisions of the Bipartisan Campaign Reform Act of 2002 because the law prohibited political speech by