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Politics or Principle? Zechariah Chafee and the Social Interest in Free Speech

Charles L. Barzun*

I. INTRODUCTION

The classic defense of free speech, long attributed to John Milton and the American Founders, has justified its protection on public grounds. Under this view, the First Amendment protects free speech to ensure the proper functioning of democratic self-government by facilitating the spread of truth on important public matters.¹ Over the past few decades, however, political and legal theorists have challenged this view, arguing instead that free expression is properly safeguarded for the sake of the individual.² These theorists have deployed various types of arguments—philosophical, doctrinal, and historical—to support this interpretation of the First Amendment.

The leading historical argument consists of a revisionist account of the origins of the democratic, public interest-based conception of

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1. See, e.g., VINCENT BLASI, *IDEAS OF THE FIRST AMENDMENT* 752–53 (2006) (quoting ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948)); STEPHEN BREYER, *ACTIVE LIBERTY* 39 (2005); Owen M. Fiss, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405, 1407 (1986); Richard A. Posner, *The Speech Market and the Legacy of Schenck*, in *ETERNALLY VIGILANT* 121, 121 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); Cass R. Sunstein, *Free Speech Now*, 59 *U. CHI. L. REV.* 255, 262 (1992).

2. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 *U. CHI. L. REV.* 225, 236 (1992); John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 *U. CHI. L. REV.* 49, 51–52 (1996); Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 *U. COLO. L. REV.* 1109, 1109 (1993); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 *PHIL. & PUB. AFF.* 204, 215 (1972); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 *COLUM. L. REV.* 334, 334 (1991).

free speech.³ Whereas First Amendment scholars traditionally traced the democratic theory back to the time of the Founders and even to the English Civil War,⁴ the revisionists contend that it was instead an innovation of the Progressive era. Jurists and intellectuals in the first decades of the twentieth century invented a theory based on the “social interest” in free speech for a democracy in order that its constitutional protection would be compatible with Progressive political ideology. In so doing, these Progressives, particularly Harvard Law Professor Zechariah Chafee (1885–1957), deliberately ignored a “conservative libertarian” tradition of legal thought that had actively promoted free speech as an essential component of individual autonomy. This revisionist historical account has been widely accepted by First Amendment theorists and historians alike.⁵ Nevertheless, I believe it is mistaken.

This Article is thus an effort to revise the revisionists. It makes two historical arguments—one negative and one positive. It first seeks to show that the revisionist account, which has been most articulately expounded by Professor Mark Graber in his book

3. See MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 6 (1991); see also DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 2–3 (1997).

4. See, e.g., HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (1988).

5. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 28–29 (2004); Robert W. Gordon, *The Constitution of Liberal Order at the Troubled Beginnings of the Modern State*, 58 U. MIAMI L. REV. 373, 386 (2003); Steven Helle, *Whither the Public's Right (Not) To Know? Milton, Malls, and Multicultural Speech*, 1991 U. ILL. L. REV. 1077, 1083–85; Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1302 (1998); H.N. Hirsch, *Majoritarian Politics and the Punishment of Speech*, 37 CAL. W. L. REV. 217, 231–32 (2001); McGinnis, *supra* note 2, at 51; Brian K. Pinaire, *A Funny Thing Happened on the Way to the Market: The Supreme Court and Political Speech in the Electoral Process*, 17 J.L. & POL. 489, 501 n.41 (2001); L.A. Powe, Jr., *Searching for the False Shout of “Fire,”* 19 CONST. COMMENT. 345, 347 n.16 (2002); Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 9 (2000); Richard W. Steele, *Fear of the Mob and Faith in Government in Free Speech Discourse, 1919–1941*, 38 AM. J. LEGAL HIST. 55, 56 (1994); G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 316 (1996); Gregory P. Magarian, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism*, 90 MICH. L. REV. 1425, 1429 (1992) (book review); Richard T. Pfohl, Note, *Hague v. CIO and the Roots of Public Forum Doctrine: Translating Limits of Powers into Individual Rights*, 28 HARV. C.R.-C.L. L. REV. 533, 534 (1993) (citing David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. R. 1205, 1211, 1283–1303 (1983)).

Transforming Free Speech, is deeply flawed and insufficiently supported by the historical evidence. Specifically, I argue that the extent and influence of the autonomy-based rationale for free speech has been somewhat exaggerated and that in reality, most nineteenth-century “conservative libertarians” paid only lip service to the topic. Furthermore, those who did discuss free speech in any depth justified its protection on public grounds.

I then offer my own account of Zechariah Chafee’s contribution to modern free speech theory, focusing particularly on his famous 1919 *Harvard Law Review* article, “Freedom of Speech in Wartime.”⁶ Whereas the revisionists characterize that article as a product of Chafee’s Progressive political ideology, I argue instead that Chafee is better understood as trying to resolve tensions in legal doctrine by analyzing more deeply the traditional conceptions of freedom of speech as they had functioned at common law. Although most scholars recognize that the democratic view has roots older than the twentieth century, insufficient attention has been paid to the way in which Chafee’s theory grew directly out of nineteenth-century protections of speech in the private law of defamation. Thus, where the revisionists see a radical break, I suggest that there has been doctrinal continuity through jurisprudential change. I further suggest that the democratic theory Chafee articulated during World War I may have particular relevance today when the government has once again made controversial efforts to control speech during wartime.

Part II of this Article briefly surveys the current theoretical debate between democratic and autonomy theorists of free speech. Part III summarizes the revisionist historical account as put forth by Professor Graber and then shows why his thesis that nineteenth-century proponents of property rights were ardent advocates of free speech, despite its intuitive plausibility, does not ultimately withstand scrutiny. Parts IV and V together present my own view as to how and why Chafee developed his theory. Part IV suggests that the growth of equity jurisdiction in the years before World War I revealed free speech rights to be not derivative of property rights, as the revisionist account contends, but instead to be in theoretical and practical tension with them. Part V then argues that Chafee’s reference to the “social interest” of free speech is best understood as

6. 32 HARV. L. REV. 932 (1919).

an effort to resolve this tension in legal thought and practice. Part VI explains why this historical debate matters today and suggests that it may tell us something important about the use of history in legal theory. Finally, Part VII contains a brief conclusion.

II. THE CURRENT DEBATE: DEMOCRACY AND AUTONOMY

A. *The Democratic View*

For most of the twentieth century, the dominant view among jurists and scholars was that the First Amendment protected speech because democratic self-government required it.⁷ According to this view, free speech facilitates the discovery and diffusion of truth on matters of public concern necessary to maintain a well-informed citizenry.⁸ This justification, which has been variously labeled, among other things, “functional,”⁹ “collectivist,”¹⁰ and “progressivist,”¹¹ is well expressed by the Supreme Court’s oft-repeated declaration of this country’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”¹²

The view has been dubbed “progressivist” because it seems to reflect a faith in the democratic process and in scientific advance characteristic of Progressive intellectuals of that era.¹³ Harvard Law Professor Zechariah Chafee, who has been called the “seminal figure in the development of the modern constitutional defense of free

7. See BLASI, *supra* note 1, at 832.

8. This characterization actually fuses two related but distinct theories of free speech: one bases its protection on its value purely for self-government, whereas the other does so for the sake of the “discovery of truth.” See Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in *ETERNALLY VIGILANT*, *supra* note 1, at 60 (distinguishing between the two rationales). The two theories are distinct, but the difference between them should not be overstated since the discovery of truth on religious, scientific, or social matters is frequently relevant to political debates and, therefore, self-government.

9. Hirsch, *supra* note 5, at 231.

10. Post, *supra* note 2, at 1109.

11. Balkin, *supra* note 5, at 29.

12. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); see Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 221 n.125 (praising the Court’s analysis in *New York Times* and quoting Alexander Meiklejohn as declaring the decision “an occasion for dancing in the streets”).

13. Balkin, *supra* note 5, at 29.

speech,”¹⁴ was perhaps the most influential proponent of this view at the time. According to Professor David Rabban, one of the leading historians of the First Amendment, Chafee’s 1919 *Harvard Law Review* article, “Freedom of Speech in Wartime,” was the “the key document” in the Progressives’ effort to advance the cause of freedom of speech and soon became “the starting point for analyzing the meaning and history of the First Amendment.”¹⁵

In that article, Chafee set out to “ascertain the nature and scope of the policy which finds expression in the First Amendment” and in kindred state constitutional provisions.¹⁶ He sought in particular to “determine the place of that policy in the conduct of war, and particularly the war with Germany.”¹⁷ In order to discover the First Amendment’s meaning and scope, Chafee looked to its history and to the “purpose free speech serves in social and political life.”¹⁸ Chafee’s historical account, which argues that the First Amendment was intended to outlaw the law of seditious libel, has been subjected to much historical argument pro and con.¹⁹ But the significance of that debate is limited for our purposes because Chafee denied that the intent of the Founders disposed of the matter, insisting that “the meaning of the First Amendment did not crystallize in 1791.”²⁰

Rather, according to Chafee, legal terms changed their meaning with time and had various influences.²¹ In addition to reflecting

14. GRABER, *supra* note 3, at 122. Professor Graber documents contemporary praise of Chafee, including Justice Frankfurter’s declaration that Chafee’s influence on civil rights “has no match in the legal professorate.” *Id.* (citing Felix Frankfurter, *A Legal Triptych*, 74 HARV. L. REV. 433, 440 (1961)); *see also* Jerold S. Auerbach, *The Patrician as Libertarian: Zechariah Chafee, Jr. and Freedom of Speech*, 42 NEW ENG. Q. 511, 531 (1969) (quoting Arthur Garfield Hays as describing Chafee’s *Freedom of Speech* as “a Bible on civil liberties questions”).

15. RABBAN, *supra* note 3, at 4–5.

16. Chafee, *supra* note 6, at 935.

17. *Id.* Chafee had in mind the 1917 Espionage Act and the convictions recently upheld under it by the Supreme Court. *Id.*; *see* Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

18. Chafee, *supra* note 6, at 945.

19. The controversy began in 1960 when Professor Levy attacked Chafee’s account as historically inaccurate. *See* LEONARD W. LEVY, *LEGACY OF SUPPRESSION* 2–3 (1960); *see also* RABBAN, *supra* note 3, at 6 (noting the widespread acceptance of Chafee’s interpretation until the publication of *Legacy of Suppression*).

20. Chafee, *supra* note 6, at 954.

21. *Id.*; *see* G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 521–22 (2002) (explaining that such a view was new in the Progressive era and depended on a modern conception of history as “a continuous process of qualitative change” in opposition to the pre-modern view of history as the unfolding of eternal laws).

“men’s bitter experiences of the censorship and sedition prosecutions before 1791,” the First Amendment drew from two further sources: “the development of the law of fair comment in civil defamation and the philosophical speculations of John Stuart Mill.”²² With these influences in mind, Chafee concluded that “[o]ne of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern” and that “[t]he First Amendment gives binding force to this principle of political wisdom.”²³ In other words, the First Amendment served a public purpose, viz., the “interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way.”²⁴

The same year that Chafee’s article was published, Justice Oliver Wendell Holmes famously declared in his dissent in *Abrams v. United States* that the “theory of our Constitution” was that “the ultimate good desired is better reached by free trade in ideas” and “that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”²⁵ Both Chafee and Holmes stressed the need to protect free speech not as a matter of natural individual right, but rather because it was instrumentally valuable in the practice of self-government and the discovery of truth. For Chafee, the principle of free speech flowed from the fact that in America the government was considered to be the servant, not the master, of the people.²⁶

This instrumentalist, democratic view of the First Amendment has remained prominent in the writings of scholars and in the Supreme Court’s jurisprudence. Most famously, the philosopher Alexander Meiklejohn, in *Free Speech and Its Relation to Self-Government*, characterized the First Amendment as functionally analogous to the procedural rules governing a fair and effective town meeting.²⁷ According to Meiklejohn, although such rules often restrict speech—for example, by permitting only those “recognized by the chair” to speak at any one time—they do so for the purpose of ensuring that “no suggestion of policy shall be denied a hearing

22. Chafee, *supra* note 6, at 955.

23. *Id.* at 956–57.

24. *Id.* at 958.

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

26. Chafee, *supra* note 6, at 947.

27. MEIKLEJOHN, *supra* note 1, at 752–53.

because it is on one side of the issue rather than another.”²⁸ Meiklejohn thus distinguished the First Amendment’s protection of speech from that provided by the Fifth Amendment, which safeguards “the right to speak one’s mind as one chooses,” or the “private right of speech.”²⁹ Such protection, though important, was “radically different in intent from the unlimited guarantee of the freedom of public discussion, which is given by the First Amendment.”³⁰

More recently, Cass Sunstein has advocated a “New Deal for speech,” whereby courts would recognize that even in the domain of speech, individual rights are creatures of the state and thus susceptible to legitimate government regulation.³¹ Sunstein argues that “the First Amendment is best understood by reference to the democratic process” and that “[t]he overriding goal of the amendment, rightly perceived, is to protect politics from government.”³² Thus, in the context of governmental regulation of media ownership, “[t]his vision of the First Amendment does not stress the autonomy of broadcasters with current ownership rights. Instead it emphasizes the need to promote democratic self-government by ensuring that people are presented with a broad diversity of views about public issues.”³³

At the same time, the Supreme Court continues to see the democratic theory as an important justification for the First Amendment’s protection of free speech. In striking down a statute that prohibited the intentional or knowing disclosure of the contents of illegally-intercepted wire, oral, or electronic communication, as applied to a radio station’s broadcast of threats made by a teacher’s union leader, the Court concluded that “[i]n these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance.”³⁴ Justice Breyer in particular has been

28. *Id.*

29. *Id.* at 754.

30. *Id.*

31. Sunstein, *supra* note 1, at 263, 267; *see also* Posner, *supra* note 1, at 120–52 (defending and formalizing an instrumental conception of free speech and tracing its roots to Holmes’s *Abrams* dissent).

32. Sunstein, *supra* note 1, at 262.

33. *Id.* at 276.

34. *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001); *see also* *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 776 (1978) (“The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of

a vocal proponent of this interpretation. In his recent book, *Active Liberty*, he emphasizes that one ought to read the First Amendment “not in isolation but as seeking to maintain a system of free expression designed to further a basic constitutional purpose: creating and maintaining democratic decision-making institutions.”³⁵

These views of the First Amendment are hardly homogeneous. To the contrary, there remain deep disagreements among theorists in this tradition as to whether the First Amendment primarily protects truth-seeking, self-government, or checking governmental abuse of power.³⁶ Still, they do share common features; all view the protection of speech as *instrumentally* valuable to serve certain political purposes, and those purposes are *public* ones of particular importance in a democratic society. For that reason, adjudicating free speech disputes under this model also frequently requires that judges *balance* competing values.³⁷ Finally, these theories tend to treat political speech as the paradigmatic form of expression deserving constitutional protection.³⁸

B. *Autonomy Theories*

Over the last few decades, however, this view has come under attack. Many theorists, often seeking to expand the category of protected speech, have argued that free expression must be protected because proper respect for individual autonomy demands it, not because doing so instrumentally serves the common good. As with the democratic view, autonomy theories vary considerably,³⁹ but the

public concern without previous restraint or fear of subsequent punishment” (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940))).

35. BREYER, *supra* note 1, at 39.

36. See, e.g., Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1 (arguing that Justice Holmes’s notion of a “marketplace of ideas” is better understood as highlighting the importance of character formation and checking governmental abuses of power than it does to either truth-seeking or self-government).

37. See Chafee, *supra* note 6, at 957 (“[T]here are individual interests and social interests, which must be balanced against each other, if they conflict . . .”).

38. But see Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699, 1704 (2005) (criticizing “the primacy of political speech” on the ground that under a true cost-benefit analysis, restrictions on commercial speech might sometimes cause more harm than those on political speech).

39. See sources cited *supra* note 2; see also Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875–76 (1993) (distinguishing between two quite different, and at times incompatible, conceptions of autonomy often employed by First Amendment

most important for our purposes are those that characterize free speech as a form of property right.

Professor John McGinnis, for instance, has expressed concern that the “self-governance” theory of free speech affords only a “contingent liberty” based on the instrumental value of speech for the collective good.⁴⁰ Professor McGinnis seeks to “cleanse the First Amendment of the obscuring varnish of social democracy and reveal its true origins as a property right of the individual, thus providing a model for an emerging laissez-faire jurisprudence.”⁴¹ Professor McGinnis argues that “since at the time of the Framing it was widely agreed that men’s liberty and property rights were one and the same, the right of free speech could be understood as intimately connected to the natural right of property.”⁴² Professor McGinnis seeks to reconceptualize the First Amendment as primarily about “prohibiting government interference with the individual’s right to transmit information and realize its use value.”⁴³ In a similar vein, Professor Steven Heyman laments the rise of legal positivism and proposes returning to a “rights-based conception of the basis and limits of freedom of speech” that would draw on the natural rights tradition of Locke and “our modern understanding of fundamental rights.”⁴⁴

Professor Mark Graber also criticizes the traditional democratic model for insufficiently appreciating the “intimate constitutional relations between expression and economic rights.”⁴⁵ But Professor Graber, unlike Professors McGinnis or Heyman, does not endorse a natural rights theory of the Constitution. To the contrary, he emphasizes the dependence of meaningful free speech on property in order to challenge the view—on which he believes the democratic model rests—that speech is a natural “input” of democracy and material resource allocation its “output.”⁴⁶ Insofar as money is

scholars). For a useful compilation of articles criticizing the traditional view, see BLASI, *supra* note 1, at 833–969.

40. McGinnis, *supra* note 2, at 59.

41. *Id.* at 56. Professor McGinnis traces this theory of the First Amendment back to James Madison “who deployed John Locke’s theory of property as the touchstone for his conceptualization of the First Amendment.” *Id.* at 64.

42. *Id.*

43. *Id.* at 71.

44. Heyman, *supra* note 5, at 1280.

45. GRABER, *supra* note 3, at 12.

46. *Id.* at 160.

equated with speech for the purposes of campaign finance, he contends, wealth is in reality as much an “input” of democracy as speech is. For Graber, this fact undermines the Supreme Court’s First Amendment rationale for striking down regulations of campaign finance.⁴⁷

In criticizing the democratic view and in advocating autonomy-based rationales of free speech, these and other scholars have employed various types of arguments. Some have based their theories of free speech on *a priori* philosophical principles.⁴⁸ Others devote more attention to showing how notions of autonomy are reflected in the Supreme Court’s First Amendment jurisprudence.⁴⁹ Still others make historical arguments. The next Part turns to the most influential of such historical arguments—that put forth by Professor Graber in his book *Transforming Free Speech*.

III. THE “CONSERVATIVE LIBERTARIAN” TRADITION

The traditional history of the First Amendment had long held that Zechariah Chafee, Justice Oliver Wendell Holmes, Jr., and others rediscovered a “worthy tradition” of free speech that could be traced all the way back to seventeenth-century England.⁵⁰ Professor Graber challenges this view, arguing instead that it is a twentieth-century invention. Specifically, he contends that Chafee virtually single-handedly invented a theory based on the “social interest” in free speech in order to make its constitutional protection consistent with his own Progressive political views. In so doing, Chafee ignored a nineteenth-century “conservative libertarian”⁵¹ tradition of free speech, according to which it was protected not for its social benefits but for “the individual’s right of self-expression.”⁵² Graber thus seeks

47. *Id.* at 215.

48. *See, e.g.*, Fried, *supra* note 2, at 231.

49. *See, e.g.*, Post, *supra* note 2, at 1125–28; *see also* Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court’s First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159 (1997) (defending the Supreme Court’s recent First Amendment decisions as properly reflecting an appreciation for a Kantian conception of human autonomy).

50. *See* KALVEN, *supra* note 4.

51. *See infra* Part III.B. These nineteenth-century theorists were libertarians insofar as they denied that the government had authority to interfere with individual rights, but Graber calls them “conservative” because they were primarily concerned with protecting property rights. GRABER, *supra* note 3, at 18.

52. GRABER, *supra* note 3, at 9.

to expose the recent origin and historical contingency of the democratic theory of free speech Chafee bequeathed to us in the hopes that doing so will finally allow us to free ourselves of it.⁵³

Graber's account has been well received among First Amendment scholars and historians,⁵⁴ but this warm reception is not justified. The claim that late nineteenth-century "conservative libertarian" supporters of laissez-faire constitutionalism vigorously defended free speech is simply not supported by the evidence. Most of the conservative libertarians whom Professor Graber holds up as free speech champions hardly ever mentioned the subject at all. And those who did devote attention to the issue justified its protection as necessary for self-government rather than for the "personal benefits of self-expression."⁵⁵ Thus, this Part seeks to show that the now-conventional view that Chafee invented his "social interest" theory of free speech whole-cloth and in the process disregarded a robust libertarian tradition of free speech is mistaken.

A. Graber's Transforming Free Speech

In *Transforming Free Speech*, Graber impressively blends First Amendment history and theory in making three related but distinct arguments: (1) the contemporary democratic theory of free speech—what he calls the "civil libertarian" view—fails to deal adequately with today's most pressing threats to free speech; (2) our continued adherence to the democratic theory despite its present defects owes at least in part to our historical misconception that it has always been the primary justification for the protection of speech; and (3) Zechariah Chafee fostered this misconception by developing a theory based on the "social interest" in free speech while ignoring the then-dominant view that it was protected for the sake of the individual. This Part seeks to show that Graber's third argument fails, but it first seeks to make clear what role Graber's historical argument plays in his larger account.

Today we face a crisis in First Amendment jurisprudence, Graber explains, because our theoretical framework for thinking about free expression cannot effectively cope with the most significant threats to it. These threats consist not in government suppression of speech,

53. *Id.* at 15.

54. See sources cited *supra* note 5.

55. GRABER, *supra* note 3, at 77.

but rather in the grossly unequal access to the economic resources necessary to make meaningful speech possible in America.⁵⁶ In its seminal decision in *Buckley v. Valeo*,⁵⁷ the Supreme Court first sought to determine the extent to which the First Amendment protects the spending of money in political campaigns. Since then, judges and scholars have framed the issue as to whether “money is speech.”⁵⁸ If it is, “then government cannot remedy even the grossest inequalities in access to the marketplace of ideas.”⁵⁹ If money is not speech, however, the power of officials to regulate private property seems virtually unlimited. “No other solution seems possible,” Graber suggests, “because the free-speech tradition assumes that all constitutional problems can be neatly classified as affecting either democratic processes or substantive policies.”⁶⁰ Thus, the problem with current theory is that it requires distinguishing between the “inputs” of democracy (speech), which deserve constitutional protection, and the “outputs” of democracy (property), which deserve none at all.⁶¹

In the last chapter of *Transforming Free Speech*, Graber begins to lay out a normative theory of free speech that rejects this distinction between speech and property. Drawing on the work of the political theorist Michael Walzer, Graber argues that since rhetorical skill and verbal persuasiveness are crucial democratic virtues, “expression rights are violated whenever legislatures attempt to alleviate the disparities that result when persons take advantage of their political talents in the marketplace of ideas.”⁶² He devotes the bulk of his book, however, to making an historical argument, the central thesis of which is that Zechariah Chafee was primarily responsible for effecting this unfortunate cleavage between property and speech.

According to Graber, prior to Chafee’s writing, the most prominent advocates of free speech conceptualized it as a species of individual property right.⁶³ These libertarian theorists, Graber

56. *Id.* at 14.

57. 424 U.S. 1 (1976).

58. GRABER, *supra* note 3, at 13. For the Court’s most recent holding on the topic, see *Randall v. Sorrell*, 126 S. Ct. 2479 (2006); *see also* *McConnell v. FEC*, 540 U.S. 93 (2003).

59. GRABER, *supra* note 3, at 13–14.

60. *Id.* at 14.

61. *Id.* at 160.

62. *Id.* at 230.

63. *Id.* at 17–49.

maintains, protected speech not for its democratic value but for “the individual’s right of self-expression.”⁶⁴ The problem for Chafee was that they grounded their defense of free speech in a more general theory of property rights that also justified the judicial invalidation of economic regulations, such as maximum-hour and minimum-wage laws, which were core to the Progressive agenda. To avoid sacrificing such laws, Graber explains, Chafee “divorced free speech from . . . property” and “concocted” a new theory of free speech based on the “social interest” in its protection.⁶⁵ In short, Chafee “transformed” free speech and did so for practical political reasons unconnected to free speech and of little relevance today.⁶⁶

B. The “Conservative Libertarian” Tradition

In documenting this “conservative libertarian” tradition of free speech, according to which it was protected as an individual right analogous to property, Graber draws on the work of various late nineteenth- and early twentieth-century legal scholars, public intellectuals, and jurists. These include, among others, John Burgess, Thomas Cooley, Christopher Tiedeman, William Graham Sumner, Herbert Spencer, and Justices Harlan and Field. These conservative libertarians expressed a “commitment to individual freedom from state regulation,” Graber maintains, that inspired them “to recognize a sphere of private mental conduct that was as inviolate as their cherished sphere of private commercial conduct.”⁶⁷ Graber further explains that for conservative libertarians, freedom of expression and property rights were inextricably tied together; for them, the government “had no more business regulating expression than it had regulating property.”⁶⁸

But the writings Graber draws upon do not bear out his thesis. As shown below, most of these conservative libertarians barely mentioned free speech at all. Furthermore, those who did take up the subject did not always hold particularly expansive conceptions of free speech; nor did they justify its protection on grounds of

64. *Id.* at 9.

65. *Id.* at 12.

66. *Id.* at 10.

67. *Id.* at 19.

68. *Id.* at 18.

individual autonomy.⁶⁹ Rather, they stressed its value for democratic self-government, just as Chafee later would. Below, I scrutinize in detail the figures Graber relies on most, but the same criticisms apply to virtually all those he mentions.

1. *Legal scholars*

Graber introduces his chapter on the conservative libertarians with a 1923 quotation from John Burgess (1844–1931), a well-known political scientist, whom Graber describes as the “last prominent survivor of an earlier conservative libertarian tradition.”⁷⁰ “No man,” Graber quotes Burgess as declaring, “who does not recognize the complete freedom of individual thought and expression, . . . possesses the most essential qualification for citizenship of the republic or any other real republic.”⁷¹ Graber relies on Burgess’s work extensively, because more than any other author, Burgess equated rights of free speech with those of property.

The problem for Graber is that virtually all of Burgess’s discussions of the topic were written in 1923 or thereafter, well after Chafee first articulated his theory. He mentions only two instances in which Burgess discussed free speech prior to 1923. In the first, Burgess described a statute criminalizing criticism of the government as “an unusual law of libel and slander”⁷²—hardly a damning condemnation. In the second, he simply listed freedom of speech among those rights protected by a general principle of individual liberty.⁷³ Thus, Burgess may have demonstrated libertarian political theory to be useful in criticizing the Espionage Act—the same Act

69. I do not mean to suggest that *no one* defended speech on these grounds. Professor David Rabban documents a tradition of “libertarian radicals” who, during the decades prior to World War I, “produced a broad conception of free speech as an aspect of their underlying belief in individual autonomy.” RABBAN, *supra* note 3, at 24. These radicals were often activists for labor reform, women’s rights, and sexual freedom. *Id.* However, as Professor Rabban notes, they tended to come from the “intellectual and social fringes of American society” and thus did not represent mainstream legal thought at the time. *Id.* at 23. This Part challenges only the idea that the dominant view of free speech among legal scholars and more conventional public intellectuals defended free speech on autonomy grounds.

70. GRABER, *supra* note 3, at 17.

71. *Id.* (quoting JOHN W. BURGESS, RECENT CHANGES IN AMERICAN CONSTITUTIONAL THEORY 26 (1923)).

72. *Id.* at 249 n.112 (citing BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 192 (Boston, Ginn & Co. 1890)).

73. *Id.* at 19, 34 (citing BURGESS, *supra* note 71, at 86–87).

that prompted Chafee's writing—but it may be an exaggeration to say that he advocated free speech rights “for more than thirty years.”⁷⁴

Graber also frequently draws upon the work of Thomas Cooley (1824–1898), the prominent nineteenth-century constitutional authority and justice of the Michigan Supreme Court. As Graber acknowledges, Cooley and Burgess were the only theorists who treated the topic at any length.⁷⁵ And Cooley was indeed an advocate of expansive constitutional protections of free speech. For instance, he proposed an expanded qualified privilege in defamation actions for criticism of public officers, advocating what later became the modern position—that liability may only attach if the plaintiff proved that the defendant made the statement knowing it to be false or with reckless disregard for its truth.⁷⁶ Cooley's construction of this privilege was broader than those of most courts at the time, and Graber makes much of this fact, often citing other writers' endorsements of Cooley's position as evidence of their libertarianism.⁷⁷

But although Cooley was a champion of individual property rights, he did not defend free speech on similarly individualistic grounds. Instead, he justified privileges for speech on *public* grounds. In criticizing a New York court's rejection of such a privilege,⁷⁸ he questioned whether “they have duly considered the importance of publicity and discussion on all matters of general concern in a representative government.”⁷⁹ He cited as authority an English judge who had found a defense counsel's argument for the privilege convincing: “He pressed upon us that, whenever *the public had an interest in such a discussion*, the law ought to protect it, and work out the public good by permitting public opinion.”⁸⁰

74. *Id.*

75. *Id.* at 24.

76. THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 439 (Legal Classics ed. 1987) (1868). This rule was later adopted by the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

77. *See, e.g.*, GRABER, *supra* note 3, at 42–43 (“Black, Tiedeman, and Brewer specifically endorsed Cooley's analysis of the law of libel.”).

78. *Root v. King*, 7 Cow. 613 (N.Y. Sup. Ct. 1827).

79. COOLEY, *supra* note 76, at 438.

80. *Id.* at 439 (citing *Gathercole v. Miall*, 15 M. & W. 319 (1846)) (emphasis added). Graber asserts that Chafee “ignored” Cooley's dissent in *Atkinson v. Detroit Free Press*, 9 N.W.

Cooley also limited the scope of the constitutional protections according to this public-interest justification. Since obscenity, blasphemy, and defamation of private individuals had no obvious connection to public issues on which citizens needed to form opinions, they were undeserving of protection.⁸¹ Nor did the constitutional provisions imply exemption from the police power of the state. Quite the opposite, immunity for publication was only guaranteed “so long as it [was] not harmful in its character, when tested by such standards as the law affords.”⁸² Graber is right to suggest that Cooley apparently thought the 1798 Sedition Act had violated the Constitution, but even Cooley’s criticism of that Act was not absolute. He explained that its “constitutionality was always disputed by a large party, and its impolicy was without question. Its direct tendency was to produce the very state of things it sought to repress.”⁸³ Cooley thus concluded that seditious libel laws tended to produce more evil than they prevented and in any case were “unsuited to the condition and circumstances of the people of America.”⁸⁴ In short, Cooley’s commitment to free speech was not unqualified, and in those areas where he did put forth expansive views of free speech, he did so for its public benefits.

Graber finds even less support in Christopher Tiedeman (1857–1903), who interpreted the First Amendment far more restrictively than did Cooley. Tiedeman wrote prolifically on constitutional law, and his influence was, in Graber’s view, “second only to Cooley’s.”⁸⁵ He wrote very little on free speech, however, devoting less than 6 of his 1096 pages of his monumental, two volume constitutional treatise to the topic (as compared with 378 pages on “Regulation of Trades and Occupations”).⁸⁶ Graber emphasizes that Tiedeman included freedom of speech among the liberties protected by the Due Process Clause of the Fourteenth Amendment “on the general

501 (Mich. 1881), GRABER, *supra* note 3, at 129, but in that decision, too, Cooley grounded his defense of liberal free speech protection in the public interest that a free press serves. *Atkinson*, 9 N.W. at 530.

81. COOLEY, *supra* note 76, at 422.

82. *Id.*

83. *Id.* at 427.

84. *Id.* at 429.

85. GRABER, *supra* note 3, at 34.

86. CHRISTOPHER GUSTAVUS TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES: CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STAND POINT 227–32, 234–612 (2d. ed. 1900).

ground that [it] would involve the deprivation of liberty and the right to pursue happiness.”⁸⁷ But the view that the Fourteenth Amendment incorporates certain legal rights does not necessarily imply anything as to the substantive scope of those rights. One could thus consistently hold that the Due Process Clause incorporates a right to “freedom of speech” and, at the same time, hold a highly restrictive notion of what that phrase means.

Such was precisely Tiedeman’s position. He began his chapter on the topic by declaring that even without the First Amendment, any state law infringing “the right of the individual to publish what he pleases” would be unconstitutional since such a right is included in a general right to individual liberty.⁸⁸ However, he immediately qualified this principle: “[T]he liberty of speech and of the press is not to be confounded with a licentiousness and a reckless disregard of the rights of others.”⁸⁹ For instance, the common law right to reputation offered a remedy against such licentiousness in the form of libel actions. Tiedeman even worried such a remedy was inadequate against an increasingly powerful press. He therefore argued that the sensationalized accounts of individuals’ indiscretions and “immoralities” frequently found in the press ought to be classed as obscene.⁹⁰ “If possible,” Tiedeman argued, “the publication of such matter should be suppressed, or at least published in such a way, as to do little or no harm to the morals of the community.”⁹¹ Tiedeman’s definition of free speech was thus fairly restrictive.

Like Cooley, Tiedeman endorsed a privilege for criticism of officers and candidates for office, but he limited it in a way Cooley found objectionable. Cooley criticized the view that such a privilege should extend only to public conduct, finding the distinction between private character and public conduct to be unacceptable in the context of a public officer whose private character directly affected his conduct.⁹² Tiedeman, however, limited the privilege to

87. GRABER, *supra* note 3, at 34 (quoting CHRISTOPHER GUSTAVUS TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES, CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT 189 (St. Louis, F.H. Thomas Law Book Co. 1886)).

88. TIEDEMAN, *supra* note 87, at 189.

89. *Id.*

90. *Id.* at 190.

91. *Id.*

92. COOLEY, *supra* note 76, at 440.

communications regarding public conduct on the ground that “a candidate for office may possess defects of character, which cannot in any way affect the public welfare by influencing or controlling his official conduct.”⁹³

Moreover, Tiedeman retreated from Cooley’s call for a similar privilege for publishers of news. Cooley thought the common law ought to recognize that modern newspapers had become “one of the chief means for the education of the people” and that they could not always verify their sources in time for publication.⁹⁴ The press should therefore not be held liable for good faith publications of false facts.⁹⁵ But Tiedeman sought to limit this privilege as well. “[T]here is no reason,” he insisted, “why any special protection should be thrown around the publisher of news. Any such special protection which cannot in reason be extended to the ‘village gossip,’ would in the main serve to protect newspaper publishers in the publication of what is strictly private scandal.”⁹⁶ Finally, to the extent Tiedeman did condone certain types of privileged communications, he appears to have done so for their public benefit, not for the individual interest in self-expression. “The electors, and the public generally,” Tiedeman explained, “are interested in knowing the character and qualifications of those who apply for their suffrages.”⁹⁷

John Randolph Tucker (1823–1897) provides Graber with slightly better evidence of a true conservative libertarian defender of free speech. A law professor and five-term Congressman, Tucker hardly discussed the constitutional protection of free speech in his writing at all, devoting less than three pages to the subject in his 874-page, two-volume treatise *The Constitution of the United States*.⁹⁸ But in the case of *Spies v. Illinois*,⁹⁹ Tucker represented before the Supreme Court several radicals who had been sentenced to death for their part in the Haymarket Square bombing.¹⁰⁰ His

93. TIEDEMAN, *supra* note 87, at 47.

94. COOLEY, *supra* note 76, at 452, 454.

95. *Id.* at 451–57.

96. TIEDEMAN, *supra* note 87, at 54.

97. *Id.* at 58.

98. 2 JOHN RANDOLPH TUCKER, *THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION* 669–71 (1899).

99. *Spies v. Illinois*, 123 U.S. 131 (1887).

100. GRABER, *supra* note 3, at 39.

brief did not rely substantially on a freedom of speech defense,¹⁰¹ but the fact that Tucker argued the anarchists' case suggests at least some economic libertarians were indeed committed defenders of free speech. However, Tucker appears to have been the exception, not the rule.

2. *Public intellectuals*

Graber draws on the work of various late nineteenth-century public intellectuals but none provide much support for his thesis. He quotes the social theorist Herbert Spencer (1820–1903) as praising “private activities and their spontaneous co-operation” for having “done more towards social development than those which have worked through governmental agencies.”¹⁰² Similarly, he notes that William Graham Sumner (1840–1910), another social critic, declared that “capital . . . emancipated slaves and serfs” and “set the mass of mankind free from the drudgery which . . . wears out the mind.”¹⁰³ According to Graber, such comments show that conservative libertarians “perceived empirical relationships between economic policies and expression rights.”¹⁰⁴

But neither of these scholars said much about freedom of speech. Spencer did expound an unabashedly libertarian political theory that influenced later libertarian radicals, such as Theodore Schroeder.¹⁰⁵ But Spencer does not appear to have ever discussed freedom of *speech* as such or explained how his “law of equal freedom” would apply to it in practice. Although Spencer devoted whole chapters of his *Social Statics* to the right to property, the right to intellectual property, the

101. The brief primarily argued that the defendants had been denied common law rights of criminal procedure. *See Spies*, 123 U.S. at 132–34.

102. GRABER, *supra* note 3, at 18 (citing HERBERT SPENCER, *MAN VERSUS THE STATE* 357–58 (1896)).

103. *Id.* at 20 (alteration in original) (citing WILLIAM GRAHAM SUMNER, *SOCIAL DARWINISM: SELECTED ESSAYS BY WILLIAM GRAHAM SUMNER* 145 (1963)).

104. *Id.*

105. HERBERT SPENCER, *SOCIAL STATICS, TOGETHER WITH MAN VERSUS THE STATE* 55 (D. Appleton & Co. 1915) (1851); *see, e.g.*, THEODORE SCHROEDER, *FREE SPEECH FOR RADICALS* 94 (1916) (endorsing Spencer’s “law of equal freedom” according to which “every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man”). The term “libertarian radicals” comes from Professor Rabban. *See RABBAN, supra* note 3, at 2.

regulation of commerce, and the separation of church and state, he devoted not one to the issue of free speech.¹⁰⁶

The same is true of Sumner, who hardly ever addressed the topic. According to Graber, “[i]n a series of anti-imperialist articles, [Sumner] attacked ‘the doctrine that those who oppose a war are responsible for the lives lost in it, or that a citizen may criticize any action of his government except a war.’”¹⁰⁷ Graber offers this as evidence of Sumner’s support for political dissidence, along with Sumner’s statement that “a democratic government . . . is excessive and pitiless against dissentients.”¹⁰⁸ But the conclusion Graber draws from such passages—that “Sumner did not defend free speech because he wanted to attack the war; he attacked the war because he wanted to defend free speech”—finds no warrant in the text.¹⁰⁹ Sumner attacked imperialism because he believed it resulted in militaristic policies, which destroyed the rule of law. “Imperialism,” he wrote, “is the way of looking at things which is congenial to people who are ruling others without constitutional restraints.”¹¹⁰ The First Amendment may have been one of the “constitutional restraints” Sumner had in mind, but he never mentioned it, nor did he ever indicate it was something to which he devoted much thought.¹¹¹ For Sumner, “[t]he evil of imperialism is in its reaction on our own national character and institutions, on our political

106. SPENCER, *supra* note 105, at 62–65, 68–73, 137–44. Spencer did, however, note the importance of *reputation* and its protection by the law of equal freedom: “[T]hough another’s good character, when taken away, cannot be appropriated by the traducer, the taking of it away is still a breach of the law of equal freedom, in the same way that destroying another’s clothes, or setting fire to his house, is a breach.” HERBERT SPENCER, JUSTICE: BEING PART IV OF THE PRINCIPLES OF ETHICS 115 (1891).

107. GRABER, *supra* note 3, at 23 (citing WILLIAM GRAHAM SUMNER, THE PREDOMINANT ISSUE 10 (1901)).

108. *Id.* at 27 (alteration in original) (citing WILLIAM GRAHAM SUMNER, WHAT SOCIAL CLASSES OWE TO EACH OTHER 32 (1920)).

109. *Id.*

110. SUMNER, *supra* note 107, at 10.

111. Far more likely, Sumner was referring to constitutional restraints on the government’s taxation power. The scope of such power was a controversial issue at the time and was addressed by the Supreme Court in *The Insular Cases*. See *Downes v. Bidwell*, 182 U.S. 244 (1901) (holding that Puerto Rico was a territory subject to the jurisdiction of the United States for purposes of the revenue clauses of the United States Constitution); *De Lima v. Bidwell*, 182 U.S. 1 (1901) (holding that in the absence of congressional legislation, the United States could not collect customs duties from Puerto Rico). I thank Michael Klarman for suggesting to me this interpretation of Sumner’s criticism.

ideas,” and on “our temper in political discussion.”¹¹² But he hardly held wide-open political discussion in high esteem when he disfavored the view proposed. In warning of the redistributive threat of democracy, Sumner wrote that a democratic system “can no more admit to public discussion, as within the range of possible action, any schemes for coddling and helping wage-receivers than it could entertain schemes for restrictive political power to wage-payers.”¹¹³

Indeed, Sumner’s commitment to laissez-faire capitalism resulted in a very narrow view of free speech protection. As we will see in Part IV, corporations at this time frequently sought injunctive relief from courts to prevent labor unions from holding boycotts. In these cases, the corporations argued that such boycotts threatened their property rights, while the unions often claimed that enjoining boycotts violated their freedom of speech. Not surprisingly, Sumner sided with the corporations on this issue: “The boycotted man is deprived of the peaceful enjoyment of rights which the laws and institutions of his country allow him, and he has no redress.”¹¹⁴ The only “rights” Sumner saw in such conflicts were the property rights of the corporation boycotted.

Finally, Sumner openly rejected the doctrine of natural rights. Whereas Spencer believed that man’s “instinct of personal rights” justified their legal protection,¹¹⁵ Sumner denied the existence of natural rights.¹¹⁶ He recognized that “the notion of natural rights is one of great value and importance,” but he denied that anything “necessary to maintain [an] existence” was protected by one.¹¹⁷ Instead, Sumner ultimately grounded his defense of limited government on the principle that people should be left free to fight in the perennial struggle for existence. As he put it, man “should be left free to do the most for himself that he can, and should be

112. SUMNER, *supra* note 107, at 11.

113. SUMNER, *supra* note 108, at 37.

114. SUMNER, *supra* note 103, at 107.

115. SPENCER, *supra* note 105, at 47–48.

116. SUMNER, *supra* note 103, at 116 (“There is a doctrine floating about in the literature that we are born to the inheritance of certain rights. That is another glorious dream, for it would mean that there was something in this world which we got for nothing.”).

117. *Id.* at 66. Sumner further mocked the logic such a doctrine entailed: “[E]very man has a natural right to succeed in the struggle for existence, or to be happy. It is the duty of the state to secure natural rights. Therefore, if there is anything which a man wants, he is entitled to have it so long as there is any of it.” *Id.*

guaranteed the exclusive enjoyment of all that he does.”¹¹⁸ In short, Sumner was so committed to Social Darwinism that for him liberty meant little more than non-interference with an individual’s efforts to acquire property in order to survive.¹¹⁹ If that was so, his justification likely did not extend to cover speech for the “personal benefit[] of self-expression,” at least insofar as such expression was not necessary for survival.¹²⁰

Graber’s effort to characterize Henry Adams (1838–1918) and E.L. Godkin (1831–1902), two prominent public intellectuals, as conservative libertarians encounters similar difficulties.¹²¹ The only evidence adduced to show that Adams was a free speech proponent comes from an article in *Forum* entitled “Shall We Muzzle the Anarchists?”¹²² Otherwise, Graber relies only on Adams’s support for “civil service and tariff reform” to justify labeling him a conservative libertarian.¹²³ Perhaps more important, even in his *Forum* article, Adams ultimately argued for tolerance on pragmatic grounds. As Graber acknowledges, the point Adams urged was that legislation to suppress anarchists’ speech would simply create sympathy for them.¹²⁴

Neither did E.L. Godkin, the founder and editor of the *Nation*, defend free speech for the sake of individual self-expression. Instead, he thought it critical for democratic self-rule. Graber draws primarily from Godkin’s article entitled *Suppression*, in which Godkin expressed outrage over the McKinley Administration’s censorship of letters sent to soldiers stationed in the Philippines and its threat to curtail their publication.¹²⁵ Godkin equated such censorship to the policies of “certain despotic countries like Russia and Turkey” and insisted that it contradicted the democratic assumptions on which this country was supposedly based: “Our Government, on the contrary, is based on the hypothesis that each man is as good a judge as any other man of what our legislation and administration should

118. SUMNER, *supra* note 108, at 35.

119. SUMNER, *supra* note 103, at 77.

120. GRABER, *supra* note 3, at 77.

121. *Id.* at 235 nn.3–4.

122. *Id.* at 19 (citing Henry Adams, *Shall We Muzzle the Anarchists?*, 1 FORUM 446–47 (1886)).

123. *Id.* at 236 n.4.

124. *Id.* at 22.

125. *Id.* at 23 (citing E.L. Godkin, *Suppression*, 68 NATION 388 (1899)).

be. It is from this theory that universal suffrage derives its moral authority to make war”¹²⁶ This justification seems to stress the value of free speech for its role in preserving democratic legitimacy rather than purely for its instrumental value in attaining truth on public matters, but in either case, Godkin clearly sought to protect speech for the benefit of the audience rather than the speaker. Interestingly, the central thesis of Godkin’s article makes this point clear. “Suppression” refers not to the administration’s policies, but rather to the *self*-censorship of the partisan presses, which rarely published facts or opinions inconsistent with their own narrowly partisan agenda. By publishing little of value to the citizen, the function of these newspapers was “mainly one of suppression.”¹²⁷

3. *Supreme Court Justices*

Graber finds some evidence of a libertarian concern for free speech in Justice Harlan’s dissent in *Patterson v. Colorado*.¹²⁸ In that case, Justice Holmes, writing for the Court, dismissed an appeal from a contempt order issued by the Supreme Court of Colorado against the publisher of articles and cartoons “intended to embarrass the court.”¹²⁹ In dissent, Justice Harlan argued that the Privileges and Immunities Clause of the Fourteenth Amendment incorporated the First Amendment’s protection of free speech. In response to the Court’s Blackstonian interpretation of the First Amendment, Harlan replied, “I cannot assent to that view, if it be meant that the legislature may impair or abridge the rights of a free press and of free speech whenever it thinks that the public welfare requires that to be done.”¹³⁰

But when discussing the “Four Horsemen,”¹³¹ Graber is less persuasive. He points out that of the nine free speech cases these Justices considered, they voted in favor of the claim in four of them.¹³² However, all of these cases occurred after Chafee had done his first writing on free speech and therefore could not have been

126. Godkin, *supra* note 125, at 388.

127. *Id.*

128. *Patterson v. Colorado*, 205 U.S. 454 (1907); GRABER, *supra* note 3, at 129.

129. *Patterson*, 205 U.S. at 463.

130. *Id.* at 465 (Harlan, J., dissenting).

131. The “Four Horsemen” were Justices Van Devanter, McReynolds, Sutherland, and Butler. These Justices were all conservative and often voted together in the 1930s.

132. GRABER, *supra* note 3, at 45.

“ignored” by him.¹³³ Moreover, in three of them, the four conservative Justices joined unanimous decisions of the Court in cases presenting fairly egregious violations of free speech.¹³⁴ In the fourth case, *Associated Press v. National Labor Relations Board*,¹³⁵ the Horsemen dissented from the Court’s holding that the NLRB’s requirement that employers rehire employees fired for engaging in union activities and advocacy of collective bargaining was not unconstitutional as applied to the AP’s discharge of one of its editorial staff members.¹³⁶ Justice Sutherland’s opinion did rely substantially on the First Amendment argument, but it is worth noting that this was a rare case in which the free speech argument was buttressed by—rather than in conflict with—freedom of contract arguments. Furthermore, as Graber acknowledges, this opinion gives a misleading impression of the views of Justice Sutherland, who during the Red Scare was hardly a zealous defender of free speech.¹³⁷

To sum up, the revisionist account’s persuasiveness owes more to its intuitive plausibility than to its empirical support. Because some of the conservative libertarians listed “freedom of speech” among the rights protected by a general theory of natural rights, at a high level of abstraction they appear libertarian on the issue. But as we have seen, these same thinkers often interpreted free speech narrowly when it seemed to conflict with another of their sacred rights—such as the property right in reputation or even the right of a community to protect its moral health.¹³⁸ Moreover, most of these scholars and

133. See *supra* notes 51–53 and accompanying text.

134. *De Jonge v. Oregon*, 299 U.S. 353, 357 (1937) (reversing the conviction under a state criminal syndicalism statute of a defendant who had attended a meeting of the Communist Party “at which nothing unlawful was done or advocated”); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) (striking down a Louisiana tax on newspaper advertising revenue that only applied to newspapers with circulations of more than twenty thousand copies per week); *Fiske v. Kansas*, 274 U.S. 380, 382 (1927) (reversing the conviction under a state criminal syndicalism statute of a defendant who had secured members to an organization whose constitution stated “[t]hat the working class and employing class have nothing in common, and that there can be no peace so long as hunger and want are found among millions of working people,” even though there was no evidence that the organization advocated crime or violence to effect political change).

135. *Associated Press v. Nat’l Labor Relations Bd.*, 301 U.S. 103 (1937).

136. *Id.* at 133–41 (Sutherland, J., dissenting).

137. GRABER, *supra* note 3, at 45–46.

138. One of today’s leading conservative libertarians has criticized *New York Times v. Sullivan* for precisely this reason. Epstein argues that *New York Times*’ broad rule making defamation non-actionable went too far because it did not take into account an individual’s interests in their reputation. See Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*,

intellectuals gave scant attention to the topic of free speech, and those who did emphasized its democratic value, just as Chafee later would. Thus, the idea that in developing his theory, Chafee disregarded a “conservative libertarian” tradition of political and legal thinkers who expounded expansive conceptions of freedom of speech is not supported by the evidence.

IV. FREEDOM OF SPEECH AND THE GROWTH OF EQUITY

Still, a question persists. For it is true that in the late nineteenth century, property rights were paradigmatic of individual rights in general.¹³⁹ One might therefore expect Chafee’s defense of free speech to be framed in such terms. And in his 1919 article, Chafee recognized that the First Amendment also protected an “individual interest,” which included the “need of many men to express their opinions on matters vital to them if life is to be worth living.”¹⁴⁰ Yet he focused more on the “social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way.”¹⁴¹ Chafee did not deny that he did so in part for practical reasons. In wartime, many understandably felt obligated to sacrifice for the common good; but so long as free speech was framed as a purely individual interest, many would assume that it “must readily give way like other personal desires the moment it interferes with the social interest in national safety.”¹⁴² Where, then, did Chafee’s talk of “social interests” come from?

That Chafee invoked both the individual and the public benefits of free speech suggests that he used the term “social interest” not only to highlight its *social* value, but also to make clear that we protect speech for the *interest* it serves. “It is useless,” he maintained, “to define free speech by talk about rights.”¹⁴³ Every assertion of right by one party is met with a counter-assertion by the other:

53 U. CHI. L. REV. 782, 798 (1986) (“Reputation is not some lifeless abstraction, but the summation of all the possibilities for gainful interactions—economic, social and political—with others that are stripped away by false statements.”).

139. See MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 145 (1992).

140. Chafee, *supra* note 6, at 958.

141. *Id.*

142. *Id.* at 959.

143. *Id.* at 957.

The result is a deadlock. Each side takes the position of the man who was arrested for swinging his arms and hitting another in the nose, and asked the judge if he did not have a right to swing his arms in a free country. "Your right to swing your arms ends just where the other man's nose begins."¹⁴⁴

To get beyond this impasse, one had to look to the social and individual interests that such rights exist to protect. These interests must then be "balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of a legal right."¹⁴⁵

Although Chafee's meaning seems clear, his motivation for framing the issue as one of "interest balancing" is not. On one view, it reflects Chafee's effort to fashion a theory of free speech compatible with political Progressivism. Professor Rabban writes that although "[w]ritten under the guise of scholarship," Chafee's 1919 article "was essentially a work of propaganda."¹⁴⁶ Similarly, Professor Graber contends that Chafee "rejected the principles underlying the 'traditional' conservative libertarian defense of expression rights because, although he sometimes pretended otherwise, he was a mainstream progressive who insisted that judges had no business protecting their idiosyncratic notions of individual rights."¹⁴⁷

This ideological interpretation suffers from two principal defects. First, it seems inconsistent with Chafee's personality and politics. Born into a wealthy and prominent Rhode Island family, Chafee's political and intellectual temperament was moderate to conservative. His biographer notes that the metaphor of balancing is a "perfect metaphor to characterize his temperament,"¹⁴⁸ and suggests that it reflects Chafee's conviction that virtually all legal problems could be solved by balancing interests.¹⁴⁹ He describes Chafee as

144. *Id.*

145. *Id.*

146. RABBAN, *supra* note 3, at 318; *see also* GRABER, *supra* note 3, at 137 ("Chafee's attitude toward law was as partisan as his attitude toward politics.").

147. GRABER, *supra* note 3, at 124; *see also* RABBAN, *supra* note 3, at 5 (noting that Chafee "essentially ignored prewar discussion of free speech that differed from his own focus on the protection of political dissent in a democracy").

148. DONALD L. SMITH, ZECHARIAH CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW 87 (1986).

149. *Id.* at 5.

“fundamentally conservative” and even attributes his concern with free speech to such conservatism.¹⁵⁰ As Chafee himself once said in discussing the *Abrams* case, “[m]y sympathies and all my associations are with the men who save, who manage, and produce. But I want my side to fight fair.”¹⁵¹ In other words, Chafee was not an ideologue.

The second defect was exposed in Part III: the “traditional” defense of free speech did not even rely on individual rights in the way the revisionist account supposes, suggesting that Chafee’s formulation may have been motivated by something other than a hostility to judicial protection of individual property rights. In this Part and the next, I thus offer an alternative, intellectual explanation for Chafee’s theory, which looks to the doctrinal and jurisprudential context in which Chafee wrote. I will first show how freedom of speech and property rights, though complementary in political theory, conflicted with each other in legal practice in the decades before World War I. In those years, corporations frequently asked courts to enjoin labor boycotts, forcing the courts to adjudicate between the property rights of the corporations and the free speech rights of the boycotting employees. And yet the courts seemed unable to find any principled way of deciding when one assertion of right trumped the other. I therefore suggest that in grounding free speech protection on new jurisprudential premises—that of the “social interest” in its protection—Chafee sought above all to overcome this doctrinal impasse. Part V will then explain how Chafee attempted to do just that by looking to the common law of defamation.

A. The Traditional View: “Equity Will Not Enjoin Libels”

The use of injunctions to resolve labor disputes around the turn of the century was highly controversial at the time and has been well documented by scholars. Writing in 1930, Professors Frankfurter and Greene wrote that “[a]s to labor controversies during the last quarter century, equity in America has absorbed the law.”¹⁵² Since then, First Amendment scholars have noted that the labor injunction

150. *Id.*

151. Jerald S. Auerbach, *The Patrician as Libertarian: Zechariah Chafee, Jr. and Freedom of Speech*, 42 *NEW ENG. Q.* 511, 525 (1969).

152. FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 47 (1930).

cases constituted one of the principal areas of legal conflict over free speech in the years before World War I.¹⁵³ At the same time, scholars of labor law have drawn the connection between the use of injunctions and the expanding conception of property—a point illustrated below.¹⁵⁴ Less attention has been paid to the way in which the growth of equity jurisdiction over these types of disputes contributed directly to modern justifications for free speech. Such neglect is striking because Chafee, one of the chief expositors of modern free speech theory, was himself a professor of equity and came to the subject of free speech while studying equitable remedies for defamation.¹⁵⁵ Indeed, it was the problem of enjoining libels that fueled his desire “to find out what this ‘liberty of the press’ really was.”¹⁵⁶ But to see why the growth of equity jurisdiction—and the corollary expansion of property rights—prompted Chafee to investigate more deeply the legal meaning of freedom of speech first requires tracing the doctrinal history of equity jurisprudence and its relation to freedom of speech at common law.

The willingness of courts of equity to issue injunctions to prevent the commission of torts grew continually throughout the nineteenth century. In principle, the elements required for asserting jurisdiction remained the same throughout; in order to receive injunctive relief, plaintiffs in tort actions had to show (1) irreparable damage to property and (2) that the remedy at law for damages was inadequate, usually because of the defendant’s continuing or repeated conduct.¹⁵⁷

153. *See, e.g.*, RABBAN, *supra* note 3, at 169–73.

154. *See, e.g.*, WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 88 (1989) (explaining how the notion that an employer had “a property interest in his employment relations” allowed “virtually any strike to be cast as an interference with an employer’s property rights”); FRANKFURTER & GREENE, *supra* note 152, at 48 (“[T]he term ‘property’ has been the lattice-work upon which the labor injunction has climbed.”); HORWITZ, *supra* note 139, at 154 (“During the 1880s, the federal courts had begun to use the idea of interference with these more abstract and intangible property rights to generate the labor injunction.”); *see also* Haggai Hurvitz, *American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts, and the Juridical Reorientation of 1886–1895*, 8 *INDUS. REL. L.J.* 307, 332 (1986) (explaining how equity decisions would “extend the concept of ‘property rights’ over employers’ exclusive powers to control and manage all business policies of their enterprises, including labor relations”).

155. ZECHARIAH CHAFEE, *THIRTY-FIVE YEARS WITH FREEDOM OF SPEECH* 2 (1952).

156. *Id.*

157. JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA* 234 (12th ed., William S. Hein & Co. 1984) (1836); Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 *HARV. L. REV.* 640, 640–41 (1916).

But whereas in the eighteenth century courts of equity had been extremely reluctant to enjoin even frequently-recurring trespasses—perhaps the most straightforward harm to property—they became increasingly inclined to do so during the first half of the nineteenth century.¹⁵⁸ Similarly, courts initially granted very few injunctions in cases of private nuisance, because enjoining a nuisance was viewed as an extreme measure only to be granted, in Chancellor Kent’s words, “with the utmost caution.”¹⁵⁹ By mid-century, however, courts were issuing injunctions to restrain private nuisances with increasing frequency.¹⁶⁰

Still, even as the jurisdiction over such torts as trespass and nuisance expanded during the nineteenth century, courts of equity typically refused to enjoin libels. There were two formal justifications for this prohibition. The first was that equity jurisdiction did not extend to the commission of crimes.¹⁶¹ Although today libels are treated as private law tort actions, in England, at that time, even private, non-seditious libels could be prosecuted by the government for their tendency to breach the peace.¹⁶² The crucial distinction between civil suits and criminal prosecutions lay in the nature of the rights implicated. Whereas criminal prosecutions enforced the positive law of the community, civil law was seen to have a pre-political, natural existence.¹⁶³ As one prominent lawyer at the time wrote, a judge in a criminal case “is *governed* himself by *positive law*, and executes and inforces [sic] the will of the supreme power, which is the will of THE PEOPLE, in their aggregate capacity.”¹⁶⁴ In contrast, “[c]ivil actions are founded in the private rights and wrongs of individuals; in which the legislative power of the civil state has

158. STORY, *supra* note 157, at 234 (“Formerly indeed Courts of Equity were extremely reluctant to interfere at all, even in regard to trespasses. But now there is not the slightest hesitation if the acts done or threatened to be done to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in future.”).

159. Paul M. Kurtz, *Nineteenth Century Anti-entrepreneurial Nuisance Injunctions—Avoiding the Chancellor*, 17 WM. & MARY L. REV. 621, 625 n.24 (1976) (citing *Att’y Gen. v. Utica Ins. Co.*, 2 Johns Ch. 371 (N.Y. Ch. 1817)).

160. *Id.* at 628–29.

161. *See, e.g.*, *Montgomery & W. P. R. Co. v. Walton*, 14 Ala. 207, 209 (1848) (“Nor can a case be found, where the chancellor has interposed by injunction, to restrain the commission of a crime, threatened by one to be perpetrated on another.”).

162. LEVY, *supra* note 19, at 9–10.

163. HORWITZ, *supra* note 139, at 11.

164. J.M. GOODENOW, *HISTORICAL SKETCHES OF THE PRINCIPLES AND MAXIMS OF AMERICAN JURISPRUDENCE* 33 (Arno Press 1972) (1819).

nothing to do Natural justice and right reason, are the foundation of all our private rights.”¹⁶⁵ Whereas judges were well-equipped by intellect and training to discern the rights involved in civil disputes, criminal prosecutions required juries because only they could legitimately enforce the positive law of the community; since courts of equity lacked juries, they had no jurisdiction over crimes.

The 1818 English case of *Gee v. Pritchard*¹⁶⁶ came to stand for this distinction between property rights and crimes. In that case, the plaintiff sought to restrain the defendant, her adopted son, from publishing in a newspaper letters she had written to him in confidence.¹⁶⁷ Lord Eldon did issue the injunction, but he carefully articulated the narrow basis of his decision. After initially declaring that “[t]he publication of a libel is a crime; and I have no jurisdiction to prevent the commission of crimes,”¹⁶⁸ he explained why jurisdiction was nonetheless proper:

I do not say that I am to interfere because the letters are written in confidence, or because the publication of them may wound the feelings of the plaintiff; but if mischievous effects of that kind can be apprehended in cases in which this court has been accustomed, *on the ground of property*, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised¹⁶⁹

So long as property rights were at issue, the court seemed to be saying it had jurisdiction, regardless of whether or not the publication happened also to constitute the commission of a crime.

The second basis for refusing to enjoin libels was that doing so violated the common law protection of freedom of speech, which barred any prior restraint of a publication. *Brandreth v. Lance*¹⁷⁰ was the case Zechariah Chafee later recalled as stimulating his interest in free speech, and the reason is not hard to see.¹⁷¹ This 1839 decision of the New York Chancery Court affirmed the rule that a court of

165. *Id.* at 36.

166. *Gee v. Pritchard*, 2 Swanston 402 (1818), in *CASES ON EQUITABLE RELIEF AGAINST DEFAMATION: SUPPLEMENTARY TO CHAFEE’S CASES ON EQUITABLE RELIEF AGAINST TORTS* 8 (Roscoe Pound ed., 1930).

167. *Id.*

168. *Id.*

169. *Id.* at 11 (emphasis added).

170. *Brandreth v. Lance*, 8 Paige Ch. 24 (N.Y. Ch. 1839).

171. CHAFEE, *supra* note 155, at 2.

equity could not enjoin libels because taking jurisdiction would violate the defendant's freedom of speech.¹⁷² The plaintiff, a well-known pill vendor, sought to enjoin a disgruntled former employee from publishing a false, libelous pamphlet entitled "The Life, Exploits, Comical Adventures and Amorous Intrigues of Benjamin Brandling, M. D. V. P. L. V. S., a distinguished pill vender, written by himself."¹⁷³ In denying the request, the court declared at the outset that "[i]t is very evident that this court cannot assume jurisdiction of the case presented by complainant's bill, or of any other case of the like nature, without infringing upon the liberty of the press."¹⁷⁴

More important, although some American authorities, such as Joseph Story, had accepted *Gee* as good law,¹⁷⁵ the court expressed deep reservations about that decision. It questioned whether *Gee* really implicated a property right at all since a more plausible motive for the plaintiff's suit in *Gee* was her desire to protect from public exposure the intimate thoughts expressed in her letters rather than to vindicate any supposed property right in their literary value.¹⁷⁶ "[I]t may, perhaps, be doubted," the Chancellor concluded, "whether his lordship in that case did not, to some extent, endanger the freedom of the press by assuming jurisdiction of the case as a matter of property."¹⁷⁷ Indeed, the facts in *Brandreth* seemed far more capable than those in *Gee* of supporting a decision on the basis of harm to property since Brandreth's pill business was branded with his own name and might well have been damaged by the negative publicity the pamphlet caused. Even so, the court refused to enjoin the publication.¹⁷⁸

Both *Gee* and *Brandreth* eventually came to stand for the proposition that a court of equity would not enjoin a libel unless property rights were violated.¹⁷⁹ At the same time, the holding in *Brandreth* reflected a greater reluctance on the part of American courts to interpret "property" as broadly as Lord Eldon had in *Gee*.

172. *Id.*

173. *Brandreth*, 8 Paige Ch. at 24.

174. *Id.*

175. STORY, *supra* note 157, at 250.

176. *Brandreth*, 8 Paige Ch. at 26.

177. *Id.*

178. *Id.*

179. See JOHN WILLARD, A TREATISE ON EQUITY JURISPRUDENCE 387 (1855).

This divergence between the English and American practice continued through the 1870s and was reflected in a line of cases in which American courts consistently refused to enjoin libelous speech potentially injurious to a plaintiff's business. Many of these cases were slander of title cases in which the defendant had falsely informed, or threatened to inform, the plaintiff's customers that the plaintiff had infringed the defendant's trademark or patent.

In the 1873 case of *Boston Diatite Co. v. Florence Manufacturing Co.*, for instance, the defendant had told plaintiff's customers that the plaintiff's toilet mirrors infringed defendant's patent.¹⁸⁰ In denying the request for an injunction, the Massachusetts Supreme Judicial Court cited *Gee v. Pritchard* for the proposition that "[t]he jurisdiction of a Court of Chancery does not extend to cases of libel or slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involve no breach of contract."¹⁸¹ In reaching this conclusion, the court dismissed two recent English cases, both of which had upheld jurisdiction in analogous circumstances, as "so inconsistent with these authorities and with well settled principles" that they ought not be followed.¹⁸²

Similarly, in *Kidd v. Horry* a federal court held on similar facts to those of *Boston Diatite* that the plaintiff's request to enjoin defendant from publishing circulars challenging plaintiff's patent must be rejected because the court possessed no such power.¹⁸³ Although the defendant cited English cases to support an injunction, the court distinguished those as decisions based on acts of Parliament.¹⁸⁴ Then, citing *Brandreth* and *Boston Diatite*, it held that "neither the statute law of this country, nor any well-considered judgment of the courts, has introduced this new branch of equity, into our jurisprudence."¹⁸⁵

180. *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69, 69 (1873).

181. *Id.* at 70.

182. *Id.* The cases referred to are *Dixon v. Holden*, 7 L.R.Eq. 488 (1869) and *Springhead Spinning Co. v. Riley*, 6 L.R.Eq. 551 (1868).

183. *Kidd v. Horry*, 28 F. 773, 775 (C.C.E.D. Pa. 1886).

184. *Id.*

185. *Id.* at 775-76.

Other courts during this time followed a similar rule.¹⁸⁶ In each of them, courts refused to enjoin libelous speech, holding it was both beyond the power of the courts of equity, and correlatively, a violation of freedom of speech. In 1886, John Norton Pomeroy summarized the state of the law on this issue in his *Treatise on Equity*: “The American courts seem, thus far, unwilling to follow the example of the recent English decisions, and they decline to extend the jurisdiction so as to restrain such torts as libels on business, slanders of title, and the like.”¹⁸⁷ But Pomeroy’s qualification of “thus far” would prove prescient. For beginning in 1888, American courts of equity became increasingly willing to issue injunctions to restrain libelous publications in circumstances almost exactly analogous to those in the cases above. These latter cases would soon provide the crucial precedents for the labor injunctions courts began issuing around the same time. Both lines of cases rested on a dramatic expansion in the meaning of the term “property.”

B. Property and Equity

Commentators have documented well the change in the conception of property during the latter half of the nineteenth century.¹⁸⁸ In the late eighteenth century, Blackstone had described property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion

186. See, e.g., *Singer Mfg. Co. v. Domestic Sewing Mach. Co.*, 49 Ga. 70, 74 (1873) (refusing to enjoin the publication of a newspaper article falsely reporting that the defendant had won a product award at a state fair and concluding that the “settled rule” was that “[l]ibel and slander, however illegal and outrageous, will not be enjoined” and that it was a “perversion of language to say that the complainant had a property right in the truth of the report”); *Life Ass’n of Am. v. Boogher*, 3 Mo. App. 173, 179 (1876) (citing both *Gee* and *Brandreth* while refusing to enjoin the publication of allegedly libelous statements); see also *Balt. Car-Wheel Co. v. Bemis*, 29 F. 95, 95 (D. Mass. 1886) (citing *Kidd* and *Boston Diatite* as authority for declining jurisdiction in a slander of title case); *Whitehead v. Kitson*, 119 Mass. 484, 484 (1876) (citing *Boston Diatite* as authority for denying jurisdiction in a slander of title case).

187. 3 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE 390–91 (San Francisco, A. L. Bancroft & Co. 1883).

188. See, e.g., HORWITZ, *supra* note 139, at 145–69; Thomas Grey, *The Disintegration of Property*, in PROPERTY 69, 73 (J. Roland Pennock & John W. Chapman eds., 1980); Kenneth J. Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980).

of the right of any other individual in the universe.”¹⁸⁹ The traditional Blackstonian conception referred primarily to real estate or physical objects.¹⁹⁰ But as such new sources of value as corporate stock, goodwill, and patents were bought and sold, this “physicalist” conception of property began to erode. As Professor Horwitz writes, “During the course of the nineteenth century, there was a consistent tendency toward generalization and abstraction of the idea of property in order to accommodate these new and intangible interests.”¹⁹¹ Thus, in 1872, one Supreme Court Justice asserted that “[p]roperty is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner.”¹⁹² Nearly fifty years later, the Supreme Court held that a business enterprise was itself a property right deserving of protection under the Constitution.¹⁹³ Such expansion made it much easier for courts of equity to justify taking jurisdiction over libelous speech.

The first decision to reflect this change was an 1888 decision by an Illinois federal district court. Like *Boston Diatite* and *Kidd*, the case of *Emack v. Kane*¹⁹⁴ involved a slander of title claim. The plaintiff, a manufacturer of “muffled” slates used by schoolchildren, sought to enjoin the defendant from sending circulars to plaintiff’s customers claiming that he had infringed the defendant’s patent on such slates.¹⁹⁵ Here, though, the court granted the injunction.¹⁹⁶ In justifying its decision, the court distinguished *Kidd* as involving merely a challenge to the validity of the patent, whereas in this case the defendant had made threats of litigation.¹⁹⁷ While recognizing that cases of “mere personal slander or libel may perhaps properly be left to the courts of law,” the court held that “[i]t shocks [the court’s] sense of justice to say that a court of equity cannot restrain

189. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (Oxford, Clarendon Press 1766).

190. Vandeveld, *supra* note 188, at 329.

191. HORWITZ, *supra* note 139, at 145.

192. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 127 (1872) (Swayne, J., dissenting).

193. *Truax v. Corrigan*, 257 U.S. 312, 327 (1921).

194. *Emack v. Kane*, 34 F. 46 (N.D. Ill. 1888).

195. *Id.* at 47.

196. *Id.*

197. *Id.* at 50.

systematic and methodical outrages like this, by one man upon another's property rights."¹⁹⁸

Five years later, the Supreme Court of Indiana reached a similar result in *Shoemaker v. South Bend Spark-Arrester Co.*¹⁹⁹ Here again, the plaintiff sought to enjoin the defendant from publishing circulars that challenged the validity of his patent and threatened litigation. In upholding jurisdiction, the court distinguished the *Boston Diatite* line of authority as not involving threats of litigation.²⁰⁰ This case, it asserted, "involves more than libel of title. It charges the false and malicious destruction of the appellee's property rights, in injuring its business" ²⁰¹ Then, after quoting the *Emack* court's opinion almost in full, it acknowledged the objection raised by the *Boogher* court, namely that enjoining such circulars interfered with the freedom of speech.²⁰² Virtually without any argument, however, the court refused to accept that decision as authority and dismissed its argument as not "sound."²⁰³ In *A.B. Farquhar Co. v. National Harrow Co.*, the Third Circuit reached the same conclusion.²⁰⁴ On facts similar to those of *Shoemaker*, the court held that while good faith challenges to the validity of a patent were legal, "where, as is here averred, they are not made or issued with such intent, but in bad faith, and solely for the purpose of destroying the business of another . . . property rights are fraudulently assailed."²⁰⁵ In other words, the court held that because the defendant had an improper motive, the plaintiff's property rights were therefore injured.

These decisions did not necessarily represent willful judicial overreaching. Although the opinions do not recount the facts in detail, the cases appear to have been distinguishable from the earlier line insofar as the defendants were threatening customers with lawsuits rather than merely notifying them of a challenge to the plaintiff's intellectual property. Still, as we will see, the tension between the two lines of cases was noted by courts at the time. Furthermore, the opinions demonstrate well the consequences of

198. *Id.* at 50-51.

199. *Shoemaker v. S. Bend Spark-Arrester Co.*, 35 N.E. 280 (Ind. 1893).

200. *Id.* at 282-84.

201. *Id.* at 282.

202. *Id.* at 282-83.

203. *Id.* at 283.

204. *A.B. Farquhar Co. v. Nat'l Harrow Co.*, 102 F. 714, 715 (3d Cir. 1900).

205. *Id.*

characterizing plaintiffs' injury as a violation of property rights. Once a court concluded such a right was implicated, it felt justified in freely granting an injunction. Furthermore, the courts seemed to be suggesting that the *intent* of the defendant determined whether or not the plaintiff's property rights were injured and, therefore, whether or not the traditionally extreme measure of equitable relief was justified. It was precisely this logic that enabled courts to justify granting injunctions against labor boycotts.

C. Equity and Free Speech

As is well known, beginning in the late 1880s, courts became increasingly willing to issue injunctions to quell labor strife. The violence that erupted at Chicago's Haymarket Square in May of 1886 and the increasing use of national strikes by workers encouraged courts to take a more aggressive role in seeking to maintain labor peace.²⁰⁶ As a result, the so-called "labor injunction" soon became notorious among workers as a means of suppressing what they perceived to be their legitimate right to demand better conditions.²⁰⁷ No doubt a complex combination of political, social, and economic factors explain why injunctions were issued with such frequency, but offering such an explanation of this change is not our concern. Instead, for our purpose, these decisions matter insofar as they expose how doctrinally superficial courts' efforts were in reconciling conflicts between property rights and free speech.

The Massachusetts Supreme Judicial Court's decision in *Sherry v. Perkins* was one of the first to enjoin picketers on the grounds that such speech constituted a violation of property rights rather than a libel.²⁰⁸ In a short two-page opinion, the court distinguished *Boston Diatite* as a "case of defamation only" and held that the banner the defendants were carrying outside of the plaintiff's business was "injurious to the plaintiff's business and property, and was a nuisance, such as a court of equity will grant relief against."²⁰⁹

In *Casey v. Cincinnati Typographical Union*, a federal court extended the reach of the new rule and offered a somewhat more

206. See FORBATH, *supra* note 154, at 63.

207. See *id.* at 73.

208. *Sherry v. Perkins*, 17 N.E. 307, 310 (Mass. 1888).

209. *Id.* at 310.

elaborate justification.²¹⁰ In this case the plaintiff sought a preliminary injunction to stop the defendant union from boycotting the plaintiff's business for its failure to hire union workers. In granting the injunction, the court cited *Boston Diatite* and *Kidd* for the proposition that a court of equity would not restrain a libel, but it then framed the issue as whether or not "this case falls within the rule."²¹¹ The court concluded that it did not, because although the union had made no *explicit* threats, "the language of the circulars has no doubtful meaning," and the word "boycott" was itself a threat.²¹² The defendant did not merely intend to libel the plaintiff but instead possessed a "malicious intent to injure complainant's business."²¹³ This decision was followed by another federal court the next year. In *Coeur D'Alene Consolidated & Mining Co. v. Miners' Union*, the court distinguished enjoinable injuries to property from non-enjoinable libels by reference to the presence of "words which will operate to intimidate and prevent the customers of a party from dealing with" that party, even if no threat is explicit.²¹⁴ Citing both *Casey* and *Emack*, the court granted the injunction.²¹⁵

Before long, the trend of issuing injunctions in such cases seemed so evidently justified that courts began to treat the bar on the prior restraint of speech as an anomaly in the law. The Missouri Supreme Court, for instance, acknowledged that courts had traditionally denied themselves the power to enjoin libels but insisted that

the law of libel is peculiar, and those cases turn upon that peculiarity. The freedom of the press has been so jealously guarded both in England and in this country that our law of libel is like no other law on the books. . . . Libel is the only act injurious to the rights of another which a man cannot, under proper conditions, be restrained from committing; and that is so because the constitution says he shall be allowed to do it, and answer for it afterwards.²¹⁶

210. *Casey v. Cincinnati Typographical Union*, 45 F. 135 (S.D. Ohio 1891).

211. *Id.* at 143.

212. *Id.*

213. *Id.* at 144.

214. *Coeur D'Alene Consol. & Mining Co. v. Miners' Union*, 51 F. 260, 267 (D. Idaho 1892).

215. *Id.* at 266–67.

216. *Hamilton-Brown Shoe Co. v. Saxey*, 32 S.W. 1106, 1108 (Mo. 1895) (quoting the trial court below).

The court then issued the injunction, finding the legal remedy to be inadequate.²¹⁷ The defendant clearly had intended to “destroy the business of these plaintiffs,” the court held, and to “force the eight or nine hundred men, women, boys, and girls who are earning their livings in the plaintiff’s employ to quit their work against their will.”²¹⁸

A more penetrating analysis of the doctrinal difficulty courts faced was offered in two separate dissenting opinions in *Vegelahn v. Guntner*.²¹⁹ In this case, the majority of the Massachusetts Supreme Judicial Court upheld an injunction preventing two men from patrolling the streets outside plaintiff’s business to demand better wages. The court cited *Sherry* and *Coeur D’Alene Consolidated* and employed the oft-repeated distinction that “a court of equity will decline to issue an injunction to restrain the commission of a crime; but a continuing injury to property or business may be enjoined.”²²⁰

In dissent, though, Justice Field attacked the premise of the court’s holding. After pointing out that “[t]he practice of issuing injunctions in cases of this kind is of very recent origin,” he distinguished the English cases upholding jurisdiction as based on Parliament’s Judicature Act and said the American cases following them were thus wrongly decided.²²¹ He then denied that the defendant’s “malicious” intent ought to bear on the issue of whether or not the plaintiff’s property rights were violated:

For myself, I have been unable to see how malice is necessarily decisive. To persuade one man not to enter into the employment of another, by telling the truth to him about such other person and his business, I am not convinced is actionable at common law, whatever the motive may be.²²²

Of course, if such speech was false, the defendant could be liable for libel at law, but given the traditional rule against preventive relief for libel, Justice Field contended that “something more is necessary to justify issuing an injunction.”²²³

217. *Id.*

218. *Id.*

219. *Vegelahn v. Guntner*, 44 N.E. 1077 (Mass. 1896).

220. *Id.* at 1078.

221. *Id.* at 1078 (Field, J., dissenting).

222. *Id.* at 1079.

223. *Id.*

In a separate, now-famous dissent, Justice Oliver Wendell Holmes made a similar point, but he directed his attack on a deeper jurisprudential level. Like Justice Field, Justice Holmes denied that a plaintiff's right to be free from injury necessarily hinged on the intent of the defendant.²²⁴ Instead, liability ultimately depended on whether or not the law sanctioned the type of injuries he inflicted on the plaintiff. "[I]n numberless instances," Justice Holmes maintained, "the law warrants the intentional infliction of temporal damage, because it regards it as justified."²²⁵ The critical question was, what counts as a justification? To this, Justice Holmes answered that "[t]he true grounds of decision are considerations of policy and of social advantage."²²⁶ Just as we recognize competition among businesses as socially advantageous, he reasoned, so ought we recognize the competition between labor and capital as a legitimate part of the "free struggle for life."²²⁷ Similarly, whether a defendant's speech amounted to a permissible warning or an illegal "threat" ultimately depended on the legality of that which was threatened. "As a general rule," he maintained, "what you may do in a certain event you may threaten to do—that is, give warning of your intention to do—in that event."²²⁸ Thus, if the boycotters were not threatening violence but merely threatening not to work, their speech ought not be restrained.

But Justice Holmes's protest fell mostly on deaf ears. Courts continued to uphold the use of injunctions against boycotts and other types of speech harmful to businesses.²²⁹ One court accurately

224. *Id.* at 1082 (Holmes, J., dissenting).

225. *Id.* at 1080.

226. *Id.*

227. *Id.* at 1081. Holmes had already developed this argument in a law review article two years before. See Oliver Wendell Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

228. *Vegelahn*, 44 N.E. at 1081 (Holmes, J., dissenting).

229. See *A.R. Barnes & Co. v. Chi. Typographical Union*, 83 N.E. 940 (Ill. 1908) (upholding the grant of an injunction against union picketers); *Nat'l Life Ins. Co. v. Myers*, 140 Ill. App. 392 (1908) (upholding the grant of a preliminary injunction against plaintiff's ex-employee to stop him from publishing libelous articles about plaintiff); *M. Steinart & Sons Co. v. Tagen*, 93 N.E. 584 (Mass. 1911) (upholding the grant of an injunction preventing union members from driving around the streets with placards and slogans adverse to the plaintiff); *Davis v. New England Ry. Publ'g Co.*, 89 N.E. 565 (Mass. 1909) (granting an injunction that prevented defendant from publishing a business directory it claimed included all businesses while excluding plaintiff's business for the sole purpose of causing injury to plaintiff's business); *Marlin Firearms Co. v. Shields*, 64 N.E. 163 (N.Y. 1902) (reversing a

noted in 1898 that “while some writers have doubted the remedy by injunction [to restrain labor boycotts], it is now settled beyond dispute.”²³⁰ Finally, in 1911 the United States Supreme Court gave its official sanction to the doctrine.²³¹

In *Gompers v. Bucks Stove & Range Co.*, the Supreme Court upheld an injunction against Samuel Gompers, the president of the American Federation of Labor and editor of the *American Federationist*, preventing him from organizing a boycott of the plaintiff’s business and from publishing its name on a list of employers labeled with the words “Unfair” and “We Don’t Patronize.”²³² Writing for the majority, Justice Lamar addressed Gompers’s free speech defense but dismissed it as irrelevant to the issue. “We will not enter upon a discussion of the constitutional question raised,” he explained, because the defendant’s challenge “raises no question as to an abridgment of free speech, but involves the power of a court of equity to enjoin the defendants from continuing a boycott which, by words and signals, printed or spoken, caused or threatened irreparable damage.”²³³ While acknowledging the legal definition of “boycott” to be a question of some dispute among the courts, he noted that “the strong current of authority” had held the publication of letters or circulars to “constitute a means whereby a boycott is unlawfully continued” and could therefore be lawfully enjoined.²³⁴ Furthermore, the courts’ protective powers, he

lower court’s refusal to enjoin defendant publisher from publishing false and harmful articles about plaintiff’s products).

230. *Beck v. Ry. Teamsters’ Protective Union*, 77 N.W. 13, 21 (Mich. 1898).

231. The Court had already upheld an injunction of a boycott against the Pullman Palace Car Company in *In re Debs*, 158 U.S. 564 (1895), *overruled by* *Bloom v. Illinois*, 391 U.S. 194 (1968), but the petitioners in that case did not assert a freedom of speech defense.

232. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 436 (1911).

233. *Id.* at 436–37.

234. *Id.* at 437. Later treatises confirmed this view. See W.A. MARTIN, A TREATISE ON THE LAW OF LABOR UNIONS § 106 (1910) (recognizing a split in authority on the issue but noting the “weight of authority” supports granting injunctions against boycott circulars); 5 JOHN NORTON POMEROY, A TREATISE ON EQUITABLE REMEDIES § 2048 (2d ed. 1919) (explaining that although “the contention is sometimes made that the constitutional guaranties of freedom of speech and the well-recognized rule against enjoining a libel are a bar to the equitable remedy” in disputes over boycott notices, “the great weight of authority” is in accord with the view that such notices may be enjoined); THOMAS C. SPELLING & JAMES HAMILTON LEWIS, A TREATISE ON THE LAW GOVERNING INJUNCTIONS § 125 (1926) (“As is well known, courts of equity ordinarily abstain from issuing injunctions against libels. But the practice of restraining the use of circulars and similar instrumentalities in the carrying on of a boycott or other trade conflict is well established.”).

maintained, “extend to every device whereby property is irreparably damaged or commerce is illegally restrained.”²³⁵

Thus, following the practice of other courts, the Supreme Court refused to address the scope or meaning of freedom of speech. Instead, it merely dismissed the First Amendment protections as inapplicable when property rights were at issue, rendering any further analysis unnecessary. The superficiality of the doctrinal analysis courts employed in this area was typified perhaps best of all by the lower court’s decision in *Gompers*. In upholding the injunction, the Court of Appeals for the District of Columbia declared that “there is a point where the right of free speech and a free press ends, and unlawful interference with personal and property rights begins. When the citizen passes this point, he can no longer claim the protection of the Constitution.”²³⁶ Where that point was, however, neither court would say.

Professor Rabban describes well the courts’ treatment of First Amendment arguments during this period when he notes the “analytic sterility of most opinions.”²³⁷ As he points out, even when courts vindicated free speech claims, they rarely discussed the precise scope of the First Amendment’s protection.²³⁸ For Professor Rabban, such decisions nevertheless prove that “the tradition of insensitivity was not so dominant that only an intellectual breakthrough in constitutional interpretation could have created the possibility of different results.”²³⁹ But the doctrinal survey above suggests that

235. *Gompers*, 221 U.S. at 438.

236. *AFL v. Buck’s Stove & Range Co.*, 33 App. D.C. 83, 112–13 (D.C. Cir. 1909) (Van Orsdel, J., concurring).

237. RABBAN, *supra* note 3, at 176.

238. *Id.*; see, e.g., *Marx & Haas Jeans Clothing Co. v. Watson*, 67 S.W. 391, 395 (Mo. 1902) (noting that the Missouri Constitution’s protection of freedom of speech “makes no distinction, and authorizes no difference to be made by courts or legislatures, between a proceeding set on foot to enjoin the publication of a *libel*, and one to enjoin the publication of *any other sort or nature, however injurious it may be*, or to prohibit the use of free speech or free writing on any subject whatever; because, wherever the authority of *injunction begins*, there the right of free speech, free writing, or free publication *ends*” (emphasis added)); see also *Kelley v. Ypsilanti Dress-Stay Mfg. Co.*, 44 F. 19 (E.D. Mich. 1890) (refusing to enjoin defendant from publishing circulars stating his rights as a patentee); *Flint v. Hutchinson Smoke Burner Co.*, 19 S.W. 804 (Mo. 1892) (refusing to enjoin defendant from slandering plaintiff’s title to a patent because doing so deprived defendant of trial by jury and freedom of speech); *Lindsay & Co. v. Mont. Fed’n of Labor*, 96 P. 127 (Mont. 1908) (refusing to enjoin defendant union from publishing circulars encouraging customers to boycott plaintiff’s business).

239. RABBAN, *supra* note 3, at 176.

such an intellectual breakthrough was precisely what was required to adequately deal with freedom of speech. For the courts' frequent invocation of property rights as a basis for defeating free speech defenses exposed the term "property" to be properly the conclusion of a legal argument rather than one of its premises.

D. Free Speech and Property

This, at least, was Chafee's view. Recall his exhortation that arguments over competing claims to "rights" were fruitless because "each side takes the position of the man who was arrested for swinging his arms," who is told by the judge that "[y]our right to swing your arms ends just where the other man's nose begins."²⁴⁰ Chafee likely had in mind statements like those of the D.C. Circuit in *Buck's Stove & Range Co.*²⁴¹ But he was not alone in his dissatisfaction with "talk of rights." By the time Chafee wrote his 1919 article, legal scholars had already been challenging the jurisprudential assumptions of the current legal orthodoxy for years. For them, the courts' tendency to consistently find the infringement of property rights revealed how insufficiently analyzed was their concept of a legal right.

The most well known attempt to provide a more rigorous framework for the analysis of rights was offered by Professor Wesley Hohfeld. In an influential article, Hohfeld said that concepts often loosely referred to as "rights" and "duties" were in fact composed of sixteen distinct "jural relations."²⁴² According to Hohfeld, a "right" could refer either to a true *right* (the law gives *A* a claim to *X* and imposes a duty on others not to interfere with *X*) or it could refer to a *privilege* (the law permits *A* to do *X*, but does *not* impose a duty on others to refrain from interfering with *X*).²⁴³ Hohfeld's analysis

240. Chafee, *supra* note 6, at 957.

241. *Buck's Stove & Range Co.*, 33 App. D.C. at 112-13 ("[T]here is a point where the right of free speech and a free press ends, and unlawful interference with personal and property rights begins. When the citizen passes this point, he can no longer claim the protection of the Constitution.")

242. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-30 (1913).

243. The word was also used to refer to a *power* (the law gives *A* the ability to change his or others' legal relation with respect to *X*, e.g., by buying or selling *X*), or it could refer to an *immunity* (the law protects *A* from having his legal relations with respect to *X* altered by others). *Id.* at 24, 55. Each of these conceptions, Hohfeld explained, has a "jural opposite"

clarified many legal debates at the time, and in particular it seemed to offer a better interpretation of the nature of the conflicts implicated in the boycott cases.²⁴⁴ If a plaintiff corporation merely had a *privilege* to compete in the marketplace and to contract for labor rather than a *right* to do so, it would not be inconsistent to hold that the boycotting unions also had a *privilege* to speak freely about the corporation to potential employees.

Hohfeld's scheme thus offered a formal way to understand Justice Holmes's point in *Vegeahn v. Gunter* that the real issue was whether or not the law would condone the "temporal damage" inflicted on plaintiff by defendant.²⁴⁵ If it did condone such damage, the law would only grant the company a *privilege* to hire whomever would consent to employment, but if it did not, it would grant the company a true *right* to do so. But while some scholars, like Hohfeld, attacked the concept of a right in orthodox legal thought through formal analysis of legal relations, others sought to get at the substance behind the form. These scholars sought to analyze more carefully what purposes the assignment of a right served. They sought to understand, for instance, why the law permitted the defendant to inflict "temporal damage" on the plaintiff in some circumstances, but not in others. One such scholar, Roscoe Pound, later recounted why attempts to define rights precisely so often failed: "[T]he compromises and adjustments which were called for could not be derived from the simple idea of freedom. The law books of the last century are full of curious situations of logical *impasse* to which such attempts continually led."²⁴⁶

In this Part, I have tried to explain why Chafee perceived a need to get beyond "talk of rights." By the time Chafee began to investigate the First Amendment, the legal enforcement of private property rights not only failed to entail the protection of free speech rights but in many cases precluded it. In the next Part, I argue that the "logical impasse" noted by Pound prompted Chafee to clarify the analysis of free speech rights. I thus seek to show how Chafee could have invoked the language of "social interests" without believing himself to be dramatically altering the law of free speech.

and a "jural correlative." *Id.* at 30. For instance, the opposite of a *power* is a *disability*, but its correlative is a *liability*. *Id.*

244. HORWITZ, *supra* note 139, at 155.

245. *Id.*; *Vegeahn v. Gunter*, 44 N.E. 1077, 1080 (Mass. 1896).

246. ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 159 (1923).

V. SOCIOLOGICAL JURISPRUDENCE AND FREE SPEECH

According to the revisionist account, Zechariah Chafee's effort to defend free speech on the basis of the "social interest" in its protection was a bold theoretical innovation. Chafee ignored its traditional libertarian defense, this view maintains, and replaced it with a theory better suited to his Progressive political views.²⁴⁷ But the fact that, as we have seen, the libertarians were less zealous in their advocacy of free speech than has been thought renders this view less plausible. Although the protection of a "sphere of mental conduct" would seem to follow from the enforcement of property rights, in practice, competing claims of private property and free speech frequently came into direct conflict. The labor injunction cases revealed this to be true even under the restrictive Blackstonian view that the First Amendment only bars the prior restraint of speech. In this Part, I argue that by grounding his theory in the principles of sociological jurisprudence, Chafee sought above all to resolve this doctrinal conflict. I further contend that Chafee was justified in characterizing his argument as traditional rather than novel. These two claims may appear to contradict each other since "sociological jurisprudence" was a distinctly modern phenomenon, but I hope to show why they do not so conflict.

Doing so requires a two-step argument. The first step is to show that sociological jurisprudence was more than a political ideology; it was instead a philosophy of law. To be sure, its advocates were concerned with the social effects of judicial decisions, and they saw law as a tool for social improvement. The revisionist account emphasizes these aspects of sociological jurisprudence, suggesting that the movement was little more than the legal-academic arm of political Progressivism. I contend rather that it constituted a coherent—if perhaps not complete—philosophy of law. Specifically, its central tenets consisted in the view that (1) legal rights were essentially instrumental in nature; (2) such rights were often justified by their ability to secure specifically *social* interests; and (3) in defining the scope and limit of a legal right, competing interests—whether individual or social—had to be balanced against each other. In other words, sociological jurisprudence consisted of a set of ideas

247. GRABER, *supra* note 3, at 124; RABBAN, *supra* note 3, at 4–5; Heyman, *supra* note 5, at 1303–04.

whose appeal lay in its intellectual coherence, not just the political consequences of its application to economic legislation.

The second step is to show that these jurisprudential tenets particularly illuminated the traditional justification for freedom of speech. In his study of defamation law, Chafee discovered that free speech defenses in libel suits (1) were traditionally defined *instrumentally*, (2) almost always served *public* purposes, and (3) frequently required courts to *balance* individual and social interests. In the context of defamation law, free speech was protected not as a property right itself but instead as a publicly-justified exception to, or carve out of, the prevailing scheme of individual rights, specifically that of reputation. In Chafee's formulation of freedom of speech, therefore, we see doctrinal continuity through jurisprudential change.

A. Sociological Jurisprudence and Social Interests

At the heart of sociological jurisprudence lies the concept of an "interest." Professor Graber characterizes the notion that "government should advance social interests" as one of the "legitimate first premises" of "sociological jurisprudence."²⁴⁸ According to Graber, in developing his theory, Chafee was thus "forced to change the premises, rather than the conclusions, of free-speech argument."²⁴⁹ But the idea that the function of law was to secure human "interests" was not a "first premise" of sociological jurisprudence; instead, it was one of its most significant conclusions. The arguments supporting it were most famously elaborated by Chafee's teacher, Roscoe Pound, but when Chafee referred to the rights/interests distinction in "Freedom of Speech in Wartime," he properly credited the German legal philosopher Rudolph Von Ihering with originating the idea and the American jurist John Chipman Gray with developing it.²⁵⁰ Together, these theorists laid the intellectual groundwork for Chafee's defense of free speech.

In *Law as a Means to an End*, Rudolph Ihering sought to establish the philosophical foundation for an instrumental

248. GRABER, *supra* note 3, at 10.

249. *Id.* at 11.

250. Chafee, *supra* note 6, at 957 n.81.

conception of law.²⁵¹ He began with first principles: according to the “principle of sufficient reason,” everything that exists must be the consequence of some antecedent change or phenomenon.²⁵² In the *material* world, we call this *cause*; thus natural processes are caused by the laws of physics. As applied to the *will*, however, we call this principle *purpose*.²⁵³ So, just as no physical effect can exist without some cause, no action of the will (human or animal) can exist without a purpose. Ihering used an intriguing comparison to illustrate this point: “The dry sponge fills itself with water; the thirsty animal drinks. Is it the same process? Externally, yes; internally, no. For the sponge does not fill itself in order to do so, but the animal does drink in order to quench its thirst.”²⁵⁴ Ihering thus defined the will as the “the maintenance of one’s own causality over against the external world.”²⁵⁵ But he felt compelled to qualify this metaphysical dichotomy lest it appear naïve in the face of Darwinism. Neither denying nor affirming the validity of Darwin’s theory, Ihering conceded that his speculations rested on an article of faith: “Only one of two things is possible. Either cause is the moving force of the world, or purpose [is]. In my opinion it is purpose.”²⁵⁶

If actions of the will only had a purpose or, in Aristotelian terms, a “final cause,” human action was properly understood as essentially *instrumental* to those purposes. No action could be taken for the sake of the action itself, but must instead be conducted for some other goal—even if that goal is reached at the same time the action is taken.²⁵⁷ “Whoever drinks wants indeed to drink,” Ihering explained, “but he wants it only for the sake of the consequence which it has for him.”²⁵⁸ A purposeful action was therefore synonymous with action itself. “An act without a purpose,” he contended, “is just as

251. RUDOLPH VON IHERING, *LAW AS A MEANS TO AN END* (Boston Book Co. 1913) (1877). Ihering is no longer a household name among lawyers, but he profoundly influenced a generation of legal scholars. One commentator has described Ihering as “the great impetus” to sociological jurisprudence, and Roscoe Pound himself cited Ihering’s discussion of interests as a breakthrough in the analysis of rights. James A. Gardner, *The Sociological Jurisprudence of Roscoe Pound*, 7 *VILL. L. REV.* 1, 2 (1962).

252. VON IHERING, *supra* note 251, at 1.

253. *Id.* at 2.

254. *Id.* at 3.

255. *Id.* at 17.

256. *Id.* at lvii.

257. *Id.* at 9.

258. *Id.*

much an impossibility as is an effect without a cause.”²⁵⁹ Ihering believed that most animals also had wills and so acted from a final rather than efficient cause, but in humans such a purpose went by a special name: *interest*.²⁶⁰ Just as animals drink to quench their thirst, so do humans act instrumentally in order to satisfy their interests.²⁶¹ This did not imply that man was inherently *self*-interested; Ihering distinguished between man’s “egoistic” and “ethical” interest.²⁶² The latter was prompted by “the feeling on the part of the agent of the ethical destiny of his being.”²⁶³ Regardless, action without interest was no more intelligible than cause without effect.²⁶⁴

Given that our various interests often pull us in different directions, how do we—and how *ought* we—decide among competing courses of action? Ihering said we formed in our minds ideas or “pictures” of future states in which our interests were satisfied, and then we compared those future states with each other.²⁶⁵ Whether we accepted one or the other, he suggested, “depends upon the preponderance of the reasons for the deed over the reasons against it. Without such a preponderance the will can no more be set in motion than the balance can move when there is an equal weight in both scales”²⁶⁶ In other words, any conscious human action requires us to *balance* our interests.

The implications for a legal system of such a moral psychology is not hard to imagine. Like Jeremy Bentham, Ihering thought law should appeal directly to human interests, through reward and punishment, in order to guide human behavior.²⁶⁷ Indeed, the bulk of *Law as a Means to an End* consists of a survey of the various “social levers,” from commercial law to criminal law, which Ihering saw as crucial to ensuring effective social cooperation.²⁶⁸ More important, though, such social levers *protected* those same interests

259. *Id.*

260. *Id.* at 22.

261. *Id.*

262. *Id.* at 45.

263. *Id.*

264. *Id.* at 36–40.

265. *Id.* at 7–8.

266. *Id.* at 8.

267. *Id.* at 33. The similarity between Ihering and Bentham was not lost on Ihering’s contemporaries. The editor to the 1913 edition compares the views of the two philosopher-jurists in his preface. *Id.* at xvii–xxi.

268. *Id.* at 71–423.

on which it depended for its force. The right to property, for instance, grew out of the individual's interest in maintaining his own existence—that is, his interest in life itself.²⁶⁹ Without property, for instance, “there is no secure future for existence . . . without law there is no securing life and property.”²⁷⁰

Ihering's view that human interests formed an essential component of law found a receptive audience in John Chipman Gray, the Harvard Professor and lawyer. Like Ihering, Gray asserted in *The Nature and Sources of the Law* that “[h]uman society is organized for the protection and advancement of human interests” and that “[t]he object of its organization is to insure the doing of certain things which individuals could not do.”²⁷¹ In order to accomplish this goal, he explained, “the chief means employed by an organized society is to compel individuals to do or to forbear from doing particular things.”²⁷² But Gray also criticized Ihering's analysis of legal rights for being insufficiently precise. Whereas Ihering had suggested that legal rights *were* legally-protected interests, Gray sought to clarify that the right was merely an instrument of the state used to *secure* legal interests. The conduct “organized society” compelled an individual to do, or forbear from doing, consisted in that individual's legal duties, and the correlative of those duties were legal rights.²⁷³ In short, a legal right was just “the *means* by which enjoyment of the interest is secured.”²⁷⁴

The work of Ihering and Gray greatly influenced the intellectual leader of sociological jurisprudence, Roscoe Pound, who developed a more elaborate classification and analysis of the interests protected by law.²⁷⁵ According to Pound, all interests could be categorized as individual interests, public interests, or social interests.²⁷⁶ Individual interests traditionally had been labeled “natural rights,” and they

269. *Id.* at 49.

270. *Id.*

271. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 12 (Macmillan 1921) (1909).

272. *Id.*

273. *Id.* at 18.

274. *Id.* (emphasis added).

275. Gray was one of Pound's teachers when the latter attended Harvard Law School, and he made quite an impression on the young Pound. DAVID WIGDOR, *ROSCOE POUND: PHILOSOPHER OF LAW* 40–41 (1974); *see also* NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 54 (1995).

276. Roscoe Pound, *Interests of Personality*, 28 *HARV. L. REV.* 343 (1915).

included “personality interests” (an individual’s interest in “physical and spiritual existence”), “domestic interests” (those of an “expanded individual life”), and “interests of substance” (economic interests).²⁷⁷ The public interest referred to the “interests of the state as a juristic person” or sovereign, while social interests included the “interests of the community at large.”²⁷⁸ Pound did not deny the significance of individual interests and found there to be “much truth in the old theories of natural rights,” but he focused his attention primarily on the *social* interests law served to protect.²⁷⁹

Why Pound stressed social interests above the others is an interesting question. Professor Graber is right to suggest that part of the reason no doubt lies in Pound’s disapproval of the contemporary judicial tendency to sanctify individual rights.²⁸⁰ In his essay entitled *Liberty of Contract*, Pound lamented “the currency in juristic thought of an individualist conception of justice, which exaggerates the importance of property and of contract, exaggerates private right at the expense of public right, and is hostile to legislation.”²⁸¹ In Pound’s view, judges were neglecting the interests of the community in their single-minded focus on the enforcement of individual economic rights.

But Pound also focused on social interests because he believed them to be essential to the nature of law itself. This was true in two senses. First, as an historical matter, Pound argued that all law had arisen to protect the most basic social interest of all: general security. “It is not too much to say,” Pound maintained, “that law came into being to secure this interest.”²⁸² Laws that appeared to protect purely individual interests had in fact often arisen to protect social interests. For example, the first injuries Roman law recognized were physical injuries, but they were not seen as harms to the individual interest in bodily integrity. Instead, they threatened the “social interest in peace and good order,” which would be disturbed by vengeful acts from the assailed individual’s kinsman.²⁸³ Thus, once the individual interest was legally recognized, it was regarded as an interest in

277. *Id.* at 349.

278. *Id.* at 344.

279. *Id.* at 343.

280. GRABER, *supra* note 3, at 72.

281. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 457 (1909).

282. Pound, *supra* note 276, at 345.

283. *Id.* at 356.

“honor, in one’s standing among brave men regardful of their honor, rather than as an interest in the integrity of the physical person.”²⁸⁴ In fact, the Latin term *iniuria*, which came to describe any injury to the person, originally meant “insult,” suggesting that legal rights served as remedies for affronts to honor in order to ensure social peace.²⁸⁵ This interpretation reflected one of the core assumptions of sociological jurisprudence—that law was best understood as a social institution and could therefore be analyzed as a “social science,” akin to economics or sociology.²⁸⁶

Second, social interests were essential to law because they were an inherent component of judicial decisionmaking. Following Ihering’s view that *all* deliberative human action entailed the balancing of competing “picture[s],” Pound argued that judges balanced competing social visions.²⁸⁷ Although they claimed to be deducing outcomes from abstract principles, in fact such outcomes were “arrived at by an unconscious weighing of the competing claims.”²⁸⁸ Through this process, the content of a legal right was filled. Why must the judge balance *social* interests and not, for instance, the *individual* interests of the parties to the suit? Pound answered that individual interests did have to be weighed, and in most simple cases such weighing would be sufficient.²⁸⁹ But in difficult cases—especially ones of “first impression”—what usually did and should make the difference were the *social* interests implicated, because in such cases the individual interests were usually evenly balanced.²⁹⁰ The judge was then faced with effectively making new law and was forced to consider the policy consequences of his decision.

284. *Id.* at 357.

285. *Id.*

286. See Roscoe Pound, *The Scope and Function of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 516 (1912) (“[T]he sociological jurist pursues a comparative study of legal systems, legal doctrines, and legal institutions as social phenomena, and criticizes them with respect to their relation to social conditions and social progress.”). The connections between sociological jurisprudence and other social sciences are suggested by the name itself and have been well documented by other scholars. See, e.g., WIGDOR, *supra* note 275, at 213 (mentioning that the sociologist Albion Small directly influenced Pound); Gardner, *supra* note 251, at 5 (noting the sociologist Lester Ward’s influence on Pound).

287. VON IHERING, *supra* note 251, at 7–8; POUND, *supra* note 246, at 160.

288. POUND, *supra* note 246, at 160.

289. Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 3 (1943).

290. *Id.* at 4.

This idea was hardly novel in the law, but it had traditionally gone under a different name: “The body of the common law is made up of adjustments or compromises of conflicting individual interests in which we turn to some social interest, frequently under the name of *public policy*, to determine the limits of a reasonable adjustment.”²⁹¹ In other words, the term “social interests” was, in his view, just a new name for “public policy,” long recognized as a legitimate component of common law decisionmaking. According to Pound, then, the right of “due process of law” consisted in one’s right to have such decisionmaking proceed in a non-arbitrary way; that is, due process protected the individual’s second-order right to have his legal rights determined through an impartial “weighing or balancing of the various interests which overlap or come in conflict” as well as a “rational reconciling or adjustment” of them.²⁹² Simply put, the content of legal rights was the result of interest-balancing.

This view is not without theoretical difficulties. For one thing, Pound did not offer judges criteria to guide them in the process of weighing interests, and this fact ranks as a principal shortcoming of sociological jurisprudence. It is well to say that all rights derive from social interests, but without any explanation as to why some interests are legitimate for legal decisionmaking and others are not, it appears somewhat question-begging as a normative theory of adjudication. If judges may legitimately balance interests, will any old interest do? And how do we know the “weight” of the various interests? Indeed, can one even “weigh” competing interests that lack a common unit of measure?²⁹³ Furthermore, Pound’s faith in the ability of “experts”—whether judicial or administrative officials—to mete out justice in an entirely impartial and apolitical fashion appears naïve to us today, now that we are sensitive to the dangers of agency “capture” and other implications of public choice theory of bureaucratic behavior.²⁹⁴

291. *Id.* (emphasis added).

292. *Id.*

293. See Jeremy Waldron, *Fake Incommensurability: A Response to Professor Schauer*, 45 HASTINGS L.J. 813, 815–18 (1994) (discussing different types of incommensurability and the philosophical difficulties associated with each of them).

294. See, e.g., Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827 (applying public choice theory to the conduct of judges in the American constitutional system).

Nevertheless, this brief survey of the work of Ihering, Gray, and Pound has sought to show that, despite its theoretical shortcomings, sociological jurisprudence was a philosophy of law insofar as it offered an account of the nature of legal rights and a theory of adjudication. Specifically, under this view, (1) legal rights were justified by reference to public policy or “social interests,” (2) such rights were essentially *instrumental* conceptions designed to serve such interests, and (3) legal disputes were properly resolved by the weighing or balancing of competing interests. Each of these features figured prominently in Chafee’s theory of free speech.

B. Freedom of Speech and Defamation

The second step in showing why Chafee’s reliance on the principles of sociological jurisprudence reveal his theory to be traditional rather than novel is to show how those principles were embodied in the long-established protections of free speech at common law. Recall that in his famous article, Chafee referred to “the subsequent development of the law of fair comment in civil defamation” as one of the primary sources of the “constitutional conception of free speech.”²⁹⁵ Chafee also singled out the law of “privilege and fair comment” as a notable exception to his general indictment of recent case law on free speech as being decided “largely by intuition,” suggesting he found more principled decisionmaking governing in those areas.²⁹⁶ These references should not be surprising since defamation law was the main area in which conflicts over permissible and impermissible speech arose and was one of Chafee’s principal areas of expertise.²⁹⁷ Chafee saw that the structure and function of the various privileges in defamation law seemed to reflect the core tenets of sociological jurisprudence. Specifically, the qualified privileges in libel law served public, democratic functions; they were viewed as instrumentally necessary for achieving those purposes; and determining their meaning and scope of application required balancing individual and social interests.

295. Chafee, *supra* note 6, at 955.

296. *Id.* at 945.

297. *See, e.g.*, Zechariah Chafee, *The Progress of the Law, 1919–1920: Equitable Relief Against Torts*, 34 HARV. L. REV. 388, 408 (1921).

1. Public purposes

As we saw in Part III, contrary to the revisionists' allegations, almost all of the conservative libertarians who addressed the issue of free speech defended it on public grounds. Thomas Cooley in particular advocated an expansive qualified privilege for criticism of public officials, which was only one among many such privileges he viewed as necessary to secure the public interest in free discussion.²⁹⁸ Cooley said the First Amendment protected a "sacred right" that is "essential to the existence and perpetuity of free government."²⁹⁹ The state and federal constitutions protecting freedom of speech "do not create new rights" but instead "protect the citizen in the enjoyment of those already possessed."³⁰⁰ Yet Cooley did not look to natural rights to justify such constitutional protections; rather, "[w]e are at once . . . turned back from these provisions to the common law, in order that we may ascertain what the rights are which are thus protected."³⁰¹

For Cooley, the common law meaning of freedom of speech consisted in nothing more and nothing less than a series of legitimate defenses, or "privileges," in common law defamation actions. He devoted most of the chapter entitled "Liberty of Speech and of the Press" in his constitutional treatise to the following topics: "Libels upon the Government," "Criticism upon Officers and Candidates for Office" (qualified privilege), "Statements in the Course of Judicial Proceedings," "Privilege of Counsel," "Privilege of Legislators," "Privileges of Publishers of News," "The Jury as Judges of the Law" (a traditional procedural requirement to aid the defendant), and finally "Good Motives and Justifiable Ends" (a limiting element of defenses in libel actions found in the text of many state constitutional provisions on free speech).³⁰² We no longer typically think of the attorney-client privilege as primarily a protection of free speech, but Cooley clearly stated the criterion for its inclusion. He explained that he would only concern himself "with those special cases where, *for some reason of general public policy*, the publication is

298. COOLEY, *supra* note 76, at 414.

299. *Id.*

300. *Id.* at 416–17.

301. *Id.* at 417.

302. *Id.* at 425–64.

claimed to be privileged, and where, *consequently*, it may be supposed to be within the constitutional protection.”³⁰³

Not surprisingly, Cooley rejected the Blackstonian conception of free speech for similar reasons.³⁰⁴ Professor Graber cites Cooley’s repudiation of the Blackstonian view as evidence of his conservative libertarian credentials,³⁰⁵ but he neglects to mention Cooley’s justification for speech privileges mentioned in the very next paragraph. “[T]heir purpose,” Cooley noted, “has evidently been to protect parties in the free publication of *matters of public concern*, to secure their right to free discussion of public events and *public measures*.”³⁰⁶ In his treatise on torts, Cooley was even more direct:

The freedom of the press was undoubtedly intended to be secured on public grounds, and the general purpose may be said to be, to preclude those in authority from making use of the machinery of the law to prevent full discussion of political and other matters in which the public are concerned.³⁰⁷

It would be difficult to find a more explicit statement that the constitutional protections of free speech grow out of public, democratic values.

Chafee not only endorsed Cooley’s criticism of the Blackstonian view,³⁰⁸ but he also looked to more recent discussions of defamation privileges. In noting the influence of the law of fair comment on the meaning of the First Amendment, Chafee cited an article by Judge Van Vechten Veeder, entitled “Freedom of Public Discussion.”³⁰⁹ In that article, Veeder noted that “[t]he process of continual readjustment between the needs of society and the protection of individual rights is nowhere more conspicuous than in the history of the law of defamation.”³¹⁰ Once again, here the “needs of society”

303. *Id.* (emphasis added).

304. *Id.* at 421.

305. GRABER, *supra* note 3, at 37–38.

306. COOLEY, *supra* note 76, at 421–22 (emphasis added).

307. THOMAS COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 256 (2d ed. 1888) (emphasis added).

308. *See supra* Part II.

309. Chafee, *supra* note 6, at 955.

310. Van Vechten Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413, 413 (1910).

referred to the value of open discussion, whereas the protection of individual rights meant the individual's right to reputation.³¹¹

Veeder's analysis of defamation privileges did not differ significantly from Cooley's, even though Cooley wrote during an era of legal formalism while Veeder wrote at the height of the Progressive era. Veeder endorsed Cooley's qualified privilege for false statements about public officials made in good faith and cited Cooley in support of his refusal to limit such a privilege to comments made about the officer's public conduct.³¹² Veeder acknowledged that "this view has not met with universal acceptance," but he insisted that "the fundamental error of any other doctrine consists in the assumption that the private character of a public officer is something aside from, and not entering into or influencing, his public conduct."³¹³ Just as Cooley had before him, then, Veeder determined the proper scope of privileged communications by reference to their relevance to democratic decisionmaking.³¹⁴

2. Instrumentalism

Following Gray, Ihering, and Pound, Chafee understood legal rights to be only instrumentally valuable to the protection of human interests. He emphasized that the distinction between rights and interests "clarifies almost any constitutional controversy."³¹⁵ This was particularly true in defamation law, where the scope and limits of privileges clearly betrayed their functional rationale. For example, we saw in Part III that despite Professor Graber's claims to the contrary, Christopher Tiedeman was not a vigorous defender of free speech—at least not on the grounds of an individual's natural rights.³¹⁶ Interestingly though, Tiedeman did see one defamation privilege as

311. *Id.* at 414.

312. *Id.* at 430.

313. *Id.*

314. This point requires some qualification. That Veeder and Chafee agreed with Cooley in seeing free speech as necessary for self-government does not imply that their conceptions of democracy were the same. It may be that Cooley's view reflected a *republican* concern with the corruption of political officials while Chafee thought free speech was necessary to legitimize majority rule. See White, *supra* note 21, at 526 (distinguishing these views and noting the republican distrust of mass democracy). Still, the point is to contrast both of these positions with the libertarian view described by the revisionists, namely that freedom of speech protected an individual's "sphere of . . . mental conduct." GRABER, *supra* note 3, at 19.

315. Chafee, *supra* note 6, at 957.

316. See *supra* Part II.

protecting an individual interest. In explaining the rationale behind the privilege for impartial accounts of legal proceedings, he pointed out that “the law favors the greatest amount of publicity in legal proceedings, it being one of the political tenets prevailing in this country, that such publicity is a strong guaranty of personal liberty.”³¹⁷ Thus, an individual interest was served by the constitutional protection of free speech, but only in a derivative, instrumental sense: the parties’ right to a fair and impartial trial was functionally protected by the publicity to which all the trial’s actors—judges, lawyers, and witnesses—were exposed.

Another example from Tiedeman’s work reveals even more clearly how functional concerns drove the complex system of speech privileges. In limiting the qualified privilege for criticism of public officers, Tiedeman drew a distinction between unelected public officers removable only for cause and those removable at the discretion of an elected official:

[W]here the office is one, the incumbent of which can only be removed for malfeasance in office, only those communications should be held to be privileged, which criticise [sic] his public conduct. If, however, the office is appointive, and the incumbent is removable at the pleasure of the appointive power, the privilege should be as extensive as that which should relate to candidates.³¹⁸

Tiedeman appears to be suggesting that speech ought to be protected only insofar as the public’s awareness of it could have a practical effect on the officer’s job security. He defined the scope of the privilege to speak freely, in other words, exclusively by reference to its likely consequences. Thus, even the formalist Christopher Tiedeman protected speech not because it protected a sacred sphere but because it had *instrumental* value in ensuring the proper functioning of representative self-government. This is not to deny that sociological jurisprudence was novel insofar as it conceived of law *entirely* in functional terms, but it does suggest that the elaborate system of privileges in defamation law provided sociological jurists like Chafee with good evidence to support such a view.³¹⁹

317. TIEDEMAN, *supra* note 86, at 64.

318. *Id.* at 56.

319. For an interesting present-day functional analysis of the impact of the First Amendment on defamation law, see Michael Passaportis, *A Law and Norms Critique of the Constitutional Law of Defamation*, 90 VA. L. REV. 1985 (2004).

3. *Interest balancing*

Finally, Chafee found in defamation law the third notable feature of sociological jurisprudence, namely the balancing of interests. “Unlimited discussion,” Chafee maintained, sometimes interferes with other important government objectives.³²⁰ When that occurs, such purposes “must then be balanced against freedom of speech, but freedom of speech ought to weigh heavily in the scale.”³²¹ Such balancing analysis closely mirrors that required in defamation law where, Veeder explained, “the existence and extent of the [fair comment] privilege is determined by balancing the needs of society with the right of an individual to enjoy a good reputation.”³²² Indeed, when Roscoe Pound sought to elucidate the meaning of a legal “privilege,” he looked to defamation law as an example:

What would ordinarily be actionable as a libel because of its effect upon the reputation of the subject of the writing may be privileged and hence involve no liability when written in honest criticism of the official acts of a public officer, since the public interest in free criticism in such a case *outweighs* the individual interest.³²³

Such balancing was hardly an innovation of sociological jurists. In a concurring opinion he wrote while serving as a justice on the Michigan Supreme Court, Cooley was candid about how one must decide libel cases in which the defendant asserted privilege as a defense. “The difficult problem in the law of libel,” Cooley began, “is how to reconcile privilege with a proper protection of the rights of the individual. Privilege in the law of libel implies some liberty of discussion and publication, and protection therein even though the discussion proves to be mistaken.”³²⁴ Because “the public benefits of free discussion” are often considerable, the law refuses to impose liability in such cases despite the real harm that the plaintiff suffers.³²⁵ “But there are other cases,” Cooley explained, “where the public benefits of free discussion may be equaled or *overbalanced* by public evils.”³²⁶ In such cases, “the privilege might cause private injuries

320. Chafee, *supra* note 6, at 957.

321. *Id.*

322. Veeder, *supra* note 310, at 414.

323. Roscoe Pound, *Legal Rights*, 26 INT’L J. ETHICS 92, 99 (1915) (emphasis added).

324. *Foster v. Scripps*, 39 Mich. 376, 383 (1878) (Cooley, J., concurring).

325. *Id.*

326. *Id.* (emphasis added).

without any compensating public benefits except such as are offset by public evils.”³²⁷ In this case, because he found insufficient the public benefits from the defendant newspaper’s speech, Cooley denied it protection.³²⁸ Thus, Cooley not only balanced public and private values, but also balanced *public values* against each other in order to determine the proper assignment of a legal right.³²⁹

Cooley was not unique in this regard. In *Post Publishing Co. v. Hallam*, then-Judge William Howard Taft upheld a plaintiff-politician’s libel suit against a newspaper that had run stories accusing the politician of accepting bribes.³³⁰ In rejecting the defendant’s argument that his speech was protected by a qualified privilege to make statements in the good faith belief in their truth, Judge Taft declared,

The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed.³³¹

Taft was not one to be easily mistaken for a sociological jurist, but here we see him adjusting the scope of protection granted to certain forms of speech by balancing the interests of society in open discussion against the individual interest in reputation. This view was elaborated in other decisions of the time as well.³³²

327. *Id.*

328. *Id.*

329. This is not to deny that the use of balancing analysis in constitutional jurisprudence was somewhat new. Professor Aleinikoff points out that while it is impossible to know for sure whether or not nineteenth-century jurists were weighing interests in order to define their categories of analysis, it is unlikely that they were. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 952 (1987). The use of this technique by Cooley may simply indicate that in the area of defamation law jurists were more inclined to do so than in other areas.

330. *Post Publ’g Co. v. Hallam*, 59 F. 530, 531, 542 (6th Cir. 1893).

331. *Id.* at 540.

332. *See, e.g., Jones, Varnum & Co. v. Townsend’s Adm’x*, 21 Fla. 431, 457–58 (1885) (“[I]t is said that a fair account of proceedings not *ex parte* in a court of justice is privileged, the reason being that the balance of public benefit from publicity is great, and the inconvenience arising from the chance of injury to private character being small as compared to the convenience of publicity.”); *see also Merchants’ Ins. Co. v. Buckner*, 98 F. 222, 233 (6th Cir. 1899) (citing with approval the passage quoted above from *Post Publishing Co.*).

No wonder, then, that Chafee did not see as revolutionary his proposal that social and individual interests of free speech “must be balanced against each other” in order to define the meaning of the First Amendment.³³³ He saw in defamation law doctrinal evidence of precisely those features that Pound and Gray had argued were essential to law itself. This fact suggests that the ideological appeal of a theory of free speech based on “social interest” was not necessary for its development. Rather, the traditional legal defenses to libel actions provided Chafee with the answers he sought in his effort to discover the “nature and scope of the policy” of the First Amendment.³³⁴

C. Chafee and the First Amendment

I have been arguing that Chafee articulated a defense of free speech based on the democratic value of free and open discussion on public matters because he believed it to be the traditional justification for free speech protections found in defamation law. It may be objected that even if that is true, Chafee’s argument, while perhaps sufficient as a defense to private libel suits, fails to justify striking down an act of Congress infringing free speech. After all, Progressives typically called for deference to legislative judgments precisely because representatives of the people were considered to be the best judge of what constitutes a “social interest.” Insofar as Chafee sought to make a *constitutional* argument, then, his theory entailed a profound change in First Amendment theory.

The first response is to note that Chafee’s goal in “Freedom of Speech in Wartime” was not to justify judicial review of legislation. Professor G. Edward White has correctly pointed out that the project of rationalizing the Court’s simultaneous deference to legislatures in the economic realm and its refusal to do so in freedom of speech cases “occupied the Court from the 1920s through the 1940s.”³³⁵ Even so, Chafee wrote his article before even one act of Congress was struck down on the basis of the First Amendment, so it may be anachronistic to interpret him as preemptively trying to resolve the

333. Chafee, *supra* note 6, at 957.

334. *Id.* at 935.

335. White, *supra* note 21, at 533.

so-called counter-majoritarian difficulty.³³⁶ Indeed, in his 1919 article, Chafee instructed judges how to *interpret* the Espionage Act, not strike it down; he even suggested Congress *could* constitutionally limit speech if it so desired. “The Espionage Act,” he maintained, “should not be construed to reverse this national policy of liberty of the press and silence hostile criticism, *unless Congress has given the clearest expression of such intention in the statute.*”³³⁷

Furthermore, insofar as Chafee did invoke his theory to justify striking down acts of legislatures, we ought not let our own jurisprudential assumptions cloud our interpretation of his writing. Today, many are prone to see all law as inherently political, so that any legal argument appears to mask some independent ideological goal. That was not the view of Chafee and other Progressive intellectuals. To be sure, one of the central tenets of sociological jurisprudence, as we have seen, was a rejection of the view that law had an essential existence outside of human agency. But Pound and Chafee did not infer from this observation, as later scholars would, that there was therefore no rational standard by which to choose among competing human interests or goals. Rather, they believed a true and objective common good existed and that it could be discerned through careful study and observation. Thus, in grounding his legal arguments in the public policies or “social interests” at stake, Chafee sought not to revolutionize the law of free speech, but rather to reinforce its foundation.

VI. NORMATIVE AND METHODOLOGICAL IMPLICATIONS

What, it may fairly be asked, does any of this matter today? My hope is that this Article makes a contribution on three levels: historical, normative, and methodological. First, there is value in setting the record straight as an historical matter. First Amendment historians have embraced the idea that there existed a conservative libertarian tradition in spite of the relative dearth of evidence supporting it. Professor Rabban, for instance, has argued that Chafee and other Progressives “developed a conception of free speech that

336. The counter-majoritarian difficulty refers to the idea that the doctrine of judicial review is fundamentally anti-democratic. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

337. Chafee, *supra* note 6, at 962 (emphasis added).

differed significantly from defenses that prevailed before the war.”³³⁸ Professor White similarly has written that Chafee “discarded the legacy of earlier libertarian speech theorists by treating their work as largely invisible.”³³⁹ I hope the foregoing account has shown that that this view is seriously misleading. This is not to say that there is no evidence of libertarian defenses in these years. Some political radicals, such as Theodore Schroeder, did indeed advocate expansive conceptions of free speech based on individual autonomy, as Professor Rabban has shown.³⁴⁰ But the point I have stressed is that the laissez-faire constitutionalism epitomized by *Lochner*,³⁴¹ did not entail, either in theory or practice, a comparable dedication to protecting free speech. Indeed, in certain legal contexts, such as the labor injunction cases, we have seen that just the opposite was true.

But the argument also has normative bite. For if Professor Graber is right that Chafee’s theory was “a product of the peculiar intellectual conditions of [the Progressives’] times, not a position inherent in either liberalism or the constitutional history of the United States,”³⁴² one might expect that it would only be true or useful under such conditions. Indeed, this is precisely the conclusion Graber draws. Under the democratic view, the paradigmatic purpose of the First Amendment is to prevent government suppression of dissident political speech, but Graber notes that, writing in 1991, “there has been little significant repression of this sort over the past twenty years.”³⁴³ Thus, in discussing Professor Vincent Blasi’s “pathological perspective” of the First Amendment, which sees it as primarily concerned with governmental censorship of speech,³⁴⁴ Graber accuses Blasi of “sacrific[ing] solutions to contemporary threats to expression in order to develop doctrine that is more responsive to past problems.”³⁴⁵ In today’s world, Graber contends,

338. RABBAN, *supra* note 3, at 4.

339. White, *supra* note 5, at 316; *see also* Gordon, *supra* note 5, at 386 (“Mark Graber has convincingly argued that to ‘conservative libertarians’ of the late nineteenth century, free speech was conceptually on a par with contractual liberty as a core liberty to be protected against the state—that is, it was an integral piece of the social sphere.”).

340. *See* SCHROEDER, *supra* note 105.

341. *Lochner v. New York*, 198 U.S. 45 (1905).

342. GRABER, *supra* note 3, at 216.

343. *Id.* at 13.

344. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

345. GRABER, *supra* note 3, at 201.

“[T]he most important First Amendment issues facing American society concern the ways that disparities in economic resources affect access to the marketplace of ideas.”³⁴⁶

If, however, the democratic, instrumentalist theory of free speech has roots older than Chafee, and if it derives from legal principles unrelated to Progressive politics, we might expect it to be relevant even in periods when the “peculiar intellectual conditions” of that time do not pertain. And recent evidence suggests this may be the case. Although Graber’s relative unconcern with government suppression of political speech may have been warranted in the early 1990s when Graber was writing, it no longer seems to be. Indeed, the Government’s recent efforts to mute political dissent and tightly monitor information related to its “War on Terror” and the actual war in Iraq have been the source of much legal and political controversy. Examples include the President’s use of “free speech zones” to keep protestors at a distance during his public speeches;³⁴⁷ the Justice Department’s criminal investigation into the Internet posting of the names of the Republican delegates by critics of the Administration prior to the 2004 Republican convention;³⁴⁸ the FBI’s collecting of thousands of pages of files on political groups critical of the Administration, such as the ACLU and Greenpeace;³⁴⁹ and the Justice Department’s efforts to force journalists to reveal their confidential sources or their phone records used in connection with such sources.³⁵⁰ Finally, the Bush Administration is even reported to be considering prosecuting journalists themselves for violating the very same Espionage Act that prompted Chafee to write his 1919 article, a move which would be virtually unprecedented in our nation’s history.³⁵¹

346. *Id.* at 13.

347. Dahlia Lithwick, *Tyranny in the Name of Freedom*, N.Y. TIMES, Aug. 12, 2004, at A25.

348. Eric Lichtblau, *Subpoena Seeks Records About Delegate Lists on Web*, N.Y. TIMES, Aug. 30, 2004, at P10.

349. Eric Lichtblau, *Large Volume of F.B.I. Files Alarms U.S. Activist Groups*, N.Y. TIMES, July 18, 2005, at A12.

350. *See* N.Y. Times Co. v. Gonzales, 459 F.3d 160, 181 (2d Cir. 2006) (Sack, J., dissenting) (noting that a qualified privilege protecting journalists from revealing their sources “is an integral part of the way in which the American public is kept informed and therefore of the American democratic process”).

351. Walter Pincus, *Prosecution of Journalists Is Possible in NSA Leaks*, WASH. POST, May 22, 2006, at A4. The 1917 Espionage Act provides in relevant part that one who “lawfully having possession of, access to, . . . any document, writing, . . . or note relating to the national

This is not to deny that one could justify striking down some of these governmental actions on autonomy grounds. Surely one could.³⁵² But the Administration's actions do suggest that what are considered paradigmatic threats to free speech under the democratic view may not be relics of the past. This fact constitutes further evidence that the "social interest" in free speech Chafee identified was grounded on an enduring legal principle, not merely on an ephemeral political ideology.

Which leads to the final, methodological point. This Article has been motivated less by a desire to defend a particular conception of free speech than by a desire to offer a certain view of history. Although I have used Professor Graber's work as a foil for my own historical account of the First Amendment, I have done so in part because I share his conviction that history is directly relevant to normative legal theory. For if he is right that Chafee's theory of free speech was an ad hoc, politically expedient response to unique historical circumstances no longer relevant to us, that fact should indeed prompt us to scrutinize it carefully to ensure there remain good reasons for our present adherence to it.

But if my view is correct, does not the opposite conclusion follow? That is, if Chafee's view of free speech is older and on firmer legal ground than has been recently thought, surely that should count as a reason to take it all the more seriously. The theory's endurance over time may be evidence of its success at coping with certain fundamental features of political life—in this case, the inevitable desire of those in power to shield themselves from public criticism. And this need not be true for metaphysical reasons. Even if a legal or political theory is not "timeless" or true *a priori*, its success over time may nonetheless be sufficient to justify according it a certain amount of respect on that basis. In this way, history is directly relevant to current normative debates.

defense," and who "has reason to believe [it] could be used to the injury of the United States . . . [and] willfully communicates, delivers, transmits . . . to any person not entitled to receive it" may be punished for up to ten years. 18 U.S.C. § 793(d) (2000); see also Geoffrey R. Stone, *Scared of Scoops*, N.Y. TIMES, May 8, 2006, at A21.

352. But it is difficult to see how it would justify the reporter's privilege where autonomy concerns seem almost entirely absent. Indeed, few have sympathy for investigative journalists who claim a right to the "privacy" of their sources given that most earn their livelihood by making public that which other people seek to keep private.

Against this conclusion, a couple of methodological objections might be leveled. First, one might object that I have misinterpreted Chafee's theory by stripping it out of its historical context. One might argue, in other words, that my interpretation is necessarily misleading insofar as it takes Chafee's words at face value and seeks only to understand *what* he said, not *why* he said it. In this vein, Professor Quentin Skinner, whose historical method Graber endorses, has suggested that one can only explain an historical text if one uncovers what Skinner calls its "illocutionary force," a concept he borrows from the philosopher J.L. Austin.³⁵³ Professor Skinner distinguishes the *force* of a text from its *meaning*, whereas the latter refers to what the author intended to *say* in uttering certain words, and the former refers to what he or she intended to *do* by uttering such words—e.g., to issue a warning, to make a promise, or to tell a joke.³⁵⁴ In order to discover the "force" of the text, Professor Skinner explains, the historian must be aware of the linguistic and ideological context in which the author wrote, for only by learning how the author was constrained by the rhetorical conventions of his time may we come to understand how he or she sought to conform to, revise, or challenge such conventions.³⁵⁵

How this view applies to my interpretation of Chafee is not hard to see. Graber cites Skinner in arguing that Chafee was constrained by certain "legitimate first premises" of political argument in the Progressive era, namely that any such argument had to be framed in terms of the "social interests" implicated.³⁵⁶ Thus, insofar as my assertion of Chafee's relevance today requires ignoring the ideological constraints he faced at the time he wrote, Graber or Skinner might argue that I misinterpret Chafee's writing.

But whether or not the concept of "illocutionary force"³⁵⁷ is useful for the interpretation of historical texts as a general matter (something about which I harbor some doubt), it is sufficient to

353. Quentin Skinner, *Meaning and Understanding in the History of Ideas*, in MEANING & CONTEXT: QUENTIN SKINNER AND HIS CRITICS 29, 61 (James Tully ed., 1988) (citing J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962)). For Graber's endorsement of Skinner's approach, see GRABER, *supra* note 3, at 10.

354. Skinner, *supra* note 353.

355. *Id.* at 62–63.

356. GRABER, *supra* note 3, at 10.

357. For an insightful critique of Skinner's use of the concept, see Keith Graham, *How Do Illocutionary Descriptions Explain?*, in MEANING & CONTEXT: QUENTIN SKINNER AND HIS CRITICS, *supra* note 353, at 147–56.

note that in this case its invocation simply begs the central historical question as to what Chafee was up to. I have argued that in formulating his theory of free speech in the way he did, Chafee was acting as a legal scholar rather than a political advocate, as Graber contends. I could have equally said that the “illocutionary force” of his 1919 article was to use existing conventions of legal discourse (e.g., reliance upon precedent and use of analogical reasoning) to expound what he believed was the best interpretation of the First Amendment. However framed, though, the issue remains unchanged: the point of contention between Graber and myself is whether Chafee’s writing is better explained by a Progressive political ideology or by traditional legal principles. If my historical account is more accurate—and if we have reason to believe those legal principles have continuing relevance today—then, as stated earlier, my insistence upon Chafee’s present-day relevance is justified. By the same token, if my interpretation is flawed, then the normative conclusions I draw are misplaced. Regardless, though, the point is that this objection is ultimately an historical one, not a philosophical or methodological one.

Second, one may argue that even if I correctly interpret Chafee’s own work accurately, in my effort to find continuity between his work and that of earlier scholars, such as Thomas Cooley, I obscure important differences. Professor White, for instance, notes that republican political theory tended to be suspicious of mass democracy, whereas the Progressives embraced it.³⁵⁸ Cooley’s advocacy of expansive speech privileges may have thus reflected the traditional republican concern with the corruption of legislative representatives, which grows out of a political theory not only different from, but in many ways hostile to, Chafee’s Progressive view that the “discovery and spread of truth on subjects of general concern” would enable popular majorities to guide public policy.³⁵⁹

This objection finds theoretical support in Thomas Kuhn’s famous notion of “paradigms.” According to Kuhn, progress in the natural sciences does not proceed in a steady, linear fashion, but instead consists of long periods of “normal science,” followed by radical breaks or “revolutions,” in which the natural phenomena

358. See White, *supra* note 21, at 526.

359. Chafee, *supra* note 6, at 956–57. I thank Professor White for making this distinction clear to me in personal correspondence.

under study is reinterpreted within a new “paradigm.”³⁶⁰ According to Kuhn, these paradigms so deeply affect how scientists view the world that one may fairly say that those working in different paradigms “in some sense live in different worlds.”³⁶¹ Although Kuhn himself attributed this developmental pattern to certain sociological features of scientific communities that are absent in other fields such as medicine and law, and even doubted whether the social sciences had yet acquired a dominant paradigm,³⁶² his historical method has been extremely influential outside the history of science, including in the fields of constitutional history and theory.³⁶³ The objection could thus be recast as denying that Chafee and Cooley could have had similar understandings of the First Amendment since their underlying conceptual frameworks placed them in completely different jurisprudential worlds.

But while there may indeed be important differences between the jurisprudential assumptions of Chafee and Cooley, there are also similarities: both assumed that government derived its legitimacy from the consent of the governed, both regarded the protection of liberty and property as one of the primary duties of government, and both believed that efforts to stifle criticism of officials threatened to limit the ability of the government to reflect the will of the people—even if they may have differed as to whether such a “will” was best expressed through pure electoral majorities or through some form of enlightened representation. This last similarity may reflect a further shared assumption, namely that the governed were, on balance, sufficiently rational to distinguish between true and false ideas in public affairs.

Of course, one can certainly argue that the differences between the two theorists were deeper or more significant than the similarities for the purposes of understanding their views on the First Amendment, but doing so requires *historical* argument. That is, it

360. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10–22 (2d ed. 1970) [hereinafter KUHN, *SCIENTIFIC REVOLUTIONS*]. Kuhn later reformulated this concept as a “disciplinary matrix.” See THOMAS S. KUHN, *Second Thoughts on Paradigms*, in *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* 297 (1977).

361. KUHN, *SCIENTIFIC REVOLUTIONS*, *supra* note 360, at 193 (emphasis omitted).

362. *Id.* at 15, 19.

363. See, e.g., Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1598–99 (1982).

requires interpreting their texts in light of what we know about the time in which they lived and based on plausible assumptions about human motivation in general. Such an argument may in fact reveal a radical disjuncture between Chafee's and Cooley's worldviews—or between Chafee's and our own—but again there is no *a priori* reason to assume at the outset that it will do so. Quite the opposite, in this Article, I have argued that although Chafee clearly articulated his theory using the dominant jurisprudential concepts of his day, he discovered its core features in the traditional justifications for protecting free speech at common law.

VII. CONCLUSION

Revisionist historians of modern free speech theory have contributed much to our understanding of the First Amendment. They have demonstrated well that it was not just the Framers who valued free speech and that the intellectual history of the First Amendment is not as monolithic as previously considered. Yet the revisionist account itself requires revision, because it has exaggerated the extent to which freedom of speech was defended by nineteenth-century libertarians as a form of property right, and, in so doing, it has somewhat mischaracterized the history of the modern democratic view of free speech and neglected its intellectual roots in the common law. Chafee did not argue that the First Amendment protected a “social interest” in free speech merely because it was politically expedient; he did so because he understood it to have been long protected for that reason in the private law of defamation. That he framed his theory in the language of sociological jurisprudence does not constitute evidence to the contrary; it suggests only that Chafee thought he could gain insight into the present through philosophical analysis of legal sources from the past. On that issue, he may even have been right.

