Freedom of Speech and the Common Law: A Contrarian Perspective

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I. INTRODUCTION

The proper scope of freedom of speech is a perennial controversy in the United States. Why? Perhaps it is because of the way the debate is framed, which is usually as follows:

> The First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." But everyone knows that the word "no" cannot be taken literally in this context. For doing so would mean that individuals could falsely shout "Fire" in a crowded theater and cause a panic, or make an incendiary speech to a hungry crowd urging it to burst into the nearby house of a grain dealer and kill him, or utter fighting words designed to provoke an immediate violent response, or commit fraud, or publish obscene materials with no redeeming social value, or publish the private intimate details of another's life, or falsely accuse others of despicable sexual practices. Because unregulated speech poses many dangers and can do much harm, the government must step in somewhere to prevent the most dangerous and harmful speech. The debate is over where to draw the line. Should it be only when the speech poses a clear and present danger of serious harm? Only when it can result in physical harm? Why not serious psychic harm? On which side of the line is speech that tends to undermine democratic government, or hateful speech that has a disproportionately damaging impact on members of socially subordinated groups, or disinformation that tends to

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> undermine support for necessary public health measures? Advocates stake out positions at various points along the spectrum from greater to lesser restrictions on speech and offer principled arguments as to why they have identified the proper place to draw the line.

What's wrong with this way of addressing the issue? Perhaps it is not so much what is being asserted as what is being overlooked.

This approach assumes that the only alternative to a world in which the government imposes necessary restrictions on speech is one in which there are *no* restrictions on speech—that legislation is required to avoid the harms of completely unregulated speech. But this is a clear example of a false dilemma. For in Anglo-American law, there is a powerful non-legislative regulatory force at work: the common law. Speech, like all human conduct, is limited by civil liability—by the law of tort, contract, and property.

Overlooking the regulatory effect of civil liability distorts the analysis at the outset by creating the assumption that the First Amendment cannot truly mean what it says. If legislation is the only means of regulating speech, then the First Amendment cannot literally mean that Congress shall make ***no*** law. There is no value in freedom of speech *per se*. The value being pursued is free *and responsible* speech—speech subject to regulation that ensures it does not impose unacceptable harm on others. If legislation is the only source of such regulation, then it would be self-defeating to ban all legislation that restricts speech.

Why is the existence of common law regulation so often overlooked? Political and legal theorists tend to focus their professional attention on the actions of those who exercise political power and the Constitutional limitations on that power. Sometimes, they become so intensely focused on that relationship that they simply fail to notice the non-political regulatory forces at work in society. In these cases, they suffer from the psychological phenomenon known as inattentional blindness—the "failure to notice a fully-visible, but unexpected object because attention was engaged on another task, event, or object."[1] Because for humans, conscious perception requires attention, it is possible for people to fail to perceive an object that is right in front of them when they are focused on something else.[2]

This feature of our psychology was famously demonstrated in what became known as the invisible gorilla experiment. In the experiment, subjects were asked to watch a video of two teams of three people each, one wearing white shirts and one wearing black shirts, passing a basketball back and forth while weaving in and out of each other's space. The subjects were asked to count the number of passes made by either the white-shirted team or the black-shirted team. In the middle of the video, a woman in a gorilla costume walks into the frame, stops and

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1. Daniel J. Simons, *Inattentional Blindness*, 2(5) SCHOLARPEDIA 3244 (2007), http://www.scholarpedia.org/article/inattentional_blindness [perma.cc/LRZ2-FTH2].

2. Daniel J. Simons & Christopher F. Chabris, *Gorillas in Our Midst: Sustained Inattentional Blindness for Dynamic Events*, 28(9) PERCEPTION 1059, 1059–74 (1999).

looks into the camera, and then walks out of the frame. Subsequent questioning showed that only half of the subjects noticed the gorilla. Further, none of those who failed to notice the gorilla believed there was one until the videotape was replayed for them.[3]

The invisible gorilla experiment shows that when human beings focus their attention on one aspect of their experience, they can become blind to what would otherwise be apparent to them. And this is true even when the humans involved have PhDs. It seems that political and legal theorists can become so focused on a particular aspect of human interaction—the regulation of individual behavior by rules that are consciously created by those who wield political power—that they can fail to see other aspects—the regulation of individual behavior by civil liability—that are right before their eyes. In this article, I suggest that when it comes to the issue of freedom of speech, the common law—civil liability—is an analog of the invisible gorilla.

I contend that when the existence and effect of the common law are taken into account, it is perfectly reasonable to treat the First Amendment as an absolute bar to federal legislation restricting speech. I further contend that freedom of speech is more effectively secured by civil liability than by the First Amendment, and that, as interpreted by the Supreme Court, the First Amendment has frequently authorized the suppression of dissident speech and encouraged the rise of irresponsible journalism.

II. CONSTITUTIONAL COMMON SENSE

There is no way to discuss freedom of speech in the United States without talking about the Constitution and the First Amendment. So let's begin with a little common sense Constitutional analysis.[4]

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3. *Id*. Although this version of the experiment may seem trivial, the phenomenon it identifies can constitute a significant danger in real-world contexts. For example, in a similar experiment, professional airline pilots operated a flight simulator in which flight console information was projected directly onto the cockpit windshield. The pilots could view both the console information and the external world simultaneously, but some of the pilots still attempted to land the plane when the runway was clearly obstructed by another airplane. When asked about it afterward, the pilots reported never being aware that there was a plane obstructing the runway. By their own reports and their actions, these pilots never saw the other airplane despite looking directly at it. Richard F. Haines, *A Breakdown in Simultaneous Information Processing*, PRESBYOPIA RESEARCH 171, 171–75 (1991).

4. An important disclaimer. Nothing in this article addresses or is relevant to the debate among legal scholars over how the text of the Constitution should be interpreted.

Many people find the study of Constitutional law fascinating. I do not. I am unable to generate any enthusiasm for arguing over the content of oxymorons such as "substantive due process," finding new Constitutional rights in the penumbras and emanations of a subset of the Bill of Rights, *see* Griswold v. Connecticut, 381 U.S. 479, 484 (1965), attempting to determine which rights are "deeply rooted in the Nation's history and traditions," *see* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997), or explaining how the power to regulate interstate commerce permits the federal government to limit the amount of wheat a farmer can grow on his own farm to feed to his cattle, *see* Wickard v. Filburn, 317 U.S. 111, 118–30 (1942). The knowledge that the vast majority of Supreme Court Constitutional decisions interpret a total of four words—"due process" and "equal protection"—leads me to regard Constitutional law as a species of Felix Cohen's transcendental nonsense—the practice of resolving

The Constitution of the United States was adopted in 1787 to create a strong national government to replace the Articles of Confederation. In 1791, the first ten amendments to the Constitution were enacted to place explicit limitations on the power of this strong new government. The First Amendment, in relevant part, states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[5] The adoption of this amendment did not guarantee citizens freedom of speech. It simply stated that the *Federal* government did not have the power to pass legislation restricting the speech of the citizens of the United States.

State constitutions had similar, more expansive provisions restraining the state governments' power to legislatively suppress the speech of their citizens. For example, the Virginia constitution proclaims

> that the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.[6]

Similarly, Pennsylvania's constitution states:

> The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.[7]

And New York's constitution declares that "[e]very citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."[8]

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legal questions by the manipulation of abstract concepts that are not explicitly connected to matters of empirical fact or ethical value; that is, by "legal magic and word-jugglery." *See* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935).

The Constitution identifies the powers possessed by the federal government of the United States and the limitations on those powers. Originalists favor an interpretation of the Constitution that tends to restrain these powers. Living Constitutionalists favor an interpretation that permits the expansion of these powers. This is an argument about political philosophy dressed up to look like a legal dispute. To my mind, it would be better to cut out the middleman and engage in the philosophical debate directly.

5. U.S. CONST. amend. I.

6. VA. CONST. art. I, § 12.

7. PA. CONST. art. I, § 7.

8. N.Y. CONST. art. I, § 8. Similar provisions exist in the constitutions of the states that joined the union after the adoption of the Constitution. *See, e.g.*, CAL. CONST. art. I, § 2 ("Every person may freely

There is an interesting distinction between the First Amendment and the state constitutions' free speech clauses. The First Amendment simply says that Congress shall make no law abridging the freedom of speech. The state provisions all contain a responsibility clause, a clause indicating that although the state government cannot infringe on the right to speak, the speaker bears responsibility for his or her expression. Thus, the Virginia constitution states "that any citizen may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of that right*;" the Pennsylvania constitution states that "every citizen may freely speak, write and print on any subject, *being responsible for the abuse of that liberty*;" and the New York constitution states that "[e]very citizen may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right*."

There is a fairly straightforward explanation for this distinction. Each state had inherited the common law of England on its separation from the mother country. Hence, each had a developed body of law designed to discourage unacceptably harmful speech. Lawsuits for libel, slander, fraudulent misrepresentation, breach of contract, tortious interference with business relationships, and even breach of a promise to marry could be brought to hold individuals responsible for the harmful effect of their speech on others. The state constitutional provisions were thus designed to prohibit only legislative restrictions on speech—to guarantee individuals freedom from governmental efforts to suppress their speech—while preserving the private common law actions designed to ensure that citizens did not exercise this freedom harmfully and irresponsibly.

The federal government, in contrast, was entirely a creation of the Constitution and had no prior existence and no pre-existing body of common law. The First Amendment contained no responsibility clause because none was needed. There was no underlying federal common law to be preserved.

The power to regulate speech is part of what is known as the police power–the power to enact legislation designed to protect or improve the health, safety, morals, and general welfare of the populace. The state governments possess the police power. The federal government is endowed only with the powers enumerated in Article I, §8, which do not include the police power.[9]

In the debates over its ratification, the supporters of the Constitution argued that the new national government posed no danger to citizens' civil liberties because it was a government of limited enumerated powers that did not include the police power. Hence, the federal government was not empowered to pass

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speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."); FLA. CONST. art. I, § 4 ("Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.").

9. Many political theorists argue that the police power derives from the social contract that is the basis of and justifies the existence of the state governments. No such argument is available for the federal government, however, because the federal government was not created by a social contract. It was consciously created by the Constitution.

legislation restricting citizens' freedom of speech or other civil liberties. Opponents of the Constitution countered that this implicit limitation on the power of the federal government was insufficient to protect citizens' liberty—that political incentives and the temptations of power will inevitably cause the federal government to exceed its designated authority. The Bill of Rights was added to the Constitution to meet this criticism by making such implicit limitations on federal power explicit.

The purpose of the First Amendment was to provide an explicit statement that the Congress of the United States could not legislate restrictions on speech. The state constitutions prohibited the state legislatures from enacting laws that restrained or punished speech. The First Amendment was designed to make it clear that in creating a national legislature, the states were not investing it with a power that they had denied themselves.

This understanding makes it perfectly sensible to treat the First Amendment as an *absolute* bar on federal legislation restricting speech. The states had the power to regulate speech. Their constitutions barred the state legislatures from restricting speech, leaving all regulation to the state's underlying common law. The First Amendment made it clear that the federal legislature was subject to the same prohibition as the state legislatures. Speech in the United States was to be regulated by common law, not by politicians.

III. THE GREAT NON SEQUITUR

As it turns out, the opponents of the Constitution were correct to be skeptical of the limitations on federal power, as was proven by the adoption of the Sedition Act in 1798. This Act, which punished "written, printed, uttered or published" opposition to the federal government and its policies,[10] demonstrated not only that the federal government would not be bound by the implicit limitation of its enumerated powers, but would disregard the First Amendment as well. The Act, which expired in 1801, was never challenged in court—probably because the Supreme Court did not decide *Marbury v. Madison*, the case that established the power of judicial review, until 1803.[11]

For the next 118 years, there was virtually no judicial history of the First Amendment because the federal government did not attempt to restrict speech. Then, in 1919, the Court decided the case of *Schenck v. United States*.[12] In this case, the defendant was convicted of violating the Espionage Act of 1917 for opposing military conscription during World War I by distributing leaflets that quoted the Thirteenth Amendment, identified conscription with involuntary

10. Sedition Act, ch. 74, § 2, 1 Stat. 596 (1798).

11. 5 U.S. 137 (1803). This is not technically correct. In *United States v. Callender*, 25 F. Cas. 239 (C.C.D. Va. 1800), a seditious libel case brought under the Act, defense council argued that the petit jury was entitled to disregard the law if it believed it to be repugnant to the Constitution. However, this was not a direct challenge to the legal validity of the Act and was not based on the First Amendment.

12. 249 U.S. 47 (1919).

servitude, and advocated that citizens assert their right to oppose the draft.[13] In upholding Schenck's conviction, Oliver Wendell Holmes offered the greatest non sequitur in the history of the Supreme Court. After admitting that "in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights," he stated,

> [b]ut the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.[14]

This assertion is perfectly true and utterly irrelevant. Indeed, one is not legally free to falsely shout fire in a crowded theater and cause a panic or utter words that have the effect of force because one would be subject to civil liability for doing so. Such speech is subject to regulation at the state level under common law. But the relevant question in *Schenck* is not whether speech is subject to regulation, but whether it is subject to legislative regulation by the federal government. The fact that individuals are not free to falsely shout fire in a crowded theater tells us exactly nothing about whether *the federal government* should have the power to suppress citizens' ability to express opposition to the military draft in times of war.

This line of reasoning makes sense only under the assumption that the only alternatives are totally unregulated speech and speech regulated by federal legislation—that is, only if one does not notice the existence of the regulatory effect of civil liability. Apparently, the invisibility of the common law is not a contemporary phenomenon.

The First Amendment states that *Congress* may not infringe on freedom of speech, not that nothing may. This implies that regulation of speech must occur at the state level. The state constitutions, in turn, state that the regulation must come via common law, not state legislation.

There is a good reason for this. It is difficult to suppress speech through common law. To recover damages, there must be a plaintiff who can prove by a preponderance of the evidence that the speech in question caused him or her legally cognizable harm. And to impose a prior restraint on speech—to get an injunction—the plaintiff must demonstrate that the speech presents a high probability of irreparable harm. The requirement to establish both harm and causation significantly limits the power to suppress speech through the common law.

Neither limitation applies to legislation. Legislation can suppress speech purely on the basis of speculation as to what might happen—e.g., prohibiting publication of leaflets opposing the draft because it might undermine the war

13. *Id*. at 49.
14. *Id*. at 52.

effort—and what constitutes harm can be defined in any way the politically dominant party wants—e.g., prohibiting expression that appeals to the prurient interest and lacks serious literary, artistic, political, or scientific value.

Schenck gave us the "clear and present danger" test for when the federal government may legislatively restrict speech.[15] This is often hailed as a great protection for freedom of speech. It is not. *Schenck* is the case that turned the word "no" in the First Amendment into the word "some," and turned an impermeable barrier into a porous sieve permitting an ever-increasing number of legislative restrictions on speech to seep through it.

Holmes himself quickly came to regret his statement when later in the same year, the Court heard the case of *Abrams v. United States*.[16] In this case, the defendant was convicted of violating the Espionage Act by distributing leaflets opposing American intervention in Russia and calling for a proletarian revolution to overthrow capitalism.[17] When the Court upheld the conviction, Holmes dissented on the ground that the majority was misapplying the clear and present danger test—that "nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so."[18]

But Holmes was quite wrong. The majority of the Court could and did make that supposition. By removing the prophylactic of the First Amendment as an absolute bar on the legislative restriction on speech, Holmes had opened a Pandora's box of political regulation that could not be limited to "attempts to check the expression of opinions that . . . so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country,"[19] as he desired.

Six years later, in *Gitlow v. New York*,[20] the Court decided that the Due Process Clause of the Fourteenth Amendment meant that the First Amendment applied to the state governments as well as the federal government.[21] This, too, is typically hailed as a great protection for freedom of speech. Once again, it is not. The state constitutions already contained their own clauses prohibiting legislative restriction on speech and preserving its regulation by common law. Applying the First Amendment to the states added no additional protection for speech but brought

15. *Id.* ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").

16. 250 U.S. 616 (1919).

17. *Id.* at 617.

18. *Id.* at 628.

19. *Id.* at 630.

20. 268 U.S. 652 (1925).

21. *Id.* at 666 ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

along the clear and present danger test (and other subsequently developed exceptions) that taught the states how to evade the constitutional limitations on their legislative power.

Having opened the door to the legislative regulation of speech, the Court spent the next century distinguishing speech that is protected by the First Amendment from speech that is not. Political speech is protected unless it creates "a clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent." Then it is not.[22] Are fighting words—words "which by their very utterance inflict injury or tend to incite an immediate breach of peace"—protected? No.[23] Speech advocating the violent overthrow of the federal government? No.[24] Movies? Yes.[25] Obscenity? No.[26] Symbolic speech? Sometimes,[27] unless it is cross-burning; then, no.[28] Students' speech in schools? Yes,[29] unless it encourages drug use; then no.[30] Spending money to promote a political candidate? Yes.[31] Contributing money to a political candidate? No.[32] Commercial speech? No,[33] then yes,[34] then sometimes.[35] Pornography? Yes.[36] Child pornography? No.[37] Hate speech? Yes.[38] Video games? Yes.[39]

What basis does the Court have for making such distinctions? One would think that it would look at the purpose of the First Amendment—the reason that it was added to the Constitution. But that cannot help. The original purpose of the First Amendment was to maintain the separation of powers between the state and federal governments by denying the federal government the power to regulate speech. But the Court abandoned that purpose in *Schenck* when it permitted federal regulation of speech and *Gitlow* when it held that the First Amendment applies to the state governments.[40]

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22. Schenck v. United States, 249 U.S. 47, 52 (1919).
23. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
24. Dennis v. United States, 341 U.S. 494 (1951).
25. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).
26. Roth v. United States, 354 U.S. 476 (1957).
27. United States v. O'Brien, 391 U.S. 367 (1968).
28. Virginia v. Black, 538 U.S. 343 (2003).
29. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
30. Morse v. Frederick, 551 U.S. 393 (2007).
31. Buckley v. Valeo, 424 U.S. 1 (1976).
32. *Id.*
33. Valentine v. Chrestensen, 316 U.S. 52 (1942).
34. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).
35. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).
36. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).
37. New York v. Ferber, 458 U.S. 747 (1982).
38. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
39. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011).
40. *See* New York Times v. Sullivan, 376 U.S. 254, 276–77 (1964) ("It is true that the First Amendment was originally addressed only to action by the Federal Government, and that Jefferson, for one, while denying the power of Congress 'to controul the freedom of the press,' recognized such a power in the States. But this distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment's restrictions."); Gitlow v. New York, 268 U.S. 652 (1925); Schenck v. United States, 249 U.S. 47 (1919).

This forced the Court to seek a normative grounding for the First Amendment by asking what value it serves. Its initial answer was that the First Amendment was designed to preserve a well-functioning representative democracy. As the Court explained in *Terminiello v. Chicago*,[41]

> The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.[42]

This could explain why the realm of protected speech included an expansive conception of political speech—including symbolic speech, hate speech, and campaign expenditures—but excluded incitement of violence, obscenity, and commercial speech.

In the 1960s, the Court expanded its concept of the value undergirding the First Amendment beyond merely the preservation of representative government to the facilitation of the exchange of ideas and personal expression. Thus, in *New York Times v. Sullivan*,[43] the Court limited the ability of public officials to sue for defamation—requiring them to demonstrate actual malice to recover—on the ground that the First Amendment embodied "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[44] Similarly, in *Curtis Publishing Co. v. Butts*,[45] the Court limited the ability of all public figures to recover for defamation, declaring that the First Amendment

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41. 337 U.S. 1 (1949).

42. *Id.* at 4. This is an illustrative example of a point the Court reiterated over the course of decades. *See, e.g.*, Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."); De Jonge v. Oregon, 299 U.S. 353, 365 (1937) ("The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."); United States v. United Auto Workers, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting) ("Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important—vitally important—that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.").

43. 376 U.S. 254 (1964).

44. *Id.* at 270.

45. 388 U.S. 130 (1967).

> is as much a guarantee to individuals of their personal right to make their thoughts public and put them before the community, as it is a social necessity required for the 'maintenance of our political system and an open society. . . . The dissemination of the individual's opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an 'unalienable right' that 'governments are instituted among men to secure.'[46]

This could explain the Court's inclusion of student speech, movies, pornography, and video games in the realm of protected speech. But note that by limiting individuals' ability to recover for defamation, the Court treated the First Amendment as a restraint, not only on the legislative regulation of speech, but also on the regulation of speech by state common law.

Thus, over the course of a century, Holmes' non sequitur transformed the First Amendment from an absolute ban on the regulation of speech by the federal government into an exception-laden bar to the regulation of speech by both the federal and state legislatures and state common law. By opening the door to the political regulation of speech, it turned the scope of freedom of speech into a political football that theorists would struggle to move up or down the ideological field, resulting in the conventional way of addressing the issue described at the beginning of this article.

IV. A COMPARATIVE ASSESSMENT

How does the common law regulate speech? The first thing to note is that under common law, there is no need to make a conceptual distinction between speech and conduct. The common law evolved to discourage individuals from intentionally or carelessly harming others. Thus, liability attached to conduct that caused harm, regardless of whether it was speech or physical conduct.

Consider intentional torts first. A false statement intended to cause others to rely on it and suffer a loss gives rise to liability for misrepresentation. False statements intended to damage another's reputation and standing in the community give rise to liability for defamation. Publicly disclosing certain types of private information gives rise to liability for invasion of privacy. Extreme forms of offensive speech intended to cause another severe emotional distress give rise to liability for the intentional infliction of emotional distress. Disclosure of confidential information one is contractually bound not to reveal gives rise to liability for breach of contract. And, of course, falsely shouting fire in a crowded theater with the intent to cause others to be injured in a panic gives rise to liability for battery.[47]

Speech is also regulated by the tort of negligence. Negligence requires us to exercise reasonable care—that is, the amount of care a reasonably prudent person

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46. *Id*. at 149–50.

47. *See* RESTATEMENT (SECOND) OF TORTS § 13 (Am. L. Inst. 1965) ("An actor is subject to liability to another for battery if a) he acts intending to cause a harmful or offensive contact with the person of the other of a third person, . . . and b) a harmful contact with the person of the other directly or *indirectly* results.") (emphasis added).

would use—to avoid causing harm to others. This requires us to be careful about what we say as well as what we do. A personal trainer who causes an injury by carelessly instructing a client to lift much too much weight is liable for negligence. So is a financial advisor who causes a financial loss by telling a client to buy a stock without doing proper research, or a doctor who tells a patient having a heart attack to ignore the chest pain without doing a proper medical examination.

The common law also permits the prior restraint of speech in exceptional circumstances. A plaintiff who can show that there is a high probability that he or she will suffer irreparable harm if another is permitted to speak can obtain an injunction barring that speech. Although rare, such circumstances sometimes exist. For example, an author of a book deemed sacrilegious and under a fatwa calling for his death could obtain an injunction barring the disclosure of his location, as could the proverbial grain dealer with a hungry crowd outside his or her home who needed to prevent an incendiary speech. As Holmes pointed out in *Schenck*, "[t]he most stringent protection of free speech would not protect a man . . . from an injunction against uttering words that may have all the effect of force."[48]

Under the common law, would a Neo-Nazi organization be permitted to hold a march in Skokie, Illinois, a community with a large Jewish population that included many survivors of the Holocaust?[49] Yes, if none of the residents can demonstrate that there is a high probability that they will suffer irreparable harm. No, if they can.

In sum, under the common law, people would be able to speak freely, but would be required to speak responsibly, using reasonable care not to harm others by what they say.

Note that under the common law, there are many forms of unpleasant speech that are not subject to regulation. Offensive speech that does not cause the type of harm that can give rise to a lawsuit will not be suppressed. This would include the publication of obscene and pornographic materials, advocacy of "blasphemous" religious doctrines or extreme political positions, insulting racial or ethnic stereotypes, and any other assertions that most people do not want to hear.[50] In addition, in many cases, speech that may influence others to do bad things will not be suppressed. This is because absent a special relationship that makes one responsible for the actions of another (e.g., the employer/employee relationship) or gives him

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

49. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

50. The parameters of what the common law will recognize as harm are constantly changing. At one point in time, the common law permitted recovery for physical, but not psychic harm. But over the course of the 20th century, the tort of intentional infliction of emotional distress and the ability to recover damages for negligently inflicted emotional distress evolved as juries came to recognize psychic harm as worthy of legal protection. Many people currently advocate that derogatory, racial, ethnic, and sexual assertions cause a type of harm that the law should protect. If juries come to agree with this, then the line between offensive and harmful speech will shift once again.

or her the ability and duty to control the other, the common law will not trace causation through the voluntary action of a third party—that is, one who tells another to do something harmful will not be held liable if the other party does it of his or her own free will.[51]

Common law regulation of speech will never be perfect because the common law is never perfect. A feature of the common law is that it is always wrong in the present but is self-correcting. At any point in time, one can identify ways in which the rules of common law are not doing an adequate job of resolving human conflicts. But in such cases, the litigation load increases until a new rule evolves that does a better job resolving the conflict. This trial-and-error learning process keeps the common law responsive to changing cultural and social mores that are expressed through jury decisions. But the adjustment takes time. As the technology of communication advances, there will be cases in which the common law rules have not yet evolved sufficiently to provide effective regulation of its new use. As a result, there may well be cases of socially damaging speech where no individual has been sufficiently harmed to bring suit or is in a position to obtain an injunction. Can this situation be improved by permitting the legislative regulation of speech?

Theoretically, yes. Academics can always describe an omniscient, beneficent government that only legislates restrictions designed to achieve the public good. But that is not the nature of the governments that actually exist. In the real world, legislation is not correctly understood as regulation of individual behavior for the public good but as regulation produced by political forces—regulation designed to advance whatever the politically dominant interest happens to be, whether that interest corresponds with the public good or not. So, the relevant question is whether politicians functioning in the real world of rough and tumble politics can improve upon the common law.

There is good reason to believe that the answer is no. Under common law, there can be no legal action without either a party who has been harmed or one who can demonstrate a high probability of irreparable harm. This limits the scope of speech subject to suppression. But as noted in §III,[52] legislators are not bound by this limitation. They are free to envision speculative connections between speech and harm to society, and to legislate restrictions on such speech. And because politicians tend to identify the policies they support with the public good, dangerous speech invariably turns out to be speech that opposes their policies. Recognition of this tendency was the reason that the First Amendment was added to the Constitution in the first place.

Consider the results of Oliver Wendell Holmes' opening the door to the legislative regulation of speech just a crack to permit the suppression of words that are "used in such circumstances and are of such a nature as to create a clear and

51. There are exceptions to this principle, notably the incendiary speaker who sets the crowd on the hypothetical grain dealer.

52. *See supra* p. 546.

present danger that they will bring about the substantive evils that Congress has a right to prevent."[53] That crack permitted legislation that suppressed leaflets quoting the Thirteenth Amendment and encouraging citizens to oppose military conscription,[54] leaflets opposing American intervention in Russia and calling for the overthrow of capitalism,[55] advocacy of communism,[56] and membership in the Communist Party.[57] It permitted legislation that invested the state with the power to punish "utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means . . . ."[58] It gave the state the power to punish speech not because it *did* cause harm or *would* cause harm, but because it *might* cause harm. Whatever Holmes' intention, for the first half of the twentieth century, the clear and present danger test served as an authorization for the punishment of dissident speech.

Note also that having opened the door to the legislative regulation of speech, the Court had to determine where to place the doorstop. The initial stopping point was political speech. The Court viewed the purpose of the First Amendment as the maintenance of "the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means."[59] Hence, political speech was at the core of the First Amendment's protection.

But placing political speech at the core meant that other forms of speech were at the periphery. Highly offensive, non-political speech that can undermine public and private morality—obscene speech[60]—is not required to maintain a well-functioning representative government. Neither is commercial speech—speech used to advertise and sell products. So, neither obscenity[61] nor commercial speech (at first)[62] received First Amendment protection.

Over the course of the twentieth century there are many Supreme Court decisions that strike down state and federal statutes restricting speech with ringing endorsements of the importance of freedom of speech to the American form of

53. *Schenck*, 249 U.S. at 52.
54. *Id.* at 51–52.
55. Abrams v. United States, 250 U.S. 616 (1919).
56. Dennis v. United States, 341 U.S. 494 (1951).
57. Scales v. United States, 367 U.S. 203 (1961).
58. Whitney v. California, 274 U.S. 357, 371 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).
59. De Jonge v. Oregon, 299 U.S. 353, 365 (1937).
60. *See* Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963).
61. *See* Roth v. United States, 354 U.S. 476 (1957).
62. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942). The Court changed this holding, giving commercial speech partial First Amendment protection in 1976. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

government.[63] Legal scholars exalt these decisions as embodiments of the Court's commitment to protect freedom of speech. Are they? The reason there are so many of them is because the Court authorized legislators to pass restrictions on dangerous and obscene and commercial speech in the first place—something the legislators did with gusto. And invariably, the speech politicians found to be dangerous, or obscene, or commercially objectionable was the speech of disfavored ideological and cultural minorities. Having narrowed the range of speech it would protect, I am not sure the Court deserves laurels for vigorously protecting the part that remains.

Interestingly, the Court's ultimate construction of the scope of First Amendment protection was not only too narrow, but also too broad. As noted in §III, in the 1960s, the Court held that the First Amendment restrained not only the federal Congress and state legislatures, but also state common law. In *New York Times v. Sullivan* and *Curtis Publishing Co. v. Butts*, the Court ruled that public officials and public figures could not recover for defamation unless the defendant acted with actual malice, which required knowledge of the falsity of the defamatory statement or reckless disregard for its truth.[64] This was essentially a judicially created Constitutional tort-reform measure. It freed individuals and media from the requirement to exercise reasonable care not to harm the reputation of others in their public statements.

The language the Court used in these decisions suggests it suffered from the same inattentional blindness that I have been ascribing to political theorists—the inability to see the regulatory effect of civil liability. For example, in *Sullivan,* the Court justified its holding by claiming that there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[65] But this is clearly wrong. There may be a profound national commitment to robust and wide-open debate on public issues, but there is not one to uninhibited debate. The common law of defamation, invasion of privacy, non-disclosure contracts,

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63. Although some of the most illustrious endorsements came in dissents. A good example is Justice Douglas's opinion in *United States v. United Auto Workers*:

> Under our Constitution it is We the People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important—vitally important—that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community. . . . Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group—labor or corporate. First Amendment rights are part of the heritage of all persons and groups in this country. They are not to be dispensed or withheld merely because we or the Congress thinks the person or group is worthy or unworthy.

United Sates v. United Auto Workers, 352 U.S. 567, 593–97 (1957) (Douglas, J., dissenting).

64. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967).

65. *Sullivan*, 376 U.S. at 270.

and the intentional infliction of emotional distress are designed to place inhibitions on the way debate is conducted.

Boxing matches encourage the robust, wide-open exchange of physical rather than rhetorical blows that include vehement and unpleasantly sharp attacks on the fighters, but there are still many blows that are barred by the rules of the sport. The common law of speech provides the rules of responsible political debate.

Similarly in *Curtis Publishing,* the Court justified limiting the ability of public figures to recover for defamation on the ground that the First Amendment is

> a guarantee to individuals of their personal right to make their thoughts public and put them before the community . . . . The dissemination of the individual's opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an 'unalienable right' that 'governments are instituted among men to secure.'[66]

This is one of the Court's ringing endorsements for limiting the government's power to restrict speech. The Declaration of Independence is an inspiring affirmation of the limitation individual rights place on government power. But it is a non sequitur in the context of civil liability, which is about resolving conflicts between the individual members of society, not protecting individuals from government.

In *Sullivan*, the Commissioner of Public Affairs of Montgomery, Alabama, recovered a $500,000 libel judgment against the *New York Times* and several individuals for publishing an advertisement accusing the Montgomery police force of several abusive practices against Martin Luther King and African American demonstrators.[67] This lawsuit may be the world's most famous example of an abusive SLAPP (strategic lawsuit against public participation) suit. There is good reason to believe that it is an unjust result deriving from a biased jury pool in Alabama, and something that needed correction on appeal. But the solution to problems like this cannot be to free individuals and the media from the duty to exercise due care not to damage others' reputation in their public statements.

The *Sullivan* and *Curtis Publishing* cases may have had little initial effect on the *New York Times* and other mainstream media organizations that practiced responsible journalism. But it opened the door to publications like the National Enquirer to cut corners on their reporting standards. The growth of similar tabloids over the last decades of the twentieth century may be due in part to these decisions. It cannot be surprising that relieving people of the duty to use reasonable care in reporting results in less careful reporting. And to some extent, the explosion of irresponsible journalism that accompanied the advent of the internet and social media in the twenty-first century may be a second order consequence

66. *Curtis Pub. Co.*, 388 U.S. at 149.
67. *Sullivan*, 376 U.S. at 256.

of these decisions. There is some reason to believe that this instance of judicial tort reform is, at least in part, responsible for the transition from the time in which CBS news anchor Walter Cronkite was the most trusted man in America to the present in which only 42 percent of people say they trust most news most of the time.[68]

The common law provides good but imperfect regulation of speech. It suppresses most truly harmful speech, but only truly harmful speech. It is not perfect because there will always be new forms of harmful speech for which effective common law regulation has not yet evolved. And political theorists will always be able to imagine emergency situations that the common law would not address.

They will also be able to imagine legislation that would cure these ills. But to attempt to address the flaws in the common law by empowering politicians to regulate speech is to make the perfect the enemy of the good.

Politicians are necessarily driven by political considerations, and almost never anticipate new dangers in advance. Legislation is almost always a response to harm that has already occurred. And even when a future danger is perceived, the political process ensures that it will not be addressed in a timely manner. It is not news that the social security trust fund is running out of money or that greenhouse gases are affecting the climate. More significantly, politicians tend to identify the public good with the policies they support, which causes them to identify dangerous speech with dissident speech that opposes those policies. The prospects of any government composed of human beings who must be responsive to political considerations to obtain and retain power legislating only beneficial corrections to the flaws of the common law of speech is vanishingly small.

The Supreme Court tried this experiment with *Schenck*'s clear and present danger test. Opening the door to the political regulation of speech just a crack gave us not only a century of legislation aimed at suppressing dissident political, cultural, and sexual speech, but also judicial tort reform relieving individuals and media from their common law duty to use reasonable care not to harm others by their speech. The fact that, despite the obvious parallel with George Orwell's Ministry of Truth from *1984*,[69] the United States government created the Disinformation Governance Board in the Department of Homeland Security[70]

68. Helen Coster, *More People Are Avoiding the News, and Trusting it Less, Report Says*, REUTERS (June 14, 2022), https://www.reuters.com/business/media-telecom/more-people-are-avoiding-news-trusting-it-less-report-says-2022-06-14/ [perma.cc/36AJ-ZUMU].

69. GEORGE ORWELL, 1984, at 3 (1992).

70. Amanda Seitz, *Disinformation Board to Tackle Russia, Migrant Smugglers*, ASSOCIATED PRESS (Apr. 28, 2022), https://apnews.com/article/russia-ukraine-immigration-media-europe-misinformation-4e873389889bb1d9e2ad8659d9975e9d [perma.cc/4QVH-CL4E]. Within weeks of the announcement and amid outcry from across the political spectrum, the board was paused; a subsequent review by Homeland Security Department advisors deemed there was "no need" for the board. Kanishka Singh, *U.S. Advisers Say No Need for Disinformation Governance Board*, REUTERS (July 18, 2022), https://www.reuters.com/world/us/us-advisers-say-no-need-disinformation-governance-board-2022-07-19/ [perma.cc/M8DB-V7NU].

suggests that it is better to keep this door shut and locked and be satisfied with the good but imperfect regulation of the common law.

V. CONCLUSION

In this article, I have suggested that, like political and legal theorists, the Justices of the Supreme Court appear to suffer from inattentional blindness—that they are so focused on the conscious exercise of political power by the legislature and the Constitutional limitations on such power that they fail to see the regulatory effect of common law civil liability.

From Holmes' great non sequitur in *Schenck* that ignored the difference between common law and legislative regulation of speech, through *Sullivan* and *Curtis Publishing*, which similarly failed to distinguish regulation by the common law of defamation from political regulation, the justices wrote as though the only two options were no regulation at all or political regulation by legislators. They wrote as though they were unfamiliar with the original constitutional relationship in which the federal and state constitutions prohibited legislative regulation of speech, but the state constitutions contained responsibility clauses specifically endorsing common law regulation. They wrote as though they viewed free speech as the complete absence of regulation and legislation as regulation of speech for the public good—as though they were blind to the fact that in the real world, speech is regulated by common law and that free speech is correctly understood as speech free from *political* regulation.

It appears that in jurisprudence, as much as in political theory, common law civil liability is the invisible gorilla.